Construction Law

by Frank O. Brown, Jr.*

I. INTRODUCTION

This Article focuses on noteworthy opinions by Georgia appellate courts and one new Georgia statutory provision between June 1, 2017 and May 31, 2018, that are relevant to the practice of construction law.[1]

II. STATUTES OF LIMITATIONS

In *Demere Marsh Associates, LLC v. Boatright Roofing & General Contracting, Inc.*,[2] the Georgia Court of Appeals addressed, in part, whether claims by a condominium association against the developer, general contractor, and exterior vinyl siding subcontractor for negligent design and installation of the exterior vinyl siding were barred by Official Code of Georgia Annotated (O.C.G.A.) section 9-3-30(b)(1),[3] a statute of limitations.[4] That subsection partially states that

> [t]he causes of action . . . for recovery of damages to a dwelling due to the manufacture of or the negligent design or installation of synthetic exterior siding shall accrue when the damage to the dwelling is discovered or, in the exercise of reasonable diligence, should have been discovered, whichever first occurs.[5]

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1. For an analysis of construction law during the prior survey period, see Frank O. Brown, Jr., *Construction Law*, *Annual Survey of Georgia Law*, 69 MERCER L. REV. 63 (2017).

2. 343 Ga. App. 235, 808 S.E.2d 1 (2017).

3. O.C.G.A. § 9-3-30(b)(1) (2018).

4. *Demere Marsh Assocs.*, 343 Ga. App. at 235–36, 808 S.E.2d at 2.

5. O.C.G.A. § 9-3-30(b)(1). This statute of limitations is an exception to the general statute of limitations applicable to negligent construction claims at O.C.G.A. § 9-3-30(a) (2018), which is four years from substantial completion of the subject project. O.C.G.A. § 9-3-30(a).

The court of appeals concluded O.C.G.A. § 9-3-30(b)(1) barred claims because there was no genuine issue of fact about whether the association was aware of "potential problems" with the siding more than four years before suing, and therefore, no genuine issue of fact about whether, in the language of O.C.G.A. § 9-3-30(b)(1), the association should have discovered the associated damage more than four years before suing.[6]

III. SPOLIATION

Spoliation was an important issue before the Georgia Court of Appeals in *Demere Marsh Associates, LLC v. Boatright Roofing & General Contracting, Inc.*[7] The appellants alleged, and the plaintiff condominium association appears to have acknowledged that, without notice to the appellants, the association's expert conducted significant "'destructive testing, including the removal and discarding of material elements of evidence from the exterior facades' of the buildings after"[8] the association had filed suit alleging negligent installation and design by the appellants.[9] The appellants were a condominium developer, general contractor, and siding contractor.[10] The appellants requested the Glenn County Superior Court dismiss the complaint as a sanction for the alleged spoliation. In a cryptically written order, the trial court declined to dismiss the complaint but stated that it was "inclined to charge the jury on the law of spoliation and to allow the jury to make appropriate findings of fact on the issue of spoliation at trial."[11]

On appeal, the appellants challenged the trial court's apparent referral of spoliation to the jury.[12] The court of appeals held that, to the extent the order can be interpreted as allowing the jury to make findings of fact about spoliation, it must be reversed because it is the duty of the trial court to make those findings of fact.[13] If the trial court determines that spoliation has happened, it may fashion an appropriate remedy.[14]

6. *Demere Marsh Assocs.*, 343 Ga. App. at 240–41, 808 S.E.2d at 5.

7. 343 Ga. App. 235, 808 S.E.2d 1 (2017). For an additional discussion of this case, see *supra* Section II.

8. *Demere Marsh Assocs.,* 343 Ga. App. at 237, 808 S.E.2d at 3.

9. *Id.* at 247, 808 S.E.2d at 9.

10. *Id.* at 235, 808 S.E.2d at 2.

11. *Id.* at 247, 808 S.E.2d at 9–10.

12. *Id.* at 248, 808 S.E.2d at 10.

13. *Id.*

14. *Id.* at 247–48, 808 S.E.2d at 9–10.

