CONTRACTS

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The following is a broad and non-exhaustive survey of a field of law in which the Georgia appellate courts broke no startling new ground in the period considered. Cases of general interest, including those in which well settled principles of contract law were restated intelligently, are noted but the conscientious practitioner is admonished that there may be significant new decisions affecting an area of particular interest to him which this writer has rather arbitrarily excluded from the general interest category. In other words, this tract is no substitute for scrutiny of the opinions.

There was no legislation in the survey period which directly affected the law of contracts, but those dealing with specifically regulated contractors, such as private employment agencies, should look to their respective statutes for any changes in the contractual terms or provisions in their field.

Finally, as the astute draftsman might caveat in his agreement, the captions in this article are "for convenience only and are not to be used in the interpretation of any of the terms and conditions contained herein."

I. PUBLIC POLICY

Several cases reviewed considered the issue of whether an agreement, notwithstanding the presence of all traditional elements of a contract, was void or voidable as contrary to public policy.

The decision of the court of appeals in *Grimes v. Community Loan and Investment Corporation of Columbus*[1] constitutes a covert application of public policy in the "construction" of a contract. In *Grimes* the consumer defendant contracted with a business college for a medical secretary course. The agreement under consideration provided the following waiver provisions in the event of an assignment:

> Unless buyers mail to assignee of this contract, within ten (10) days after notice of such assignment has been mailed to the buyers, a written notice of facts giving rise to a claim or defense arising out of this sale, the buyers shall not assert against such assignee any claim or defense arising out of this sale. Buyers waive all homestead and other property exemptions permitted to be waived.[2]

On the very day of its execution this contract was assigned to the plaintiff in this action and written notice of the assignment was properly provided the defendant. After making the first two payments the defendant

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1. 130 Ga. App. 8, 202 S.E.2d 265 (1973).
2. *Id.* at 8, 202 S.E.2d at 266.

defaulted; the plaintiff accelerated the obligation and filed the instant action. The defendant urged failure of consideration and the plaintiff moved to strike the defense, relying on the waiver provision.

In denying the plaintiff's position on the effect of the waiver, the court dragged out the Latin maxim *modus et conventio vincunt legem* which means, essentially, that the form of the agreement and the convention of the parties controls rather than the law. However, the court went on to say that the language in this waiver "must necessarily refer only to those claims and defenses arising out of the sale occurring prior to the time required for the notice."[3] The court therefore held that the defense of failure of consideration was not subject to the motion to strike, despite the waiver provision.

The apparent incongruity of this decision with the principles relied upon cannot be easily reconciled. The court stated that parties to a contract are bound by what they have said and then construed away what the parties, in reality, said in this case.

Associate Justice Stoltz's strong dissent, in which he was joined by three other judges, asserted:

> To place such an interpretation on the language of the waiver, not only severely restricts the interpretation of the waiver provisions in the case cited in the majority opinion from this Court without specifically qualifying those cases, but also places extreme limitation on cases construing waiver decided by the Supreme Court, which this Court is powerless to do.[4]

The point that both the majority and the dissent missed is that this case was an application of public policy. The majority stated that the parties did not really mean what they said, but the real effect of this decision is to invalidate such a waiver provision, at least where the contract is one of adhesion and not between parties of equal bargaining power. As stated at the outset, this case is properly viewed as a covert application of a public policy perceived by the court of appeals.

