

**GEORGIA  
CONSTRUCTION LAW  
COMPENDIUM**

**Prepared by**

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## Georgia

### Case law:

1. In *Vinings Bank v. Brasfield & Gorrie, LLC*, No. S14G1876, 2015 WL 4067814, at \*1 (Ga. July 6, 2015), Vinings Bank made a \$1.4 million loan to Wagener Enterprises, Inc. ("WEI"). As collateral, WEI granted the Bank a security interest in all of its accounts and accounts receivable, including WEI's contract to provide drywall services work for general contract (B&G) on multiple construction projects. WEI defaulted on the loan and the Bank filed suit against B&G, seeking to collect on WEI's accounts receivable and alleging conversion. The Bank then froze WEI's general deposit account for approximately four weeks and later applied those funds to WEI's loan indebtedness. During that time, WEI could not access the construction payments B&G had been making into WEI's account in order to pay its subcontractors. As such, B&G paid all of WEI's subcontractors individually.

In response to the Bank's suit, B&G asserted a counterclaim alleging conversion. The Court of Appeals affirmed the trial court's finding that Vinings Bank was not entitled to summary judgment with regard to the counterclaim for conversion. On appeal, the Supreme Court of Georgia granted the Bank's motion for summary judgment on B&G's counterclaim for conversion, finding that B&G lacked standing to bring such a claim because B&G had no direct relationship with the Bank; B&G was not a subcontractor to WEI entitled to any of the payments; B&G did not have a direct contractual relationship with any of WEI's subcontractors, and B&G had no fiduciary relationship with any of WEI's subcontractors.

2. In *Smith v. Dill's Builders, Inc.*, No. A15A0580, 2015 WL 3634699, at \*1 (Ga. Ct. App. June 12, 2015), Sharon T. Smith and Meiko A. Camp entered into a contract to build a new home with Dill's Builders, Inc. ("DBI"). A dispute arose regarding discrepancies between the construction plans and the usable square footage of the house, as well as the workmanship of the house. Smith refused to pay the balance on the contract and DBI filed a lien against the property and, later, a suit. In response, the Defendants counterclaimed for breach of contract, fraud, and slander of title. DBI moved for summary judgment, which was granted because the trial court found that Smith's affidavit in response to DBI's motion was insufficient to establish genuine issues of material fact as to whether DBI adequately performed under the contract. On appeal, the Court held that the trial court prematurely granted summary judgment because of its failure to address one of the owner's defenses of insufficient service of process and lack of personal jurisdiction.

Smith argued that the trial court erred in granting summary judgment to DBI because genuine issues of material fact existed as to whether DBI adequately performed under the contract, and whether as a result, DBI was entitled to full payment under the contract. The Court held that when a party to a building contract is also present during the walk-through, her affidavit opposing summary judgment is based on personal knowledge and can be used to set forth specific facts showing a genuine issue to be decided. As such, the Court of Appeals of Georgia reversed the trial court's holding.

3. In *City of College Park v. Sekisui SPR Ams., LLC*, 331 Ga. App. 404 (Ga. Ct. App. 2015), Sekisui SPR Americas, LLC, a subcontractor that worked on a sewer project for the City of College Park, sued the City when the general contractor failed to pay Sekisui for work performed, alleging that the City was liable because it had failed to ensure the contractor obtained a payment bond in violation of O.C.G.A. § 36-91-90. Sekisui also raised claims of

quantum meruit, unjust enrichment, implied obligation to pay, and sought attorney fees. The trial court granted summary judgment in favor of Sekisui.

On appeal, the City contended that the trial court erred in denying its motion to dismiss Sekisui's complaint on the ground that Sekisui failed to give proper ante litem notice under O.C.G.A. § 36-33-5. The Court disagreed, finding that O.C.G.A. § 36-33-5's statutory requirements apply only to tort claims regarding personal injury or property damages, not actions arising out of a contract. The Court concluded that none of Sekisui's claims were torts regarding personal injury or property damage, therefore, Sekisui was not required to comply with the ante litem notice requirements before filing suit.

In addition, the City contended that the trial court erred in denying its motion for summary judgment because the City was not required to obtain a payment bond since the Embassy Drive Project was necessitated by an emergency. The Court of Appeals of Georgia held that, because the main sewer line on Embassy Drive had collapsed and needed to be replaced, constituting an emergency, the City was exempt from securing a payment bond under O.C.G.A. § 36-91-1 *et seq.*, which would otherwise require a payment bond. Finally, the City contended that Sekisui's claims for unjust enrichment, quantum meruit, and implied obligation to pay were barred because O.C.G.A. § 36-91-91 provided the exclusive remedy by which Sekisui could sue the City. The Court found that Sekisui, as a subcontractor, could only file suit against the City for the statutory remedies provided by Georgia's lien statute, and not for implied contract theories.