IV. ARBITRATION

The issue before the Georgia Supreme Court in *SunTrust Bank v. Lilliston*,[15] was whether SunTrust had waived the right to compel arbitration in response to a renewal action when it did not raise arbitration in the original action and instead engaged in litigation, including discovery and a motion for summary judgment, for more than a year and a half.[16] Reversing the court of appeals, the supreme court held that SunTrust had not waived the right to compel arbitration because "there is a strong presumption against waiver"[17] under the applicable Federal Arbitration Act,[18] the renewal action was a new action, "not a continua[tion] of the original action,"[19] new defenses can be raised in a renewal action, and conduct relevant to an arbitration waiver in the original action is not relevant to that issue in the renewal action.[20]

V. SOVEREIGN IMMUNITY

Although not a construction case, *Lathrop v. Deal*[21] is potentially important for some construction-related claims. In *Lathrop*, the Georgia Supreme Court further broadened the protection of sovereign immunity to "the State, its departments and agencies, and its officers in their official capacities."[22] In recent opinions preceding *Lathrop*, the Georgia Supreme Court had already held, in cases not involving constitutional claims, that, in the absence of consent, sovereign immunity barred injunctive relief[23] and declaratory relief[24] "against the State, its departments and agencies, and its officers in their official capacities."[25]

In *Lathrop*, the Georgia Supreme Court held that, in the absence of consent, "sovereign immunity extends generally to suits against the State, its departments and agencies, and its officers in their official capacities for injunctive and declaratory relief from official acts [even

15. 302 Ga. 840, 809 S.E.2d 819 (2018).

16. *Id.* at 841–42, 809 S.E.2d at 821–22.

17. *Id.* at 842, 809 S.E.2d at 822.

18. 9 U.S.C. § 2 (2018).

19. *SunTrust Bank*, 302 Ga. at 843, 809 S.E.2d at 822 (quoting Archie v. Scott, 190 Ga. App. 145, 146, 378 S.E.2d 182 (1989)).

20. *Id.* at 844–45, 809 S.E.2d at 823.

21. 301 Ga. 408, 801 S.E.2d 867 (2017).

22. *Id.* at 409, 801 S.E.2d at 869.

23. Ga. Dep't of Nat. Res. v. Ctr. for a Sustainable Coast, Inc., 294 Ga. 593, 602, 755 S.E.2d 184, 191 (2014).

24. Olvera v. Univ. Sys. of Ga.'s Bd. of Regents, 298 Ga. 425, 428 n.4, 782 S.E.2d 438, 439 n.4 (2016).

25. *Lathrop*, 301 Ga. at 408, 801 S.E.2d at 869.

when they] are alleged to be unconstitutional."[26] Providing some conciliation, the court noted that, although the doctrine of official immunity would generally also bar claims seeking retrospective relief, such as damages "against state officers in their individual capacities for official acts involving an element of discretion, including [the] enforcement"[27] of allegedly unconstitutional laws, that is not so for prospective injunctive and declaratory relief against the enforcement of allegedly unconstitutional laws.[28]

The case of *Fulton County v. SOCO Contracting Co.*,[29] dealt primarily with sovereign immunity issues.[30] Fulton County and SOCO entered into "a written contract for the construction of a cultural center."[31] Thereafter, SOCO filed suit contending that it was entitled to more money than provided for in the written contract and to a delay in its completion date because of changes ordered by Fulton County. The county responded it was entitled to summary judgment on those claims because, in the absence of a written change order or compliance with Fulton County procedures for an emergency exception to a written change order, sovereign immunity barred the claims. The Fulton County Superior Court denied the county's motion for summary judgment.[32]

On appeal, the court of appeals noted that the Georgia Constitution waives sovereign immunity for breach of written contracts.[33] Thus, had SOCO's claims been based on its original written contract with the county, sovereign immunity would not have applied.[34] However, as the court noted, constitutional waiver of sovereign immunity does not apply to changes to a written contract that are not covered by a signed, written change order and are not in compliance with procedures referenced in the original written contract for an emergency exception to a signed, written change order.[35] Because it appeared to the court of appeals that the trial court had not fully considered whether there had been compliance with

