Construction Law

by Frank O. Brown, Jr.*

I. INTRODUCTION

This Article focuses on noteworthy opinions by Georgia appellate courts between June 1, 2015 and May 31, 2016 relevant to the practice of construction law and on an important amendment to Official Code of Georgia Annotated (O.C.G.A.) section 13-8-2,[1] expanding its anti-indemnity provisions.

II. COMMERCIAL GENERAL LIABILITY INSURANCE

A. Additional Insured Claims

The issue of first impression in *Auto Owners Insurance Co. v. Gay Construction Co.*[2] was whether the general contractor's scope of work or its subcontractor's scope of work should be considered when determining if standard business risk exclusions apply to the general contractor's first-party claim as an additional insured against the subcontractor's commercial general liability policy.[3]

The general contractor, Gay Construction Company (GCC), contracted to build an elevated terrace in Piedmont Park. Gunby Construction (Gunby) subcontracted to pour the concrete for the terrace floor. Dai–Cole Waterproofing Company, Inc. (Dai–Cole) subcontracted to install a waterproofing membrane and a drainage mat to prevent leakage into the areas under the terrace. Shortly after completion of the work, water began leaking into those areas. GCC determined the leak was caused by the improper application of the waterproofing membrane. When GCC could not get Dai–Cole to address the problem, GCC did so. Specifically, GCC removed the terrace's top concrete slab and drainage mat, repaired

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1. O.C.G.A. § 13-8-2 (Supp. 2016).
2. 332 Ga. App. 757, 774 S.E.2d 798 (2015).
3. *Id.* at 761, 774 S.E.2d at 801.

and replaced the waterproofing membrane, replaced the top concrete slab, repaired the underside of the slab, repainted the underside of the slab to cover water stains, and replaced a light fixture that was damaged as a result of the water infiltration. As an additional insured under Dai–Cole's commercial general liability policy, GCC then sued Auto Owners Insurance Company (Auto Owners) to recover the costs GCC had incurred in performing the work. Auto Owners filed a motion for summary judgment, contending that standard business risk exclusions applied to all of GCC's work, not just the work performed by Dai–Cole, and therefore none of the claims were covered by the policy. The trial court denied the motion but granted a certificate of immediate review.[4]

The Georgia Court of Appeals reversed, holding that the business risk exclusions applied to all of GCC's work.[5] The court reasoned in part that to hold otherwise would mean that GCC had greater coverage under the Auto Owners policy than Dai–Cole and would effectively require Auto Owners to financially guarantee Dai–Cole's work.[6]

B. Mold Claim Exclusions

Dolan v. Auto Insurance Co.[7] involved a declaratory judgment action filed by a commercial general liability insurer for a determination of coverage for claims by homeowners allegedly arising out of the negligent replacement by the insured contractor of duct work for an air conditioning unit.[8] The insurer contended that the homeowners' claims for property damage were barred by an exclusion for property damage to "[t]hat particular part of real property on which any insured or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations . . . ."[9] The Georgia Court of Appeals reversed the trial court's grant of summary judgment on this ground, reasoning that this exclusion, with its present tense language "are performing," applied only to work being performed and not to the contractor's work that had already been completed.[10]

The trial court's grant of summary judgment was also based on an exclusion for property damage to "[t]hat particular part of any property that

4. *Id.* at 757-59, 774 S.E.2d at 798-800.
5. *Id.* at 762, 774 S.E.2d at 801-02.
6. *Id.* at 762, 774 S.E.2d at 801.
7. 333 Ga. App. 601, 773 S.E.2d 789 (2015).
8. *Id.* at 601, 773 S.E.2d at 790.
9. *Id.* at 602, 773 S.E.2d at 791.
10. *Id.* at 604-05, 773 S.E.2d at 792.

must be restored, repaired or replaced because 'your work' was incorrectly performed on it."[11] The policy expressly stated, however, "this exclusion does not apply to 'property damage' included in the 'products-completed operation hazard,'"[12] which the policy defined "as property damage or bodily injury occurring away from property owned by [the contractor] and 'arising out of . . . [the contractor's] work . . . when all the work to be done at the job site has been completed.'"[13] On appeal, the court reversed, holding that because the record established all of the contractor's work had been completed prior to the damage, the work fell within the products-completed operation hazard exception to this exclusion.[14]