4. In *Ga. DOT v. Wyche, No. A15A0346, 2015 WL 3895645 (Ga. Ct. App. June 25, 2015)*, Larry J. Bowen, Jr. was killed while employed as a construction worker by Reeves Construction Company. Reeves was performing paving work on Eisenhower Parkway in Macon, Georgia pursuant to a contract with the DOT. The only DOT employee present that evening was Johnny Moss, a field materials inspector. Cedric Howard, an employee of Moreland Altobelli Associates, Inc., which was under contract with the DOT to perform inspections and ensure that Reeves was in compliance with the DOT contract, was also at the scene.

Mary Wyche, surviving mother of Bowen, filed a complaint against the DOT and Moreland, asserting claims of ordinary and professional negligence against both defendants, alleging that their lack of inspection of the construction site and planning left drivers without positive guidance. With respect to the DOT, Wyche claimed that the DOT failed to inspect and enforce its contract with Moreland when it did not provide appropriate signage and lighting to the intersection and failed to oversee and train its employees. The DOT filed a motion to dismiss on the grounds of sovereign immunity, which the trial court denied.

On appeal, the Court reversed, rejecting Wyche's argument that the State waived its sovereign immunity as to claims that the DOT negligently inspected the project because the claims fell within the inspection powers exception to sovereign immunity. Thus, the DOT was immune from those claims. In addition, the Court rejected Wyche's argument that the State waived its sovereign immunity as to claims that the DOT negligently approved Reeves' paving project because there is nothing in the Georgia Code that prohibits the DOT from delegating its responsibilities to a private contractor through a construction contract. Thus, the Court found that Wyche's claims against the DOT for negligence relating to the paving operations on the night of the accident, including the alleged failure to provide appropriate signage and lighting at the intersection, were claims based on the actions of one or more independent contractors and barred by the doctrine of sovereign immunity.

5. In *Ashton Atlanta Residential, LLC v. Ajibola*, 331 Ga. App. 231 (2015), Okakunle Ajibola and 31 other plaintiffs, homeowners in the Chattahoochee Bluffs townhouse community, filed a civil action against developer Ashton Atlanta Residential, LLC for damages resulting from broken and damaged water lines at the community. Ashton filed a motion for summary judgment, which was granted in part and denied in part. On appeal, the Court concluded that the trial court erred in denying Ashton's motion for summary judgment on the Plaintiffs' claim of negligent construction because the action was filed on February 5, 2013. As such, the Plaintiffs' action was barred by Georgia's statute of repose, which provides:

[n]o action to recover damages:

(1) For any deficiency in the survey or plat, planning, design, specifications, supervision or observation of construction, or construction of an improvement to real property; [or]

(2) For injury to property, real or personal, arising out of any such deficiency; ...

Shall be brought against any person performing or furnishing the survey or plat, design, planning, supervision or observation of construction, or construction of such an improvement more than eight years after substantial completion of such an improvement.

O.C.G.A. § 9-3-51. In order to avoid running afoul of the statute of repose, the action should have been filed before December 8, 2012 because the sale of the last townhouse sold to the Plaintiffs closed on December 8, 2004. As such, the Court of Appeals of Georgia reversed the trial court's holding.

6. In *AAA Restoration Co. v. Peek*, No. A15A0555, 2015 WL 4232299, at \*1 (Ga. Ct. App., July 14, 2015), a fire occurred at Plaintiff's residence in Newnan, resulting in the destruction of a significant portion of the home. Approximately three weeks later, Plaintiff signed a written agreement ("the Agreement") with AAA for the demolition of her damaged residence and for the construction of a new home on the same lot. The Agreement contained an arbitration clause, initialed by Plaintiff and a representative of AAA. A dispute arose between the two parties and Plaintiff filed suit against AAA. In its answer, AAA asserted that the trial court lacked jurisdiction, as the Agreement required the parties to arbitrate their dispute. AAA also filed a motion to dismiss for lack of jurisdiction and a motion to stay the action and compel arbitration.