26. *Id.* at 409, 801 S.E.2d at 869.
27. *Id.* at 434, 801 S.E.2d at 885.
28. *Id.* at 434–35, 801 S.E.2d at 885–86.
29. 343 Ga. App. 889, 808 S.E.2d 891 (2017).
30. *Id.* at 889, 808 S.E.2d at 894.
31. *Id.*
32. *Id.* at 891–92, 808 S.E.2d at 895.
33. *Id.* at 895–96, 808 S.E.2d at 897–98.
34. *Id.* at 893, 808 S.E.2d at 896.
35. *Id.* at 894–95, 808 S.E.2d at 897.

the emergency exception provisions, it remanded the case to the trial court for consideration of that issue.[36]

An additional related issue on appeal arose from the fact that the county failed to timely respond to SOCO's requests for admission. SOCO argued, in effect, that given the alleged resulting admissions, which included that the County was liable to SOCO for the amounts sought, any *de facto* lack of a written change order or compliance with the emergency exception provision did not mean that its claims would be barred by sovereign immunity.[37] The court of appeals rejected this argument, reasoning that a waiver of sovereign immunity cannot be based on a failure to timely respond to requests for admission because that is not a waiver recognized in the Georgia Constitution's waivers of sovereign immunity.[38]

The plaintiff in *Georgia Department of Transportation v. Balamo*[39] was seriously injured when he lost control of his car. He sued the Department of Transportation (DOT) under the Georgia Tort Claims Act (GTCA),[40] alleging negligent design of the subject roadway. The DOT moved to dismiss the lawsuit based on the lack of subject matter jurisdiction given that, according to the DOT, sovereign immunity barred the plaintiff's claims. The Baldwin County State Court denied the motion.[41]

The Georgia Court of Appeals noted that "the GTCA waives the state's sovereign immunity for torts committed by state officers and employees acting within the scope of their official duties or employment,"[42] but "the waiver . . . is subject to certain exclusions, including when the roadway's plan or design substantially complies with the generally accepted engineering design standards."[43] The court of appeals stated that whether the design exception applies is a threshold issue for the trial court.[44] If it applied, the trial court should have dismissed the case.[45] The court emphasized that the plaintiff bore the burden of showing the waiver exception did not apply, and implicitly, that the burden applies in the context of a motion to dismiss.[46] The court held that the plaintiff

36. *Id.* at 896, 808 S.E.2d at 898.
37. *Id.* at 895–96, 808 S.E.2d at 897–98.
38. *Id.*
39. 343 Ga. App. 169, 806 S.E.2d 622 (2017).
40. O.C.G.A. § 50-21-20 to -37 (2018).
41. *Balamo*, 343 Ga. App. at 169–70, 806 S.E.2d at 623.
42. *Id.* at 171, 806 S.E.2d at 624; O.C.G.A. § 50-21-23 (2018).
43. *Balamo*, 343 Ga. App. at 171, 806 S.E.2d at 624; O.C.G.A. § 50-21-24(10) (2018).
44. *Balamo*, 343 Ga. App. at 171, 806 S.E.2d at 624.
45. *Id.*
46. *Id.* at 171–72, 806 S.E.2d at 624–25.

failed to establish through its expert that the subject road design was at odds with the generally accepted engineering design standards.[47] Thus, the road design exception applied, sovereign immunity applied, and the trial court lacked subject matter jurisdiction.[48]

VI. OFFICIAL IMMUNITY

In *Martin v. Ledbetter*,[49] homeowners sued two inspectors with the Rome-Floyd Building Inspection Department in their individual capacities alleging that they had negligently inspected work performed "on the[] water heater's gas exhaust ventilation system," resulting in the homeowners' children being exposed to high levels of carbon monoxide.[50] On appeal, the inspectors argued, in part, "that the trial court erred in denying their motions for summary judgment,"[51] which asserted that the homeowners had failed to show that the inspectors had a duty to perform the ministerial act of inspecting the exhaust ventilation system, and therefore, the homeowners' claims were barred by official immunity.[52]

The court of appeals noted that the evidence was undisputed that the inspectors' inspection was "governed by the Department's practices and procedures," which limited the duty to inspect to those specific items of work for which a permit had been issued.[53] Because there was no evidence a permit had been issued specifically for work on the ventilation exhaust system, the court held that the inspectors had no duty to inspect that system and, consequently, that summary judgment should have been granted to the inspectors.[54]

47. *Id.* at 172, 806 S.E.2d at 625.