On appeal, the homeowners also argued the trial court erred in ruling the "Fungi Endorsement" excluded coverage for their claims for bodily injury because that endorsement did not apply to claims falling within the products-completed operations aggregate. The court disagreed, reasoning that such claims did fall within the aggregate.[15]

C. Notice to Excess Insurer

Plantation Pipe Line Co. v. Stonewall Insurance Co.[16] is a helpful reminder of the importance of promptly notifying excess insurers of potential claims and maintaining a complete record of insurance policies. The "occurrence" at issue took place in 1976, when it was discovered that fuel had leaked from a Plantation Pipe Line Company (Plantation) pipeline. Plantation immediately repaired the pipeline. About thirty years later, in April 2007, Plantation discovered contaminated soil, which was traced to the April 1976 leak.[17] Three years later, Plantation sent written notice to Stonewall Insurance Company (Stonewall) that its excess policy would likely be implicated by third-party claims arising from the contamination discovered in April 2007. Stonewall responded that Plantation's notice was not prompt as required by its policy and denied coverage. Plantation then filed suit against Stonewall. The trial court granted Stonewall's motion for summary judgment based on its notice defense, and it denied Plantation's motion for summary judgment on that defense.[18]

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11. *Id.* at 602, 773 S.E.2d at 791.
12. *Id.*
13. *Id.* at 603, 773 S.E.2d at 791.
14. *Id.* at 605, 773 S.E.2d at 793.
15. *Id.* at 603, 773 S.E.2d at 791.
16. 335 Ga. App. 302, 780 S.E.2d 501 (2015).
17. *Id.* at 303, 780 S.E.2d at 504.
18. *Id.* at 302-03, 780 S.E.2d at 504.

On appeal, the Georgia Court of Appeals referenced a notice provision of the Stonewall policy that stated in part: "When an occurrence takes place which, in the opinion of the insured, involves or may involve liability on the part of the company, prompt written notice shall be given by or on behalf of the insured to the company or its authorized agents. . . ."[19] Under terms like this, the court reasoned, the insured's notice obligations are not triggered by the underlying occurrence, but rather by the insured's assessment of the likelihood that its liability will exceed the primary policy or lower tier excess coverage.[20] The court held that Plantation failed, as a matter of law, to provide prompt notice as required by the policy, because it did not provide notice to Stonewall until more than two years after Plantation had determined that its liability would likely exceed its underlying coverages.[21]

Plantation further contended that, even if its notice was untimely, it did not eliminate coverage under the Stonewall policy, because the policy did not expressly state that prompt notice was a condition precedent to coverage, and Stonewall was not prejudiced by the delay in notice.[22] Before addressing those specific arguments, the court noted several principles of Georgia law relating to late notice.[23] First, when possible, an insurance policy is construed to avoid forfeitures and to provide coverage.[24] Second, a notice provision that expressly states timely notice is a condition precedent to coverage is enforceable absent a showing of justification for late notice, and the insurer is not required to show actual harm from a delay in order to deny coverage.[25] Third, conversely, if timely notice is not an express condition precedent to coverage, untimely notice forfeits coverage only if the insurer demonstrates prejudice.[26]

The court held that, because the Stonewall policy notice provision did not expressly make compliance with that provision a condition precedent to coverage, the trial court erred in concluding that Stonewall was not required to show prejudice in order to deny coverage.[27] The court further held Stonewall's bare assertion that Plantation's untimely notice deprived Stonewall of an opportunity to investigate was insufficient to carry its burden on summary judgment of showing prejudice as a matter