In response, Plaintiff asserted that the arbitration clause was void and unenforceable because the designated arbitral forum, Construction Arbitration Association (of Atlanta), did not exist. AAA then filed a reply in which it claimed that it intended the Agreement to designate "Construction Arbitration Associates, Ltd.," as the arbitrator. Following a hearing on the motion to compel arbitration, the trial court denied the motion. At the request of AAA, the trial court certified its order for immediate review. The Court of Appeals of Georgia then granted AAA's application for an interlocutory appeal. On appeal, the Court declined to reform the contract to reflect that the parties intended a corporate entity other than the one designated as the arbitral forum, finding that the restoration company made a unilateral mistake when it named a non-existent association as the arbitral forum. In addition, the Court found that the fact the named arbitral forum did not exist did not render the remainder of the arbitration clause unenforceable.

because the designation of the arbitral forum was an ancillary concern and was not an integral part of the parties' agreement to arbitrate any dispute that arose out of the parties' agreement.

7. In *Atlanta Flooring Design Ctrs., Inc. v. R. G. Williams Constr., Inc.*, No. A15A0664, 2015 WL 4311070, at \*1 (Ga. Ct. App., July 16, 2015), R. G. Williams Construction, Inc. (R.G.), the general contractor on a construction project, hired Atlanta Flooring Design Centers, Inc. (AFDC) as the flooring subcontractor for the project. The parties entered into a written contract requiring that disputes be resolved by arbitration. After a dispute was submitted to arbitration, and the arbitrator rendered an award, AFDC filed a motion seeking a court order vacating the award on the basis that its rights were prejudiced in the arbitration proceeds.

R.G. moved to dismiss on the grounds that the parties' contractual agreement stated that they would not challenge the validity of the arbitration or the award. The trial court ruled that the contract precluded any challenges to the award and granted the motion to dismiss AFDC's motion to vacate the award. On appeal, the Court of Appeals of Georgia reversed, finding that the Georgia Arbitration Code does not permit contracting parties who provide for arbitration of disputes to contractually waive or eliminate a party's right to apply to a court to vacate or modify an award on the statutory grounds set forth in O.C.G.A. §§ 9-9-13, 9-9-14. Thus, the contract provision stating that the parties "expressly agree not to challenge the validity of the arbitration or the award" conflicts with and frustrates Georgia public policy as expressed in the Georgia Arbitration Code and was held to be void and unenforceable to the extent it prevents AFDC from challenging the validity of the arbitration or the award by filing a motion under OCGA § 9-9-13 for the court to vacate the award.

8. In *Brown v. Seaboard Constr. Co.*, 330 Ga. App. 778, (Ga. Ct. App. 2015), Marietta Brown was injured in a vehicular accident that she attributed to a poorly paved road. Defendant Seaboard Construction had performed paving work on the road several years before the accident. Brown and the vehicle's driver, Oscar Mangram, sued Seaboard, alleging that Seaboard's employees had negligently performed the paving work and that Seaboard had negligently failed to warn of the road's dangerous and defective condition. The trial court granted summary judgment to Seaboard, and Brown appealed.

On appeal, the court cited the general rule "a road contractor cannot be held responsible for completed work over which it no longer exercises any control." In addition, "the contractor is not liable to third persons for damages or injuries subsequently suffered by reason of the condition of the work, even though he was negligent in carrying out the contract, at least, if the defect is not hidden but readily observable on reasonable inspection." Applying this principle, the Court of Appeals of Georgia affirmed the trial court's grant of summary judgment, noting that Seaboard procured an affidavit from Jeffrey Kicklighter, who had worked for Seaboard for more than 20 years and had personal knowledge of the repaving. The affidavit stated that the DOT had accepted the work in 1998. In addition, the Court found that nothing in the record suggested that the causeway had a hidden defect when the DOT accepted the work or that any of the other exceptions to the general rule regarding road contract liability should apply. In conclusion, the Court stated that Seaboard discharged its burden as movant for summary judgment, and Brown failed to point to specific evidence in the record that created a genuine issue of material fact.

9. In *Savage v. State of Georgia*, No. S15A0277, 2015 WL 3937118, at \*1 (Ga. June 29, 2015), Plaintiffs Savage, Pellegrino, and Hobgood challenged the trial court's validation of revenue bonds that would be used to help finance a new stadium in Cobb County for the Atlanta Braves major league baseball team. The bonds were to be issued pursuant to an intergovernmental agreement between Cobb County and the Cobb-Marietta Coliseum and

Exhibit Hall Authority. Under the Agreement, the Authority agreed to issue bonds to cover much of the cost of constructing the stadium and the County agreed to pay the authority amounts sufficient to cover the bond payments not covered by the licensing fees paid by the Braves. Plaintiffs argued that the Intergovernmental Agreement was not valid; that the issuance of the revenue bonds that would be used to help finance the new stadium violated the Georgia Constitution's debt limitation clause, gratuities clause, lending clause, and Georgia's revenue bond laws; and that the process used to validate the bonds was deficient. The trial court validated the stadium project bonds.