The decision of the supreme court in *Brooks v. Hicks*[5] is an interesting example of where the courts find public policy. In that case the appellant and the appellee entered into a twelve month option agreement which would terminate upon the failure of the appellant to pay the sum of $3,750.00 on the 21st day of each month during that term. The day of May 21, 1972 fell on a Sunday. The appellant failed to make his payment on that day, and his tender on the next day was refused. On motion for summary judgment the trial court held that the option was terminated by its terms. The supreme court reversed, basing its decision on the assertion

3. *Id.* at 10, 202 S.E.2d at 267.
4. *Id.* at 11, 202 S.E.2d at 268.
5. 230 Ga. 500, 197 S.E.2d 711 (1973).

that to do otherwise would perpetrate "an injustice to which this Court will not lend its aid. It is fundamental that forfeiture of rights is not favored."[6]

In reaching this decision the court looked to Ga. Code Ann. §102-102(8) (Rev. 1968) which is a rule of construction concerning the effect of any last day falling on a Sunday. The court admitted that this section was not directly applicable to contractual limitations but, nevertheless, held that "this Code Section states a rule of reason with respect to limitations, be they statutory or contractual, which should be applied to limitations in contracts in the absence of any sound reason for not applying them."[7]

As usual, the cases in the survey period included a number involving covenants not to compete incident to both sales of businesses and employment contracts. In this area there is a well articulated principle of public policy disfavoring agreements which tend to lessen competition.[8] To this writer it is surprising that practitioners have not yet learned the parameters to be considered in the drafting of these covenants.

It is clear that the one guiding principle is that covenants in restraint of trade may only be enforced if they are reasonable in terms of time and territory and in restrictions as to the breadth of activities proscribed.[9] In the application of these principles the courts usually take into account

> the interests of individuals in gaining and pursuing a livelihood, of commercial concerns in protecting property, confidential information and relationships, good will and economic advantage, and of the broader public policy favoring individual freedom to enter into contracts and to contract as one will.[10]

As restated by the supreme court in a recent decision, "the rule of reason prevails."[11]

If the foregoing sounds like a very loose principle, the cases in which this principle has been applied have clearly delineated the considerations. For example, it is clear that a covenant not to compete incident to the sale of a business can be much broader than one incident to a simple employment agreement. For example, in *Farmer v. Airco, Inc.*[12] the supreme court upheld a covenant not to compete incident to the sale of a business which restricted the seller from the operation of a similar business for a period of five years within a 150 mile radius of the buyer's office in Waycross, Georgia. In reaching this decision, the court outlined the following factors for consideration:

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6. *Id.* at 501, 197 S.E.2d at 712.
7. *Id.*
8. GA. CODE ANN. §102-102 (Rev. 1968):
9. *See, e.g.*, Durham v. Stand-by Labor of Ga., Inc., 230 Ga. 558, 561, 198 S.E.2d 145, 148 (1973).
10. *Id.*, 198 S.E.2d at 148.
11. *Id.*
12. 231 Ga. 847, 204 S.E.2d 580 (1973).

> 1. The provision must be reasonable as to the time of the restraint. 2. The provision must be definite and reasonable as to the territorial extent of the duty owed not to compete. 3. The provisions must be definite and reasonable as to [the] nature of the business activities proscribed by the non-competition covenant.[13]

Conversely, in *Purcell v. Joyner*,[14] the supreme court declined to enforce a restrictive covenant under an employment contract whereby Joyner was not to engage in the business of appraising vehicle damage in a sixteen county territory for a period of three years after the termination of his employment with Purcell. Furthermore, the court declined to apply the "blue pencil theory of severability"[15] so that, in effect, if either the territorial or the time restrictions are too broad, the entire covenant will fail.

Similarly, the supreme court has invalidated a covenant not to compete incident to an employment contract which contained a two year period but covered the entire state of Georgia.[16] In contrast, the court has upheld a two year employment non-competition agreement which was limited in territory to the five county metropolitan Atlanta area.[17] In other cases, the courts have refused to enforce non-competition employment agreements of the term of one year and fifty mile radius[18] and have absolutely refused to enforce a straight five year business non-competition agreement which contained no territorial limitation whatsoever and presumably applied to the whole world.[19]

Finally, the supreme court has made it clear that one may not avoid an otherwise valid non-competition agreement by surreptitious means. In *Daubresse v. Smithey*,[20] the court considered a situation in which the defendant attempted to avoid a non-competition agreement incident to the sale of a business by establishing an organization composed of separate but wholly owned corporations to compete with its former buyer. In so holding, the supreme court stated that "in dealing with such contracts, that thats [sic] which may not be done directly may not be done indirectly."[21]