19. *Id.* at 303-04, 780 S.E.2d at 505.
20. *Id.* at 306-07, 780 S.E.2d at 506-07.
21. *Id.* at 308-09, 780 S.E.2d at 507-08.
22. *Id.* at 310, 780 S.E.2d at 509.
23. *Id.*
24. *Id.*
25. *Id.* at 311, 780 S.E.2d at 509-10.
26. *Id.* at 311, 780 S.E.2d at 510.
27. *Id.* at 313, 780 S.E.2d at 511.

of law.[28] Based on the foregoing, the court concluded the trial court properly denied Plantation's motion for summary judgment but erred in granting Stonewall's motion for summary judgment.[29]

III. GEORGIA'S FALSE CLAIM ACT

Under certain circumstances, Georgia's Taxpayer Protection False Claim Act (Act)[30] allows a lawsuit to be brought by the state, local governments, and private persons against a person who made a false claim for money or property relating to certain state and local matters.[31] These claims can be made against public project contractors and subcontractors. The Act also includes the following anti-retaliation provision:

> Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of a civil action under this Code section or other efforts to stop one or more violations of this article.[32]

The issue in *McKinney v. Fuciarelli*[33] was whether a tenured faculty member at Valdosta State University, who claimed to have been demoted and who asserted a claim under this anti-retaliation provision, was required by the Act to obtain the Georgia Attorney General's approval to pursue that claim.[34] The Georgia Supreme Court held that such approval was required by the clear wording of the Act.[35]

IV. ARBITRATION

A. Motion to Vacate Arbitration Award

In *Atlanta Flooring Design Centers, Inc. v. R.G. Williams Construction, Inc.*,[36] the Georgia Court of Appeals addressed the validity of a subcontract provision stating: "Contractor and Subcontractor hereby expressly

28. *Id.* at 314, 780 S.E.2d at 512.
29. *Id.*
30. O.C.G.A. tit. 23 ch. 3 art. 6 (2014 & Supp. 2016).
31. O.C.G.A. § 23-3-122 (2014 & Supp. 2016).
32. O.C.G.A. § 23-3-122(l)(1).
33. 298 Ga. 873, 785 S.E.2d 861 (2016).
34. *Id.* at 873, 785 S.E.2d at 861-62.
35. *Id.*
36. 333 Ga. App. 528, 773 S.E.2d 868 (2015).

agree not to challenge the validity of the arbitration or the award."[37] After an arbitration award was issued, the subcontractor filed a motion in court seeking to vacate the award under O.C.G.A. § 9-9-13(a),[38] in the Georgia Arbitration Act, alleging its rights were prejudiced in the arbitration on grounds set forth in O.C.G.A. § 9-9-13(b).[39] The trial court dismissed the motion to vacate because of the subcontract provision quoted above.[40] The court of appeals reversed, holding that the subcontract provision "conflicts with and frustrates Georgia public policy as expressed in the [Georgia Arbitration Code,]" and is therefore unenforceable.[41]

B. Offer of Judgment in Arbitration Context

In *Alessi v. Cornerstone Associates, Inc.*,[42] the Georgia Court of Appeals addressed whether Georgia's offer-of-judgment statute, O.C.G.A. § 9-11-68,[43] applies to an arbitration award.[44] Under that statute, a defendant may recover attorney fees and expenses incurred by or on his or her behalf after the rejection of a settlement offer by or on his or her behalf if the final judgment is no liability or is less than 75% of the settlement offer.[45] Following the homeowner claimants' rejection of a $3,000 settlement offer from the builder respondent, the arbitrator issued an award that granted no money to the homeowners.[46] The builder then filed a motion in court to confirm the arbitration award and a request in court under O.C.G.A. § 9-11-68 for $67,268.41 in attorney fees and expenses incurred in the arbitration.[47] The trial court granted the motion and request under O.C.G.A. § 9-11-68.[48] The court of appeals reversed, holding that O.C.G.A. § 9-11-68 does not apply to arbitration proceedings.[49] According to the court, the fact that an arbitration award can be confirmed in court does not make it part of the judicial process.[50]

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37. *Id.* at 528, 773 S.E.2d at 869.