On appeal, the Court upheld the constitutionality of the Intergovernmental Agreement between the County and the Authority, noting that the contract has the following characteristics: it is between "political subdivision[s] of the state"; it is for a period "not exceeding 50 years"; it is a contract for services; and the agreement "deal[s] with activities, services, or facilities which the contracting parties are authorized by law to undertake or provide."

Savage and Hobgood, pointing to the laws governing the Authority, argued that, even if the Authority and the County were authorized to provide a stadium, they were not authorized to provide this particular stadium, because it would not benefit the public. The Supreme Court of Georgia disagreed, citing to the Operating Agreement. Specifically, the Court found that the Authority and the County made a specific determination that the project would benefit the public by providing "a significant and much needed catalyst for revitalization and continuing redevelopment of the property in the vicinity of the stadium." Further, in approving the Bond Resolution, the Authority determined that "the financing, acquisition, construction, and equipping of the Project will be in furtherance of the Authority's public purpose," and the County determined that the project would provide its citizens "continuing recreational benefit and other benefits" and "will promote tourism, promote the economy, and bring other benefits to the County and the State." As such, the Court concluded that the stadium project would provide public benefits.

Savage and Hobgood further argued that the issuance of the stadium project bonds would violate the Constitution's debt limitation clause because no referendum would be held for the County's voters to approve or disapprove new debt. The Supreme Court of Georgia held that the County was not violating the debt limitation clause because the debt the County was incurring under the terms of the Intergovernmental Agreement, agreeing to pay the Authority up to \$25 million per year for the next 30 years to cover the principal interest, should not be controlled by the debt limitation clause because the County's pledge was made through a valid Intergovernmental Contract. Debt incurred under a valid intergovernmental contract is not subject to the debt limitation clause

In addition, the Court found that the Intergovernmental Agreement does not violate the Constitution's lending clause because the County would not be paying, with appropriated funds or credit, for anything to be owned by the Braves parties. Instead, the stadium and stadium site would be owned by the Authority, with the Braves paying license fees to the Authority, for at least 30 years, at the end of which the bonds the County would be paying off would be fully redeemed.

In response to Savage and Pellegrino's argument that the bonds should not be validated because they do not comply with the requirements set forth in the constitutional provision and statutes governing revenue bonds, the Court held that the bonds meet the requirements set forth in the statutes and provisions because the license fees paid by the Braves to use the stadium would cover part of the bond payments, and the remainder would come from payments made by the County. As such, the revenue bonds were contemplated as part of a valid

Intergovernmental Agreement and payments made under the contract constitute project revenue. Finally, the Court rejected Pellegrino and Hobgood's argument regarding the validity of the bond validation process.

10. In *Auto Owners Ins. Co. v. Gay Constr. Co.*, No. A15A0145, 2015 WL 4069602, at \*1 (Ga. Ct. App. July 6, 2015), Gay Construction Company (“GCC”), a general contractor, filed suit against Auto Owners Insurance Company to recover directly as an additional insured under the commercial liability (“CGL”) policy issued by Auto Owners to Dai-Cole Waterproofing Company, Inc. (“Dai-Cole”), GCC's subcontractor on a project. Specifically, GCC sought to recover from Auto Owners for costs associated with allegedly faulty workmanship by Dai-Cole. Believing itself to be an additional insured under Dai-Cole's policy, GCC filed a first-party claim, seeking reimbursement for the costs of repairing and replacing the defective terrace. After Auto Owners ultimately denied GCC's claim, GCC filed a lawsuit against Auto Owners, claiming breach of contract.

