CONSTRUCTION DEFECTS: ALLEGATIONS, DEFENSES AND DAMAGES

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I. Introduction

Construction defect claims constitute a significant portion of all construction litigation. These claims tend to trigger insurance companies' obligation to defend (if not obligations to cover). Construction defect claims also tend to grow out of damage to property or property use encumbrances that Owners are required to repair to use and enjoy their buildings as intended. Construction defect claims can also grow out of a personal injury which is alleged to be caused by the negligent design or construction of an improvement to property. Thus, this paper is limited to claims of defective construction and does not address the myriad of other claims litigated in construction disputes.

In recent years, it seems that virtually all condominium projects have descended into construction defect disputes. It is important to understand both the strengths and infirmities of a construction defect claim. We will discuss common claims and defenses that arise in the context of a construction defect claim.

II. Common Allegations and Defenses

A. Allegations.

While it seems that plaintiff's counsel in construction defect claims get more creative with each complaint, the majority of claims are based on negligence, breach of contract or both. Below are common allegations made by plaintiffs in construction defect claims.[1]

1. Negligent Construction

The primary cause for action for damages in the construction context is for negligent construction. A negligent construction claim is independent of a breach of contract claim and is not based on the standards in the contract, but, instead, on whether the work complies with general industry standards.[2] The standard of care for construction is a reasonable degree of care, skill and ability, which is ordinarily employed by others in the same profession.[3] Traditional elements of negligence apply to construction based negligence claims. That is: 1) duty, 2) breach, 3) causation; and 4) damages. Negligent construction claims arise from a breach of a duty implied by law to perform the work in accordance with industry standards.[4] The existence of a breach of contract claim is not a defense. Again, negligent construction arises in tort and exists independently of any breach of contract claim.[5]

In a negligent construction case, the plaintiffs must first establish the standard of care applicable to the defendant builder through the use of expert testimony.[6] A trial court has broad discretion in determining whether a witness qualifies as an expert to give an expert opinion.[7] In Rentz, the Court of Appeals held that a builder could not be found liable for negligent

[1] This is not an exhaustive list of causes of action. This paper addresses common causes of action.
[2] Rowe v. Akin & Flanders, Inc., 240 Ga.App. 766 (1999).
[3] Seely v. Lloyd H. Johnson Constr. Co., Inc., 220 Ga.App. 719 (1996); Williams v. Renion, 173 Ga.App. 54 (1984).
[4] City of Atlanta v. Benator, 310 Ga. App. 597, 605, 714 S.E.2d 109 (2011).
[5] Fussell v. Carl E. Jones Dev. Co., 207 Ga. App. 521, 428
[6] Rentz v. Brown, 219 Ga.App. 187 (1995); Coursey Bldg. Assoc. v. Baker, 165 Ga.App. 521 (1983).
[7] Jim Ellis Atlanta v. McCalister, 198 Ga.App. 94 (1990).

construction absent expert testimony establishing the standard of care.[8] The court rejected testimony by other builders as to how they would have constructed the house or "mere custom or practice."[9] The standard of care requires "universal custom or practice."[10] Absent competent evidence of the standard of care, the Court of Appeals held that directed verdict should have been granted.[11] While we in Georgia will shortly move to Daubert standard, expert testimony will continue to drive defect claims because proof of both the industry standard of care and a breach thereof cannot be established by a lay person.

2. Negligent Misrepresentation

The Georgia Court of Appeals and the Georgia Supreme Court have recognized an exception to the privity requirement in cases of negligent misrepresentation by a professional, reasonably relied upon by a foreseeable person or class of persons.[12] This serves as a mechanism for Owners and Contractors to sue in tort for defective or deficient design drawings and/or specifications. The primary advantage is the triggering of professional negligence insurance coverage. It is also an exception to the economic loss rule.[13] Thus, a party can claim damages that are purely economic in a negligent misrepresentation action. The elements of a negligent misrepresentation claim are: 1) negligent supply of false information to foreseeable persons known or unknown, 2) reasonable reliance upon that false information, and 3) economic injury proximately resulting from such reliance.[14]

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[8] *Rentz*, 219 Ga.App. at 188.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] See *Rhodes–Haverty Partnership v. Robert & Co. Assoc.,* 163 Ga.App. 310, 293 S.E.2d 876 (1982), aff'd 250 Ga. 680, 300 S.E.2d 503 (1983).

[13] City of Cairo v. Hightower Consulting Engineers, Inc., 278 Ga. App. 721, 629 S.E.2d 518 (2006).
[14] City of Cairo v. Hightower Consulting Engineers, Inc., 278 Ga. App. 721, 629 S.E.2d 518 (2006).

3. Project Manager negligence (and personal liability).

A servant, as wrongdoer, is liable individually for a tort committed within the course and scope of his employment. Georgia courts have held that a project manager has a duty to perform the supervision of the construction work skillfully, carefully, diligently, and in a workmanlike manner.[15] This may be limited to professional or quasi-professional activities.[16]

4. Breach of implied duty to construct building in a fit and workmanlike manner.

This is an alternative way of stating a claim for negligence (although it clearly blurs the line between contract and tort). There appears to be no practical difference as Georgia courts have held that the proof required is essentially the same as with a negligent construction claim.[17]

5. Breach of Contract.

Contract breach claims are always involved where parties are in privity. In fact, contract breach is often the *real* claim. However, contract claims generally typically do not trigger insurance coverage so they tend to receive less focus from the plaintiff's side of the table. Contract defect claims are generally centered on the failure to build a structure in accordance with plans, specifications, codes or industry standards all of which generally are incorporated into a contract or subcontract.