48. *Id.* at 172–74, 806 S.E.2d at 625–26.

49. 342 Ga. App. 208, 802 S.E.2d 432 (2017).

50. *Id.* at 208, 802 S.E.2d at 432–33.

51. *Id.* at 210, 802 S.E.2d at 434.

52. *Id.* at 210 n.8, 802 S.E.2d at 434 n.8.

53. *Id.* at 211, 802 S.E.2d at 435.

54. *Id.* at 212–13, 802 S.E.2d at 435–36. In footnote 12 of *Martin*, the court generally cited *Howell v. Willis*, 317 Ga. App. 199, 203, 729 S.E.2d 643, 647 (2012) ("[I]n the case of an inspection, the specific act from which liability arises is not an inspector's appearance at a particular site to conduct an inspection. [Instead,] liability must arise from the acts the inspector was required to perform during the inspections."). *Martin*, 342 Ga. App. at 212 n.12, 802 S.E.2d at 435 n.12.

VII. PROMPT PAY ACT

City of Atlanta v. Hogan Construction Group, LLC[55] dealt in part with a claim by Hogan against the City under Georgia's Prompt Pay Act[56] for interest on unpaid amounts and attorney's fees. Hogan argued that it was entitled to interest at the rate provided by the Act (1% per month),[57] while the City contended that the interest rate in the parties' contract (prime rate) controlled.[58] Citing O.C.G.A. § 13-11-7(b)[59] of the Act, the court of appeals held that the contract-specified rate controlled.[60] That subsection states the following:

> Nothing in this chapter shall prohibit owners, contractors, and subcontractors from agreeing by contract to rates of interest, payment periods, and contract and subcontract terms different from those stipulated in this Code section, and in this event, these contractual provisions shall control. In case of a willful breach of the contract provisions as to the time of payment, the interest rate specified in this Code section shall apply.[61]

However, the court held that, because the parties' contract did not address attorney's fees, Hogan could pursue those claims under the Act.[62]

VIII. GEORGIA PROCUREMENT REGISTRY

O.C.G.A. § 36-80-27[63] became effective on July 1, 2018.[64] The section provides, in part, that if a county, city, or local board of education extends a bid or proposal opportunity for goods and services valued at $10,000 or more, or for a public works construction contract subject to the Georgia Local Government Public Works Construction Law at O.C.G.A. § 36-91-1,[65] that local governmental entity shall advertise the bid or proposal opportunity in the Georgia Procurement Registry established in O.C.G.A. § 50-5-69(b)[66] at no cost to the local governmental entity.[67]

55. 341 Ga. App. 620, 801 S.E.2d 606 (2017).
56. O.C.G.A. § 13-11-1 (2018).
57. O.C.G.A. § 13-11-7(a) (2018).
58. *Hogan*, 341 Ga. App. at 621–22, 801 S.E.2d at 608–09.
59. O.C.G.A. § 13-11-7(b) (2018).
60. *Hogan*, 341 Ga. App. at 625, 801 S.E.2d at 610–11.
61. O.C.G.A. § 13-11-7(b).
62. *Hogan*, 341 Ga. App. at 625, 801 S.E.2d at 611.
63. O.C.G.A. § 36-80-27 (2018).
64. *Id.*
65. O.C.G.A. § 36-91-1 (2018).
66. O.C.G.A. § 50-5-69(b) (2018).
67. O.C.G.A. § 36-80-27.