II. SMALL LOANS

A field of contract law allied with the considerations of the public policy

13. *Id.* at 849, 204 S.E.2d at 581.
14. 231 Ga. 85, 200 S.E.2d 363 (1973).
15. *Id.* at 87, 200 S.E.2d at 365.
16. Wulfhorst v. Hudgins & Co., 231 Ga. 170, 200 S.E.2d 743 (1973).
17. Raiford v. Kramer, 231 Ga. 757, 204 S.E.2d 171 (1973).
18. 230 Ga. 558, 198 S.E.2d 145 (1973).
19. Greer v. Libsey, 128 Ga. App. 785, 197 S.E.2d 846 (1973). This case involved the recording artist Cortez Greer. It was apparently the contention of the party seeking to enforce this agreement that Mr. Greer's constituency as an entertainer was, in fact, nearly as broad as the world.
20. 231 Ga. 725, 204 S.E.2d 133 (1973).
21. *Id.* at 726, 204 S.E.2d at 134.

cases concerns small loans and decisions of the appellate courts during the survey period with reference to the Georgia Industrial Loan Act.[22] That Act very strictly regulates the contracts of small finance companies which ordinarily deal with consumer customers of less than average financial wherewithal and expertise.

The Act sets a general usury limit of 8% of the face amount of the contract but further allows certain "fees" in excess of this limit so as to allow the lenders a rate of return on their loans in an adequate aggregate amount. The Act further provides, however, that these usury limits not be exceeded and the sanctions section of the Act provides that contracts in violation of the Act shall be void and unenforceable.[23]

In *Roberts v. Allied Finance Co.*[24] the loan company had contracted to charge the maximum rate of interest over a fifteen month period. The contract contained a provision authorizing the acceleration of "all remaining installments"[25] in the event of default. Upon the default of the borrower before the end of the fifteen month period, the plaintiff elected to accelerate under the contract and sued for the entire amount plus late charges. The defendant answered, alleging that the contract was void under the provisions of the Georgia Industrial Loan Act. The trial court directed a verdict in favor of the lender and the borrower appealed.

The court of appeals reversed, in effect finding a usurious charge which resulted in a void contract. In its analysis, the court stated:

> The result is that when plaintiff elected to declare "all remaining [installments] at once due and collectible" as the contract provides, plaintiff, by authority of this acceleration clause, charged defendant with the total amount of the interest within a period of indebtedness of less than eight months, instead of the original fifteen months upon which interest was computed to the maximum allowed by §25-315(a). Hence the effective interest rate calculated upon the contract period as foreshortened is greater than 8%per annum [citations omitted]; and, since this result is directly attributable to the exercise of the contract clause providing for acceleration of "installments," which include discounted interest, the obligation as thus accelerated is void and unenforceable.[26]

The court of appeals took the same strict view of the Act in *Patman v. General Finance Corporation of Georgia,*[27] wherein it invalidated a small loan contract which failed to show in clear terms the amount of each class of credit insurance carried and the premiums charged therefor. In *Patman* the court examined a contract form which provided for either level or decreasing term insurance in which neither was struck out, checked in any

22. GA. CODE ANN. §25-301 *et seq.* (Rev. 1969).
23. GA. CODE ANN. §25-9903 (Rev. 1969).
24. 129 Ga. App. 10, 198 S.E.2d 416 (1973).
25. *Id.* at 11, 198 S.E.2d at 417.
26. *Id.*
27. 128 Ga. App. 836, 198 S.E.2d 371 (1973).

way or otherwise designated as the type of insurance purchased. Furthermore, the precise amount of the insurance was nowhere shown in the contract. The court held that this contract on its face failed to comply with the provisions of section 25-319 and was therefore void under the sanction provisions of the Act.