38. O.C.G.A. § 9-9-13(a) (2015).

39. O.C.G.A. § 9-9-13(b) (2015); *Atlanta Flooring Design Ctrs.*, 333 Ga. App. at 528, 773 S.E.2d at 869.

40. *Atlanta Flooring Design Ctrs.*, 333 Ga. App. at 528, 773 S.E.2d at 869.

41. *Id.* at 530, 773 S.E.2d at 870.

42. 334 Ga. App. 490, 780 S.E.2d 15 (2015).

43. O.C.G.A. § 9-11-68 (2015).

44. *Alessi*, 334 Ga. App. at 492, 780 S.E.2d at 16.

45. O.C.G.A. § 9-11-68.

46. *Alessi*, 334 Ga. App. at 491, 780 S.E.2d at 16.

47. *Id.* at 492, 780 S.E.2d at 16.

48. *Id.*

49. *Id.* at 495, 780 S.E.2d at 18-19.

50. *Id.* at 494, 780 S.E.2d at 18.

V. PAYMENT AND PERFORMANCE BONDS

A. Bad Faith Penalties

A key issue in *Choate Construction Co. v. Auto-Owners Insurance Co.*[51] was whether Auto-Owners Insurance Company, the surety on payment and performance bonds, was liable under O.C.G.A. § 33-4-6(a)[52] for bad faith penalties for denial of Choate Construction Company's claim as the obligee under the bonds.[53] O.C.G.A. § 33-4-6(a) states in relevant part:

> In the event of a loss which is covered by a policy of insurance and the refusal of the insurer to pay the same within 60 days after a demand has been made by the holder of the policy and a finding has been made that such refusal was in bad faith, the insurer shall be liable to pay such holder, in addition to the loss, not more than 50 percent of the liability of the insurer for the loss or $5,000.00, whichever is greater, and all reasonable attorney's fees for the prosecution of the action against the insurer.[54]

Because the Georgia Court of Appeals concluded the surety had reasonable grounds to contest if the bonds had been issued to the defaulting subcontractor, as opposed to another entity, it held that the surety was not liable under O.C.G.A. § 33-4-6(a).[55]

B. Lack of Payment Bond

In *City of College Park v. Sekisui SPR Americas, LLC*,[56] the Georgia Court of Appeals addressed the trial court's grant of summary judgment on claims by a subcontractor against a city for amounts not being paid by the general contractor on a city project.[57] The subcontractor argued in part that the City of College Park (the City) was liable under O.C.G.A. § 36-91-91[58] because the City had not obtained a required payment bond or other substitute security. Affirming the trial court, the court of appeals rejected the subcontractor's argument because the project was an emergency, which is an exception to the City's liability under O.C.G.A. § 36-91-91.[59] The subcontractor also asserted unjust enrichment, quantum

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51. 335 Ga. App. 331, 779 S.E.2d 465 (2015).
52. O.C.G.A. § 33-4-6(a) (2014 & Supp. 2016).
53. *Choate Constr. Co.*, 335 Ga. App. at 340, 779 S.E.2d at 471-72.
54. O.C.G.A. § 33-4-6(a).
55. *Choate Constr. Co.*, 335 Ga. App. at 340, 779 S.E.2d at 472.
56. 331 Ga. App. 404, 771 S.E.2d 101 (2015).
57. *Id.* at 404-05, 771 S.E.2d at 102.
58. O.C.G.A. § 36-91-91 (2012).
59. *College Park*, 331 Ga. App. at 408-09, 771 S.E.2d at 104-05.

meruit, and implied obligation to pay claims against the City for the unpaid amounts. The City contended these claims were barred by the subcontractor's failure to give ante litem notice to the City under O.C.G.A. § 36-33-5.[60] The court held that such notice was not required because O.C.G.A. § 36-33-5 plainly applies only to tort claims regarding personal injury or property damage.[61] The court nevertheless affirmed the grant of summary judgment in the City's favor on the unjust enrichment, quantum meruit, and implied obligation to pay claims, because it agreed with the City's contention that O.C.G.A. § 36-91-91 provided the sole possible remedy for the subcontractor against the City.[62]