IX. ATTORNEY'S FEES

Graybill v. Attaway Construction & Associates, LLC[68] involved a lawsuit by a homeowner against a remodeling contractor alleging breach of contract and negligent construction and counterclaims by the contractor for "breach of contract, quantum meruit, fraud, and attorney's fees."[69] The Columbia County Superior Court entered judgment in favor of the contractor for construction-related damages and for attorney's fees.[70] An issue on appeal was whether the award of attorney's fees to the contractor was proper.[71] The court of appeals held it was not because the only alleged basis for the fees was O.C.G.A. § 13-6-11,[72] which does not authorize fees to a defendant pursuing a compulsory counterclaim as opposed to an independent claim against the plaintiff.[73] This decision highlights the importance of having a contract provision allowing attorney's fees to a contractor and, absent that, to the contractor's careful consideration of being the first party to file suit.

X. CONTRACTOR LICENSING

Baja Properties, LLC v. Mattera[74] addressed, in part, O.C.G.A. § 43-41-17(b)[75] of Georgia's contractor licensing law.[76] Construction lawyers would be well served to acquaint themselves with this Code section, as a surprising number of contractors fail to comply with it, leading to serious consequences.[77] In relevant part, that Code section

68. 341 Ga. App. 805, 802 S.E.2d 91 (2017).

69. *Id.* at 809, 802 S.E.2d at 95.

70. *Id.* at 805, 802 S.E.2d at 93.

71. *Id.* at 809, 802 S.E.2d at 95.

72. O.C.G.A. § 13-6-11 (2018).

73. *Graybill*, 341 Ga. App. at 810, 802 S.E.2d at 96.

74. 345 Ga. App. 101, 812 S.E.2d 358 (2018).

75. O.C.G.A. § 43-41-17(b) (2018).

76. *Baja Props.*, 345 Ga. App. at 101, 812 S.E.2d at 360.

77. Some unlicensed contractors mistakenly believe that they can enforce a construction contract with an owner and have related lien and bond rights as long as they arrange for a licensed contractor to obtain a permit for the project. However, getting a permit does not satisfy O.C.G.A. § 43-41-17(b)'s requirement, which relates to the contracting contractor. Local government permitting authorities are required by the contractor licensing law (O.C.G.A. § 43-41-14 (2018)) to confirm that the permit is issued to a licensed contractor. They are not, however, required by that law to determine whether the licensed contractor to which they issue a permit has a contract with the owner and they are not required to determine that the contractor who contracts with the owner has a license. A revision in the contractor licensing law to require that local permitting

states that a contractor without a required contractor license cannot enforce a construction contract with an owner and has no lien rights or bond claim for its work.[78]

Baja contracted to build a house for the Matteras. However, Baja did not have a contractor's license. Nevertheless, after disputes arose, "Baja Properties sued the Matteras for breach of contract, quantum meruit, and [enforcement of its] lien." The Matteras counterclaimed for breach of contract and negligence.[79]

The Forsyth County Superior Court thereafter granted summary judgment to the Matteras on Baja's claims based on O.C.G.A. § 43-41-17(b). Baja appealed that order. The trial court also ruled, however, that "Baja Properties was entitled to rely on the contract terms to defend [the Matteras'] breach of contract claims" and granted summary judgment to Baja on those contract claims based on the trial court's determination that the Matteras had improperly terminated the contract. The Matteras did not appeal that portion of the trial court's order.[80]

Based on O.C.G.A. § 43-41-17(b), the Georgia Court of Appeals affirmed the trial court's grant of "summary judgment to the Matteras on Baja Properties's claims for breach of contract, quantum meruit,[81] and lien [claims]."[82] The court of appeals rejected Baja's strained contention that O.C.G.A. § 43-41-17(h)[83] provided an exception to O.C.G.A. § 43-41-17(b)'s requirement that Baja have a contractor's license.[84] O.C.G.A. § 43-41-17(h) states the following:

> Nothing in this chapter shall preclude any person from constructing a building or structure on real property owned by such person which is intended upon completion for use or occupancy solely by that person and his or her family, firm, or corporation and its employees, and not for use by the general public and not offered for sale or lease. In so doing, such person may act as his or her own contractor personally

authorities also confirm, perhaps through a contractor affidavit, that the contractor requesting a permit has a contract with the owner would eliminate a number of unlicensed contractors.

78. O.C.G.A. § 43-41-17(b). Contracting without a license is also a misdemeanor. O.C.G.A. § 43-41-12 (2018).

79. *Baja Props.,* 345 Ga. App. at 101, 812 S.E.2d at 360.