In *Lawrimore v. Sun Finance Co.*[28] the court of appeals broadened its decision in *Roberts*. The *Lawrimore* contract provided for the same type of acceleration as examined in *Roberts*. However, the posture of the *Lawrimore* case was such that when it reached the court of appeals there was no showing that the judgment from which the appellant was seeking relief actually included any usurious charges. That is, the contract provided that the lender might accelerate but there was no demonstration in the record that any acceleration (with its concomitant usurious charges) took place. Nevertheless, the court invalidated the contract on the theory that the Act not only prohibited acceleration and collection of usurious charges but further prohibited the contracting for a usurious charge. That is, the contract language under consideration gave the lender the power to accelerate and claim a usurious amount and contracting for this power alone constituted a violation of the spirit, if not the actual language of the Industrial Loan Act.

III. Assumpsit and Quantum Meruit

There is a lack of clarity in the Georgia precedents respecting recoveries based upon contracts implied by law. This situation is the result of the misuse and confusion of various terms in this area. The word assumpsit is simply Latin for "he undertook" or "he promised." *Quantum meruit* has been defined as:

> As much as he deserved. In pleading. The common count in an action of assumpsit for work and labor, founded on an implied assumpsit or promise on the part of the defendant to pay the plaintiff as much as he reasonably deserved to have for his labor.[29]

This quagmire of semantics is further confused by the use of the term "quasi-contract" which is simply a term for a contract implied in law as distinguished from a contract implied by some action on the part of the parties thereto.[30]

An action on a contract implied by law was historically brought through the common law writ of assumpsit which is literally a fictional allegation that the defendant promised something. The measure of recovery in such cases is generally the extent of the unjust enrichment of the defendant.[31]

28. 131 Ga. App. 96, 205 S.E.2d 110 (1974).
29. Black's Law Dictionary 1408 (4th Ed. 1968).
30. L. Corbin, Law of Contracts §19.
31. Corbin, *supra* §§19-20.

It is clear even under Georgia precedents that

> [a]recovery on quantum meruit basis may not be obtained where the services [even if beneficial] are rendered with no anticipation that compensation is to be received.[32]

In *Creative Services, Inc. v. Spears Construction Co.*[33] the court of appeals properly applied these principles in an action brought against the defendant to recover costs of production, suggestions, and proposals respecting printed materials submitted to the defendant for his approval. The plaintiff brought its action on account and on *quantum meruit* to recover the value of the services provided. The court properly found that there was no meeting of the minds but further denied the claim based on *quantum meruit*, not on the basis that there was no meeting of the minds (which is not a proper consideration in a quasi-contractual context) but rather on the basis that

> these services and property (which were admittedly retained by the defendant) were not in themselves valuable to the defendant, absent any showing that it had actually utilized them.[34]

In this regard, the court of appeals is saying with rather loose language that there is no unjust enrichment of the defendant upon which the plaintiff can base its recovery. With this principle in mind it can be seen that *Creative Services* represents a proper application of the law of quasi-contracts.

However, the other notable application of these principles by the court of appeals in the survey period is not so clear. In *Willis v. Kemp*,[35] the plaintiff, an attorney, sued another attorney for rent due for the use of space in the plaintiff's law offices. The plaintiff contended that an express agreement existed for such rental which allegations defendant denied. The court of appeals found that the record showed no existence of an express contract and then leaped to the conclusion that the plaintiff could not recover on the basis of *quantum meruit*.