The policy in question contained a business risk exclusion that excluded “loss or damage caused by ... [f]aulty, inadequate[,] or defective ... [d]esign, specifications, workmanship, repair, construction, [or] renovation...”. Auto Owners moved for summary judgment. The trial court denied its motion. On appeal, the Court of Appeals of Georgia noted that GCC filed a first-party claim seeking reimbursement of costs associated solely with the repair and correction of faulty workmanship by Dai-Cole; there was no claim for damage to nondefective property not covered by GCC's or Dai-Cole's scope of work. As such, the claim was barred by the business risk exclusions in the Auto-Owners policy. The Court pointed out that Auto Owners did not guarantee the work of Dai-Cole, and the business risk exclusions in the policy removed from coverage the defective workmanship by Dai-Cole that caused damage to the project. GCC, as the general contractor, was responsible for all work done within the scope of work, which it contracted to perform. The Court concluded that to limit the business risk exclusions to only that work performed by Dai-Cole would permit GCC more coverage as an additional insured than that granted to Dai-Cole as policy-holder and would effectively require Auto Owners to financially guarantee Dai-Cole's work. Further, the business risk exclusions expressly excluded property damage to the work of a named insured arising out of the work, and the policy contemplated the possibility of qualifying an additional insured under the policy. As such, the Court concluded that the trial court erred by denying summary judgment on the issue.

11. In *Greene County Development Authority v. State of Georgia*, 296 Ga. 725 (2015), to finance the construction of a facility for the use of the Academy, the Greene County Development Authority proposed in 2014 to issue \$14 million in revenue bonds. The Authority entered into an intergovernmental agreement with Greene County, whereby the County contracted to pay amounts over to the Authority for repayment of the indebtedness on the bond amounts that the County contemplated would be raised by an ad valorem tax.

The Authority also proposed a lease agreement with the Academy, whereby the Academy generally would have use of the facility for so long as the indebtedness on the bonds remained outstanding, and the Authority would sell the facility to the Academy for \$1 when that indebtedness was retired. The State of Georgia filed a petition to validate the bonds, and several Green County residents intervened to object to validation. The trial court refused validation. The County, the Authority, and the Academy appealed. On appeal, the Court held that it could glean from the proposal some of the concerns the trial court would have had with the proposal. As such, the record permitted a finding that the Authority's proposal was not sound, feasible, and reasonable and therefore the trial court did not err when it refused to validate the bonds.

12. In *Cottrell v. Atlanta Dev. Auth.*, 297 Ga. 1 (2015), the Superior Court of Fulton County validated roughly \$200 million in municipal bonds to be issued by the Atlanta Development Authority d/b/a Invest Atlanta. Invest Atlanta and the Geo L. Smith II Georgia World Congress Center Authority proposed to have the bonds issued for the purpose of funding a portion of the cost of developing, constructing, and operating a new stadium facility in downtown Atlanta for the Atlanta Falcons professional football team. On February 4, 2014, the State of Georgia filed a Petition for Bond Validation in the superior court to authorize the issuance of the bonds. Rev. William L. Cottrell, Sr., Mamie Lee Moore, Tracy Y. Bates, John H. Lewis III, and Joe Henry Beasley (collectively "Cottrell") moved to intervene in the proceedings to file objections to the bond validation, and the trial court allowed them to do so. The New Stadium Project and the Georgia Dome would be funded in part by a Hotel/Motel tax levied under O.C.G.A § 48-13-51(a)(5).

Cottrell contended that the statute, which allows for an extended time period in which a county or municipality may levy a Hotel/Motel tax for purposes of funding a "successor facility" to an existing "multipurpose domed stadium facility," was an unconstitutional special law that violates the uniformity clause of the Constitution. The Supreme Court of Georgia disagreed and held the exception to be a constitutional general law exception.

Cottrell also argued that the Hotel/Motel Tax Funding Agreement between the City and Invest Atlanta was illegal and unconstitutional because O.C.G.A. § 48-13-51(a)(5)(B) requires that tax proceeds collected to fund the successor stadium facility be expended only through a contract with the certifying state authority, and the City's contract with Invest Atlanta was not a contract with such an authority. The Court found that Cottrell failed to consider that the Hotel/Motel Tax Funding Agreement works in conjunction with the Bond Proceeds Funding and Development Agreement to ensure that the New Stadium Project Tax Proceeds are expended in a manner consistent with the requirements of OCGA § 48-13-51(a)(5)(B).

In addition, Cottrell argued that the proposed bond transaction violates Ga. Const. of 1983, Art. IX, Sec. VI, Par. I and OCGA § 36-82-66 of the Revenue Bond Law because Invest Atlanta would not own or operate the New Stadium Project. As such, Cottrell argued that the revenue from the New Stadium Project to be paid to Invest Atlanta by the City would not actually be revenue "derived from the project." In response, the Supreme Court of Georgia held that there is no requirement that Invest Atlanta own the New Stadium Project in order for it to issue revenue bonds to fund the project or for the tax proceeds paid to Invest Atlanta to be considered as part of the "revenue" to pay for the bonds.