VI. CONTRIBUTION AND INDEMNIFICATION

Although *Hines v. Holland*[63] was not a construction case, it addressed contribution and indemnification claims, which are important in construction disputes. In *Hines*, a title insurer sued a closing attorney for professional negligence for failing to list an unsatisfied security deed of record on a title policy. The closing attorney, in turn, filed a third-party complaint against the title examiner who had failed to list the security deed on the title report to the closing attorney. The trial court dismissed the third-party complaint on the basis that the closing attorney could not seek indemnity or contribution from the title examiner.[64]

On appeal, the Georgia Court of Appeals stated that a third-party complaint under O.C.G.A. § 9-11-14[65] must be based on secondary or derivative liability. Typically, the court explained, this means the third-party complaint must be based on indemnity, subrogation, contribution or warranty.[66] The court held the closing attorney could not assert a contribution claim because the right to contribution relates only to joint tortfeasors, and the closing attorney had specifically denied that the title examiner was a joint tortfeasor.[67]

Before commenting on the closing attorney's indemnity claims, the court stated that Georgia law recognizes two categories of indemnity. One is contract indemnity, and the other is vicarious liability based on the imputation of liability to a principal for acts of an agent.[68] The court

60. O.C.G.A. § 36-33-5 (2012 & Supp. 2016).
61. *College Park*, 331 Ga. App. at 406-08, 771 S.E.2d at 103-04.
62. *Id.* at 409-10, 771 S.E.2d at 105.
63. 334 Ga. App. 292, 779 S.E.2d 63 (2015).
64. *Id.* at 292-93, 779 S.E.2d at 65-66.
65. O.C.G.A. § 9-11-14 (Supp. 2016).
66. *Hines*, 334 Ga. App. at 294-95, 779 S.E.2d at 66-67.
67. *Id.* at 295-96, 779 S.E.2d at 67-68.
68. *Id.* at 295, 779 S.E.2d at 67.

then held that the closing attorney was not alleging he was vicariously liable for the acts of the title examiner, but instead that the title examiner's negligence caused him to be professionally negligent.[69] The court added that under Georgia law, only an attorney is authorized to render legal opinions as to the status of the title to realty.[70] Thus, the closing attorney was directly, rather than vicariously, liable.[71]

VII. ANTI-INDEMNITY PROVISIONS IN O.C.G.A. § 13-8-2

For many years, O.C.G.A. § 13-8-2(b)[72] has outlawed provisions in contracts relative to construction, alteration, repair or maintenance of a building structure, appurtenances, and appliances that purport to require one contracting party to indemnify, hold harmless, insure or defend another of the contracting parties or other named indemnitee against liability for damage, loss, or expense arising out of bodily injury, death, or damage to property that was caused by the sole negligence of the indemnitee (the one benefitting from the indemnity), or its officers, agents, or employees.[73]

In 2016, the Georgia Legislature added subparagraph (c) to O.C.G.A. § 13-8-2.[74] It applies to contracts for engineering, architectural, and land surveying services, and it generally mirrors the indemnity restrictions in O.C.G.A. § 13-8-2(b).[75] However, it differs from O.C.G.A. § 13-8-2(b) in three ways. First, it is not limited to bodily injury, death, and property damage. Second, it does not expressly apply only to damage caused by the sole negligence of the indemnitee, or its officers, agents, or employees. Third, it does not apply to damages, losses, or expenses to the extent caused by or resulting from the negligence, recklessness, or intentionally wrongful conduct of the indemnitor or other persons employed or utilized by the indemnitor in the performance of the contract.

69. *Id.* at 296, 779 S.E.2d at 67-68.
70. *Id.* at 296-97, 779 S.E.2d at 68.
71. *Id.* at 297, 779 S.E.2d at 68.
72. O.C.G.A. § 13-8-2(b) (2010 & Supp. 2016).
73. *Id.*
74. O.C.G.A. § 13-8-2(c) (Supp. 2016) (enacted by Ga. H.R. Bill 943, Reg. Sess. (2016)).
75. O.C.G.A. § 13-8-2(b).