This is a confusing and incongruous conclusion. If there were no express contract then it would appear proper under the principles being applied that the plaintiff be allowed to show the extent of the defendant's unjust enrichment in his action on assumpsit. In reaching its conclusion the court deferred to a number of old Georgia decisions on the election of remedies and held that "one is estopped to recover on quantum meruit where there exists an express agreement."[36] This may be a fair statement but the court

32. Addison v. Southern Ry., 108 Ga. App. 314, 132 S.E.2d 833 (1963).
33. 130 Ga. App. 145, 202 S.E.2d 581 (1973).
34. *Id.* at 146, 202 S.E.2d at 583.
35. 130 Ga. App. 758, 204 S.E.2d 486 (1974).
36. *Id.* at 760, 204 S.E.2d at 489.

of appeals expressly held in this case that an express agreement did not exist and boot-strapped from that point to its conclusion that the plaintiff "having sued to recover on an express contract for rent . . . is not entitled to recover on quantum meruit."[37] If this writer has properly conveyed to the reader a basic understanding of the principles involved, the contradiction should be palpable. With the *Willis* decision, the court of appeals has further confused this area of the law by injecting election of remedy considerations.

IV. Real Estate Sales

The cases in the survey period evidence the continuing tradition of those who are for many reasons dissatisfied with or unable to comply with real estate sales contracts to attempt to avoid those agreements on the basis that they are vague or otherwise insufficient in description or terms. The decision of the court of appeals in *Penta Investments, Inc. v. Robertson*[38] is a good example of this genre. In *Penta* the property was described in the contract as follows:

> All that tract of land lying and being north of New Hope Road and being referred to as Tract 1, Land Lot 231 in the 5th District of Gwinnett County, Georgia and consisting of approximately 126.5 acres. This tract is actually shown as 142 acres, plus or minus, and is contained in Land Lots 217, 218 and 232 as well as Land Lot 231. This purchase, however, does not include any of that tract south of New Hope Road. This land is further identified as the Horace Robertson tract.[39]

The appellant filed suit seeking specific performance of this contract and the trial court granted the appellee's motion to dismiss on the basis that the description of the land was insufficient and therefore the terms of the contract were not sufficiently definite for there to be in fact a contract at all.

In reversing this holding, the court of appeals in *Penta* articulated the guiding light in these cases. That is, the court looked to whether the description of the land was sufficient to "furnish a key by which the land can be located . . . ."[40] In stating this standard the court relied on Pindar's treatise to the effect that

> [m]any instruments fall short of the ideal, but are sustainable with the help of parole evidence, where they contain enough to furnish a key by which the land can be located with the aid of extrinsic evidence. Pindar, Georgia Real Estate Law, 469, §13-54.[41]

37. *Id.*, 204 S.E.2d at 490.
38. 230 Ga. 401, 197 S.E.2d 358 (1973).
39. *Id.* at 402, 197 S.E.2d at 359.
40. *Id.* at 402-03, 197 S.E.2d at 359.
41. *Id.*

Applying this principle in the instant case, the court held: "That this description was an adequate key is demonstrated by the fact that both the title attorney and the surveyor were able to identify the property to be sold therefrom."[42]

The courts have reached similar conclusions in cases where the purchase price is stated with reference to a dollar price per acre with the number of acres left to be determined by a survey.[43] In fact, the supreme court has gone so far as to enforce an agreement to purchase

> nine proposed lots to be developed as unit IV, North Cloud Subdivision, to be completed to Gwinnett County specifications as per provisional plat by Hannan & Meeks, Surveyors . . . . Development could be of the same quality materials, etc., as Units II and III, street lights not being a part of the development.[44]

In reaching this decision, the court implies a reasonable time when no time is specified and applies the rule of *ejusdem generis* in giving meaning to the term "etc."

The foregoing precedents in no way represent a retreat from the traditional view that specific performance will be denied in cases where the terms and descriptions are not sufficiently definite. In *Wallis v. Adamson*,[45] the description of the property to be conveyed was as follows: "All that tract of land Land Lot 112 of the 5th Dist. of Clayton County, Ga. Being 36 Acers [sic] on New Hope Road."[46]

In holding this description inadequate the court looked to its standard of whether there was a key contained in the instrument which will "lead unerringly to the land in question."[47]

Similarly, the court of appeals has denied specific performance of an agreement for the purchase and construction of a house and lot under which the purchaser agreed to buy "a house to be built."[48] Since the contract did not contain any plans or specifications concerning the proposed construction, it was lacking in the necessary element of definiteness. Stated negatively, there was no key by which the plans could be identified.