Cottrell further argued that the bond transaction would violate the Intergovernmental Contracts Clause in that the New Stadium Project was not an authorized "project" of Invest Atlanta. More specifically, Cottrell argued that, because the New Stadium Project was really a "project" of the Congress Center Authority, and not a project actually being developed by Invest Atlanta, the New Stadium Project was not eligible for bond financing under the Developmental Authorities Law. The Supreme Court of Georgia found that there is no requirement that Invest Atlanta actually construct the New Stadium Project in order to properly issue revenue bonds for the purpose of financing the project.

Cottrell further argued that the trial court erred in failing to hold that City Resolution 13-R-0615, which extends Atlanta's existing Hotel/Motel tax to fund a portion of the construction and maintenance costs of the New Stadium Project, was illegal. He argued, primarily, that City Resolution 13-R-0615 was void because the City enacted it in March 2013, over a year before the Congress Center Authority provided the City with a tax certification required by OCGA § 48-



13-51(a)(5)(B) to allow for the City to pass such a resolution. The Supreme Court of Georgia rejected this argument, finding that, by its plain terms, OCGA § 48-13-51(a)(5)(B) dictates that a seven percent Hotel/Motel tax may be “levied ... and continue to be collected through December 31, 2050” to fund a successor facility if the appropriate certification is given by the state authority involved.

Finally, Cottrell contended that the trial court erred in failing to find that the Hotel/Motel Tax Operation and Maintenance (O&M) Agreement violates the Intergovernmental Contracts Clause of the State Constitution, in that the Agreement between the City and the Congress Center Authority requires the City to reimburse StadCo, a private company, for certain expenses incurred from events and other activities at the New Stadium Project. The Supreme Court of Georgia disagreed, concluding that just because StadCo pays some of the operating expenses for the New Stadium Project and is then reimbursed by the Congress Center Authority from funds that are specifically earmarked for covering “costs relating to the operation, maintenance and improvements for the New Stadium Project” does not somehow make the O&M Agreement invalid.

13. In *Gause v. Fidelity Bank*, No. A15A0284, 2015 WL 4098562, at \*1 (Ga. Ct. App. July 8, 2015), Gause obtained a \$1.1 million loan from Fidelity's predecessor in interest, Securities Exchange Bank (“SEB”), for the purchase of 25 lots in a subdivision. The loan was evidenced by a contemporaneous promissory note signed by Gause. That same day, as part of the security for the loan, Gause signed an unconditional guaranty of the note on behalf of Gause Construction, as well as a corporate resolution authorizing him to execute the Guaranty and a corporate W-9 form. On April 28, 2010, Gause renewed the Note for a two-year term in the principal amount of \$1,100,900. Gause and Gause Construction admittedly failed to pay the Note in full by the due date. The Defendants contended that the trial court erred in granting summary judgment to Fidelity on the Note and Guaranty. The Court of Appeals of Georgia held that Fidelity established a prima facie case by producing the Note; the undisputed evidence showed that the Note was duly executed and was admittedly in default; and Defendants failed to establish a defense to enforcement of the Note. Accordingly, the Court found that the trial court properly determined that Fidelity was entitled to summary judgment on its claim for breach of the Note.

Defendants also argued that a question of fact remained regarding mutual assent to the Guaranty. Specifically, Defendants argued that the page bearing Gause's genuine signature on the Guaranty was attached without his knowledge or consent. The Court of Appeals of Georgia held that, as the nonmoving party to Fidelity's summary judgment motion, the Defendants were not required to present conclusive proof that Gause's signature was invalid. Rather, Defendants only had to point to evidence giving rise to a triable issue of material fact, which they did by submitting Gause's affidavit averring that he did not sign the Guaranty.

In addition, Defendants contended that the trial court erred in granting summary judgment on the Defendants' counterclaims for setoff and recoupment. Defendants argued that they were entitled to setoff and recoupment based on \$200,000 in loans to SEB, which Gause made between December 30, 2008 and January 2, 2009. Gause's own deposition testimony, however, shows that the loans in question were made to a separate and distinct entity, SEB Bancorp, Inc., and not to Fidelity's predecessor in interest, SEB. Accordingly, the Court of Appeals of Georgia found that the trial court did not err in granting summary judgment to Fidelity on the Defendants' counterclaims for set-off and recoupment.