80. *Id*. at 101–02, 812 S.E.2d at 360–61.

81. "[A]n agreement prohibited by law cannot be the basis for a claim of quantum meruit." Everett v. Goodloe, 268 Ga. App. 536, 541, 602 S.E.2d 284, 290 (2004).

82. *Baja Props.,* 345 Ga. App. at 104, 812 S.E.2d at 362.

83. O.C.G.A. § 43-41-17(h) (2018).

84. *Baja Props.,* 345 Ga. App. at 103–04, 812 S.E.2d at 362.

> providing direct supervision and management of all work not performed by licensed contractors.[85]

XI. INDEMNITY/HOLD HARMLESS PROVISIONS

Milliken & Co. v. Georgia Power Co.[86] arose from an airplane crash near an airport, which killed occupants of the plane.[87] The plaintiffs in six lawsuits alleged that the crash happened when the plane hit a Georgia Power transmission pole, which the plaintiffs contended "was negligently placed and constructed too close to the end of the runway, too high, and [in a manner that it] encroached on the airport easement." Georgia Power and Milliken & Company, the owner of the land on which the pole had been placed, were among the defendants in the lawsuits. Milliken cross-claimed against Georgia Power for contract indemnification based on a provision in the easement agreement for the pole Milliken had given to Georgia Power.[88] That provision stated: "[Georgia Power], its successors or assigns shall hold [Milliken], its successors or assigns 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 on said easement areas herein granted."[89]

In each lawsuit, Georgia Power filed a motion for summary judgment on the cross-claim, arguing, in part, that the provision was void and unenforceable under O.C.G.A. § 13-8-2(b)[90] because it purported to make Georgia Power liable to Milliken for damages based solely on Milliken's negligence. The Fulton County State Court granted Georgia Power's motions.[91]

On appeal, the Georgia Court of Appeals noted that the applicable version of O.C.G.A. § 13-8-2(b) was the one in effect in 1989, when the easement agreement was signed,[92] because "[c]ontracts are construed under the law in effect at the time the contract was made."[93] However, it

85. O.C.G.A. § 43-41-17(h).
86. 344 Ga. App. 560, 811 S.E.2d 58 (2018).
87. *Id.* at 560–61, 811 S.E.2d at 60.
88. *Id.* at 561, 811 S.E.2d at 60.
89. *Id.*
90. O.C.G.A. § 13-8-2(b) (2018).
91. *Milliken*, 344 Ga. App. at 561–62, 811 S.E.2d at 60.
92. *Id.* at 562, 811 S.E.2d at 61.
93. *Id.* at 563 n.1, 811 S.E.2d at 61 n.1.

appears the decision of the court would be the same based on the current version. In 1989, O.C.G.A. § 13-8-2(b) stated:

> A covenant, promise, agreement, or undertaking in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair, or maintenance of a building structure, appurtenances, and appliances, including moving, demolition, and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnitee is against public policy and is void and unenforceable, provided that this subsection shall not affect the validity of any insurance contract, workers' compensation, or agreement issued by an admitted insurer.[94]

Citing Georgia appellate authority, the court of appeals stated the following:

> To fall within [O.C.G.A.] § 13-8-2(b), a provision to indemnify must satisfy two threshold conditions. The provision must "(1) relate in some way to a contract for 'construction, alteration, repair, or maintenance' of certain property and (2) promise to indemnify a party for damages arising from that own party's sole negligence."[95]

Affirming the trial court, the court of appeals concluded that the easement agreement, which governed placement, construction, and maintenance of electrical transmission structures, clearly fell within the first threshold.[96] The court also concluded that the easement agreement met the second threshold because Milliken's cross-claims "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."[97]

This opinion highlights the need for counsel to carefully draft indemnity agreements. The temptation to draft them broadly may well render them void.

94. *Id.* at 562–63, 811 S.E.2d at 61 (quoting O.C.G.A. § 13-8-2(b) (1989)).

95. *Id.* 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)).

96. *Id.* at 564, 811 S.E.2d at 61–62.

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