V. Formation and Interpretation

Aside from considerations of public policy as reflected in other cases noted in this survey, the Georgia courts did little to retreat from the traditional view that a party to a contract is bound by the terms of the agree-

42. *Id.*
43. Griffis & Weaver Builders, Inc. v. Hopson, 230 Ga. 459, 197 S.E.2d 694 (1973).
44. Perry Dev. Corp. v. Colonial Contracting Co., 231 Ga. 666, 203 S.E.2d 475 (1974).
45. 129 Ga. App. 792, 201 S.E.2d 479 (1973).
46. *Id.* at 792, 201 S.E.2d at 479.
47. *Id.* at 793, 201 S.E.2d at 480.
48. Key v. Haitchi, 129 Ga.App. 898, 201 S.E.2d 832 (1973).

ment notwithstanding his failure to read or understand them. The general rule in this regard was statedby the court of appeals in *Ayers Enterprises, Ltd. v. Adams*[49] as follows:

> The document purported to be and was signed by both parties as constituting a reduction to writing of their verbal understanding of what was involved in the construction of this house. This being so, the defendant, equally with the plaintiff, was bound by its terms in the absence of fraud, accident or mistake.[50]

The same conclusion was reached in *Granite Management Services, Inc. v. Usry*[51] wherein the defendant alleged that he was induced by fraud to sign a lease agreement but admitted that he had never read the lease. Under these circumstances the court held:

> Where two contracting parties deal at arms length with one another and a written agreement is entered into between them it cannot be set aside upon the ground of fraud or upon the basis that he was induced to enter into and sign the agreement in the consequence of fraudulent misrepresentation when it appears that the party signing did so with the full opportunity to inform himself as to the terms of the instrument but negligently omitted to take such precautions as would reasonably have served to protect him against the imposition alleged to have been practiced.[52]

Furthermore, in *Walsh v. Campbell*[53] it was held that absent special circumstances, a party may avoid a contract on grounds of fraud only where he has exercised due diligence in protecting himself from such fraud rather than merely relying blindly on the representations of another. Thus, it is clear that in most cases the parties to a contract are still bound by what they sign.

In dealing with the formation and modification of agreements, the appellate courts have also tracked along traditional courses. In *Frey v. Friendly Motors, Inc.*[54] it was held that an attempted acceptance that varies the terms of an offer constitutes a counteroffer upon those terms rather than an acceptance. Moreover, the court of appeals has continued to recognize the principle that in order for an oral modification of a previous written contract to be binding, the subsequent modification must be supported by new and valuable consideration.[55]

With respect to the vagueness defense in a context other than the sale of real property the court of appeals has penned two opinions of interest

49. 131 Ga. App. 12, 205 S.E.2d 16 (1974).
50. *Id.* at 17, 205 S.E. 2d at 20.
51. 130 Ga. App. 667, 204 S.E.2d 362 (1973).
52. *Id.* at 668, 204 S.E.2d at 363.
53. 130 Ga. App. 194, 202 S.E.2d 657 (1973).
54. 129 Ga. App. 636, 200 S.E.2d 467 (1973).
55. Giant Peanut & Grain Co. v. Long Mfg. Co., 129 Ga. App. 685, 201 S.E.2d 26 (1973); Ryder Truck Lines, Inc. v. Scott, 129 Ga. App. 871, 201 S.E. 2d 672 (1973).

in the survey period. In *McTerry v. Free For All Missionary Baptist Church No. 1*,[56] the plaintiffs sued for damages allegedly caused by breach of a written contract of employment. This contract provided for the rate of pay as well as the term but failed to describe the nature and character of the services to be performed by the plaintiff or when or where the duties were to be performed. Under these circumstances the court found the purported agreement to be "so indefinite and vague that it is unenforceable."[57] In reaching this decision the court refused to defer to certain parol evidence which was introduced in an effort to overcome the deficiency of the terms of the contract since the parol evidence was admissible only to explain an ambiguity and not to give meaning to such an indefinite agreement which standing alone imparts no meaning at all.