14. In *Carnett's Props., LLC v. JoWayne, LLC*, 331 Ga. App. 292 (2015), Carnett sold to JoWayne a parcel of approximately 1.69 acres of its 13.85-acre property, and the parties executed an Agreement, pursuant to which Carnett provided JoWayne with a drainage easement over the property it retained after the sale, and JoWayne agreed to pay 12 percent of costs associated with the maintenance, upkeep, redesign, or improvement of the detention facility serving the total 13.85 acres of Carnett's original property. Because of various regulations, Carnett added a detention pond to the property in order to service all of the various property owners of the 13.85 acres. Carnett invoiced JoWayne for the 12 percent of the price, but JoWayne refused to pay, contending that the agreement did not encompass the construction of a new detention pond. Carnett brought suit-claiming breach of contract, and the parties filed cross-motions for summary judgment. The trial court granted summary judgment to JoWayne. The trial court also found that the Agreement only referred to "*the* Detention Facility," such that the plain language concluded that JoWayne was liable only for 12 percent of the sums related to the maintenance and upkeep of the then-existing detention pond and not a newly constructed detention pond.

On appeal, the Court of Appeals of Georgia pointed out that other terms in the contract lent support to the conclusion that "facility" could mean any number of ponds in addition to or in place of the original one. Redesign, for instance, means "to revise in appearance, function, or content" or to "design (something) again in a different way." The Court also noted that the contract did not limit "upkeep and maintenance" only to those listed possibilities, which renders erroneous the trial court's conclusion that the parties' failure to include "construction of a new separate detention pond" in the list of actions constituting "maintenance and upkeep" was an intentional omission that relieves JoWayne of liability for such costs. Thus, the Court concluded that the trial court's conclusion that the language of the contract was clear and unambiguous was incorrect.

15. *2010-1 SFG Venture LLC v. Lee Bank & Tr. Co., No. A15A0271, 2015 WL 4114064, (Ga. Ct. App. July 9, 2015)*, involved a commercial real estate loan for approximately \$15 million, which was originated by Specialty Finance Group LLC ("SFG") in 2008 to DOC Milwaukee LP ("the borrower") to fund the construction of a hotel in Milwaukee, Wisconsin. The hotel was part of the collateral for the loan. After SFG originated the Loan, Lee Bank bought a 3.36% interest in the loan for \$500,000, the sale of which was memorialized in a "Participation Agreement." The agreement contained specific provisions governing any breaches of the participation agreement by SFG or by Lee Bank. The borrower eventually defaulted on the loan by failing to make loan payments and by halting construction of the hotel. Shortly thereafter, the loan guarantors declared bankruptcy. In May 2009, SFG's parent company, Silverton Bank, was closed and, a year later, the FDIC was appointed receiver for Silverton and SFG. The FDIC sold SFG's loan portfolio, including SFG's interest in the instant loan, to an affiliate of Venture. By letter dated January 3, 2013, Lee Bank informed Venture that it believed that the expenses incurred in connection with the loan were grossly unreasonable. It considered Venture to be in breach of the Participation Agreement by failing to notify it of "material adverse information." Lee Bank demanded that "Venture acknowledge that the Participation Agreement [has] been terminated and to restore [Lee Bank's] consideration by repurchasing [its] participation interest[] within thirty (30) days" of the date of the letter. Lee Bank also demanded that Venture remit to it its pro-rata share of any proceeds of the sale of any collateral "without offset or diminution." On January 31, 2013, Venture sued Lee Bank for breaching its obligation under the Participation Agreement. Lee answered, denying responsibility for the expenses, and brought counterclaims for breach of contract and rescission.

Venture contended that the trial court erred in concluding that Paragraph 17 of the Participation Agreement, a clause that limited SFG's (and hence Venture's) liability to acts or omissions that amounted to gross negligence or willful misconduct, was unenforceable because it was not sufficiently prominent in the agreement. The Court of Appeals of Georgia held that the provision was prominently placed and the agreement itself was drafted partly by Lee Bank and, therefore, Lee Bank should have been aware of its contents. As such, the Court found that the trial court erred in concluding that the provision was unenforceable.

Lee Bank further argued that the limitation of liability clause was ambiguous as to whether it applied to breach of contract claims. The Court concluded that Lee Bank failed to identify any such ambiguity. Thus, the Court held that the limitation of liability clause specifically limited SFG's (and hence successor-in-interest Venture's) potential liability for breaches of the agreement to those breaches arising from a specific type of conduct — gross negligence or willful misconduct.