In *Radlo of Georgia, Inc. v. Little*[58] the defendant agreed to raise young pigs for the plaintiff under which agreement the defendant retained broad options to terminate the agreement without notice for a number of reasons including "any other reason or event which Radlo [defendant] in the exercise of a reasonable discretion deems itself insecure . . . ."[59] The defendant maintained that this provision amounted to a contractual agreement that the performance be judged solely to its satisfaction and it, therefore, had the absolute right to terminate so long as it did not exercise bad faith. The court of appeals disagreed, finding that the discretion conferred upon the defendant must be reasonable, "that is, judged by the . . . circumstances."[60]

VI. Breach and Damages

Almost uniformly the appellate courts adhere to traditional principles respecting the breach of contracts and the damages flowing therefrom. For example, the court of appeals in *Redman Development Corp. v. Piedmont Heating & Air Conditioning, Inc.*[61] restated the general rule as follows:

> The measure of damages in the case of a breach of contract is the amount which will compensate the injured person for loss which a fulfillment of the contract would have prevented or the breach of it entailed. In other words, the person injured, is, so far as it is possible to do so by a monetary award, to be placed in the position he would have been in had the contract been performed.[62]

In *National Health Services, Inc. v. Townsend*,[63] the court of appeals

56. 129 Ga. App. 724, 200 S.E.2d 915 (1973).
57. *Id.* at 724, 200 S.E.2d at 916.
58. 129 Ga. App. 530, 199 S.E.2d 835 (1973).
59. *Id.* at 532, 199 S.E.2d at 836.
60. *Id.*, 199 S.E.2d at 837.
61. 128 Ga. App. 447, 197 S.E.2d 167 (1973).
62. *Id.* at 452, 197 S.E.2d at 171.
63. 130 Ga. App. 700, 204 S.E.2d 299 (1974).

considered a claim for lost profits asserted by a respiratory therapist who had contracted to furnish equipment and services necessary for respiratory therapy to patients of the appellant "whenever such services are prescribed by a physician either verbally or in writing."[64] Less than a month after the execution of this agreement the therapist's services were discontinued by the nursing home. The therapist brought an action, alleging that the appellant had breached its contract, to recover liquidated damages for services rendered and unliquidated damages of $20,000.00 as the value of the contract. The case was in a posture of default when it reached the trial court and the only issue was, therefore, that of damages. The appellant nonetheless appeared and moved to dismiss the therapist's claim for the value of the contract on the ground that "the therapist had failed to show with reasonable certainty what his profit would have been had the contract been continued in full force and effect for its entire life and that he made no effort to mitigate the unliquidated damages."[65]

On appeal it was the position of the nursing home that the therapist's anticipated profits were "so speculative, remote and uncertain as not to be recoverable."[66] The appellant maintained that since the services to be rendered were dependent upon the verbal or written order of a doctor, the damages were entirely speculative because the doctor might not continue to prescribe the services. The court looked to the fact that there were fourteen patients in the month of May for whom the doctor was prescribing the treatment and that there were at the time of trial fourteen patients who still needed the treatments. The court extrapolated from these facts to uphold the trial award of damages for lost profits, presumably on the assumption that this rate of prescription is provable and will continue.

In the opinion of this writer, the *National Health Services* case represents a significant departure from the general rule respecting lost profits which should be carefully scrutinized. If the certainty of damages which is required to bring into play the exception under which one may recover lost profits is no broader than that certainty of the doctor's prescription in this action, then the rule is being significantly narrowed.

In *Orkin Exterminating Co. v. Stephens,*[67] the court of appeals was faced with a termite case, which in the words of the majority, presented a "knotty question." Stephens contracted with Orkin for the control of termites in his house and paid Orkin $259.00 for initial services as well as the issuance of a "guaranty." During the term of the guaranty Stephens' house was infested with termites and he made numerous demands upon Orkin for an additional treatment. Orkin's failure of response prompted the initiation of this suit which was expressly declared to be in tort on the basis of negligence. At trial, Orkin presented no evidence and moved for a directed

64. *Id.* at 700, 204 S.E.2d at 300.
65. *Id.* at 701, 204 S.E.2d at 301.
66. *Id.* at 702, 240 S.E.2d at 302.
67. 130 Ga. App. 363, 203 S.E.2d 587 (1973).

verdict on the grounds that no breach of contract and concomitant damages were demonstrated. The trial court overruled Orkin's motion and the court of appeals was faced with the interesting question of what to do with a contract case which was expressly sued in tort.

At the outset, the majority noted that

> it is axiomatic that a single act or course of conduct may constitute not only a breach of contract but an independent tort as well, if in addition to violating a contract obligation it also violates a duty owed to plaintiff independent of contract to avoid harming him. . . . Such an independent harm may be found because of the relationship between the parties, or because of the defendant's calling or because of the nature of the harm.[68]

The court further notes that the converse of this axiom is that not all breaches of contract are also torts, especially in a case "where defendant's negligence ends merely in nonperformance of the contract . . . ."[69]

After reviewing these principles, the court of appeals held that the plaintiff's suit must fail because there was no cause of action against Orkin other than for breach of contract. In reaching this decision the court specifically distinguished this case of nonfeasance from a contractual case of misfeasance wherein one party performs defectively to the injury of the other, noting that "this distinction between defective performance or misfeasance, and failure to perform, is fatal to plaintiff's cause of action in tort."[70]

In a vigorous dissent Judge Evans attacks not only the wisdom of the majority's distinction but further asserts that this misfeasance was actually proved by the plaintiff.

Most Georgia practitioners are familiar with this tort—contract dichotomy in the area of house construction cases which, at least in the metropolitan Atlanta area, arise with frequency. Practitioners in these cases are equally aware of the difficulty of recovering on behalf of the plaintiff in the absence of palpable fraud on the part of the builder or an express warranty which was not waived at closing and merged in the deed. The court of appeals' recent decision in *Howell v. Ayers*,[71] however, adds an interesting twist to this area where the buyer directly contracts with the builder for the construction of a house. In this action Mr. Ayers agreed to provide the supervision to construct a house on a cost-plus basis for the plaintiff. After some time, the plaintiff discharged Ayers and his corporation alleging faulty construction work and failure to follow construction plans. Howell then contracted with another company to complete the house and correct the defects and subsequently initiated this action seeking damages resulting from deviation from the plans as well as negligent supervision of work.

68. *Id.* at 365, 203 S.E.2d at 590.
69. *Id.*
70. *Id.* at 366, 203 S.E.2d at 591.
71. 129 Ga. App. 899, 202 S.E.2d 189 (1973).

At the close of the plaintiff's evidence, the trial court directed a verdict both as to Mr. Ayers individually and as to his corporation.

In a brief but interesting opinion, the court of appeals reversed. As to the negligence issue, the court noted that "the evidence is sufficient to show misfeasance and negligence on Ayers' part . . . ."[72] Presumably there was a duty in this case which ran directly from Ayers to the plaintiff only because the plaintiff directly contracted with Ayers. Of more significant interest to this survey is the fact that the court also reversed as to the contractual count quoting broadly from general authorities to the effect that "[a]s a general rule, there is implied in every contract for work or services a duty to perform it skillfully, carefully, diligently, and in a workmanlike manner."[73] With this rule in mind, the court found that the evidence did not demand the finding that this implied duty was carried out.

Although the holding in *Howell* may be limited to this particular sort of house construction case, the breadth of the stated rule is obvious and will most likely be cited with regularity for some time to come.

72. *Id.* at 901, 202 S.E.2d at 191.
73. *Id.* at 900, 202 S.E.2d at 190.