Lee Bank also argued that the limitation of liability clause conflicted with other provisions of the agreement defining what circumstances constitute a breach of the agreement and, because those provisions do not reference or specifically incorporate the limitation of liability, the limitation of liability clause should be stricken. The Court disagreed, finding that there is no Georgia law, nor did Lee Bank cite to any, that requires every contract provision that may be affected by a contract's limitation-of-liability clause or an exculpatory clause to reference the clause.

Finally, Venture argued that Lee Bank failed to return the payments it received under the agreement; therefore, Lee Bank's claim for rescission must fail. The Court found that Lee Bank offered to restore the consideration it received in its initial answer and counterclaims and repeated the offer in its amended pleadings. It also made the offer during oral argument on its motion for summary judgment. Thus the Court concluded that, under such circumstances, requiring Lee Bank to remit a check to Venture for the funds it had received pursuant to the participation agreement prior to rescinding the contract would not restore the "status quo" between the parties to the agreement. Under such circumstances, the Court did not find error in the trial court's finding that a jury question remained concerning whether Lee Bank's offer to restore to Venture any benefits that it may have received under the agreement were reasonable.

16. In *Seaboard Constr. Co. v. Kent Realty Brunswick, LLC*, 331 Ga. App. 742 (2015), Harbor Development LP began a development project for residential lots and condominiums. Harbor contracted with Seaboard Construction Company ("Seaboard"), to perform certain site preparation work on Phase I. During the performance of the site work, Harbor received 17 applications for payment and paid the company \$6,261,192.52. A total of \$326,661.50 remained unpaid when a dispute arose between the parties. Seaboard subsequently filed five materialman's liens against five separate properties of the development, two of which were owned by Kent, and one of which was owned by Harbor. As a result, the aggregate amount of Seaboard's liens against Kent's properties was twice the contract balance. The aggregate amount of liens on all five properties was five times the contract balance.

Four months after filing the liens, Seaboard filed suit against Harbor seeking payment of the unpaid retainage. Three days later, Kent filed a complaint asserting defamation of title and seeking injunctive relief. Seaboard answered and counterclaimed to foreclose upon the liens. Shortly after the filing of Kent's suit, Seaboard filed a "Notice of Filing of Action for Claim on Materialman's Lien" for each of the Kent liens. The trial court granted Kent's motion and denied

Seaboard's. During the hearing, however, the trial court concluded that the liens were invalid because they were not filed in the name of the lien holder and were excessive under O.C.G.A. § 44-14-361.1(e). The court concluded further that there was a jury issue remaining on Kent's slander of title claim.

Seaboard contended that the trial court erred in granting Kent's motion for summary judgment on the validity of the liens. On appeal, the Court of Appeals of Georgia agreed with the trial court that the liens were excessive under O.C.G.A. § 44-14-361.1(e), and therefore the Court did not err in granting Kent's motion for summary judgment. Specifically, the Court found the liens to be excessive because the aggregate amount of liens filed against Kent's property exceeded the remaining contract price for improvements made or services performed on Kent's property.

Seaboard also argued that the trial court erred in failing to grant it summary judgment on Kent's slander of title claim. On appeal, the Court of Appeals of Georgia agreed, citing O.C.G.A. § 51-9-11, which provides that an "owner of any estate in lands may bring an action for libelous or slanderous words which falsely and maliciously impugn his title if any damage accrues to him therefrom." However, "[i]n order to sustain an action of this kind, the plaintiff must allege and prove the uttering and publishing of the slanderous words; that they were false; that they were malicious; that he sustained special damage thereby; and that he possessed an estate in the property slandered." The Court held Kent "could recover only such special damages as [it] actually sustained as a consequence of the alleged wrongful acts, and [it was] required to plead them plainly, fully, and distinctly." The Court explained that, as the movant for summary judgment, Seaboard had demonstrated that there was no evidence sufficient to create a genuine issue of material fact on an element of Kent's special damages, and, since Kent offered no evidence of special damages, an essential element of the claim for slander of title, the trial court erred in denying Seaboard's motion for summary judgment on the claim.

### **Legislation:**

1. **S.R. 26, A Resolution.** This resolution authorizes the granting of nonexclusive easements for the construction, operation, and maintenance of facilities, utilities, roads, and ingress and egress in, on, over, under, upon, across, or through property owned by the State of Georgia in the counties of Baldwin, Barrow, Bartow, Chatham, Clarke, Clayton, Cobb, DeKalb, Floyd, Fulton, Gordon, Houston, Laurens, Liberty, Lowndes, Macon, McIntosh, Meriwether, Newton, Polk, Richmond, Troup, Walton, and Wayne.

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