Breach of contract damages "are such as arise naturally and according to the usual course of things from such breach and such as the parties contemplated, when the contract was made, as the probable result of its breach."[18] It is important to note that "[r]emote or consequential damages are not recoverable unless they can be traced solely to the breach of the contract or unless they are capable of exact computation, such as the profits which are the immediate fruit of

[15] Schofield Interior Construction, Inc. v. Standard Bldg. Co., Inc., 293 Ga. App. 812, 726 S.E.2d 760 (2008).
[16] See Holloway v. The Travelers Indemnity Co., 761 F.Supp. 2d 1371 (N.D.Ga. 2010).
[17] Fields Bros. Gen. Contractors v. Ruecksties, 288 Ga. App. 674, 655 S.E.ed 282 (2007).
[18] O.C.G.A. § 13-6-2.

the contract, and are independent of any collateral enterprise entered into in contemplation of the contract."[19] Pursuant to O.C.G.A. § 13-6-6, "In every case of breach of contract the injured party has a right to damages, but if there has been no actual damage, the injured party may recover nominal damages sufficient to cover the costs of brining the action."

The builder is not the only party who can breach a construction contract. There can also be a breach of contract claim against a plaintiff who makes unreasonable demands and then terminates the contract based on such demands.[20] In McEntyre, the plaintiff demanded that the entire foundation of a construction project be replaced after discovering a crack in the foundation.[21] When McEntyre decided to terminate the contract in lieu of mediation, as requested by the defendant, the court held that the jury was authorized to determine that McEntyre breached her contract.[22]

6. Breach of Warranty.

Breach of both express and implied warranty claims are commonplace in construction defect cases. Again, they tend to be ancillary claims because express warranty claims tend to be limited to a premature failure of work and failure to remedy – not that it was wrongly installed in the first instance. Warranty claims are generally not covered by insurance policies. Where a warranty claim involves a product manufacturer, (for example: mechanical equipment) warranty claims can take on greater significance. Express warranties include: contract warranty, product warranty or a sales contract warranty. Express warranties generally require notice and opportunity to remedy.

[19] O.C.G.A. § 13-6-8.
[20] McEntyre v. Edwards, 261 Ga.App. 843, 845 (2003).
[21] *Id.*
[22] *Id.*

Implied warranties include: warranty of fitness and warranty of habitability. A question can arise regarding whether privity is required to assert an implied warranty claim. In many instances, privity of contract is required for a plaintiff to have the right to assert a breach of an implied warranty claim.[23] One statutory exception to the privity requirement is for manufacturers where privity is not required.[24] Further, warranties may be disclaimed. If the UCC is implicated, the ability to disclaim is codified.[25] Many subcontractors are "sellers of goods" sufficient to trigger the UCC, so be careful not to overlook its implications.

7. Fraud (usually an intentional concealment).

Fraud claims in the construction defect setting tend to be very weak due to the obligation to prove intent. They are more common in home owner matters where a builder is alleged to have done poor work and intentionally covered it up. Ordinary elements of fraud apply. Fraud is also alleged as an attempt to beat a statute of limitations defense. A statute of limitations may be tolled if a party can establish actual fraud. To establish fraud, five essential elements must

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[23] Cobb County School Dist. v. MAT Factory, Inc., 215 Ga. App. 697, 452 S.E.2d 140 (1994).
[24] O.G.G.A. § 51-1-11(b).
[25] O.C.G.A. § 11-2-314 provides that **unless otherwise disclaimed**, a warranty that the goods shall be merchantable is implied in the contract for their sale. To be merchantable, goods must be at least such as to pass without objection in the trade under the contract description, be fit for the ordinary purpose for which such goods are used, and run within the variations permitted by the agreement.

O.C.G.A. § 11-2-315 provides that where the seller at the time of contracting has reason to know any particular purpose for which the goods are required, and that the buyers were relying on the seller's skill and judgment to select or furnish suitable goods, there is an implied warranty that the goods shall be fit for such purpose **unless otherwise specifically disclaimed**.

O.C.G.A. § 11-2-316 provides the method by which you can exclude or modify warranties. Basically, provisions waiving or modifying warranties must be clear and in accordance with general contract law. In order to exclude warranties, you must make plain that there is no implied warranty. For example, the Code states that language to exclude all implied warranties of fitness is sufficient if it states that "there are no warranties that extend beyond the description on the face hereof."

exist: "(1) a false representation or omission of material fact; (2) scienter; (3) an intent to induce the party alleging fraud to act or refrain from acting; (4) justifiable reliance; and (5) damages."[26]

In the construction context, a defendant could defraud a plaintiff by either concealing a defective condition or by misrepresenting the condition.[27] Where there is evidence the defendant admitted to a defective condition and where the plaintiff never relied on any of the defendant's representations, a claim of fraudulent concealment is "patently untenable."[28] In *Mitchell v. Jones*, the court held in a synthetic stucco case:

> To establish fraudulent concealment under O.C.G.A. § 9-3-96 sufficient to toll the statute of limitation, the homeowner must prove that (1) [the builder] committed actual fraud involving moral turpitude, (2) the fraud concealed the cause of action from the homeowners and (3) the homeowners exercised reasonable diligence to discover their cause of action despite their failure to do so within the applicable statute of limitations. Moreover, to toll the statute of limitations under O.C.G.A. § 9-3-96, the concealment of a cause of action must be by positive affirmative act, not by mere silence. Some trick of artifice must be employed to prevent inquiry or elude investigation or to mislead and hinder the party who has the cause of action from obtaining the information, and the acts relied on must be of an affirmative character and fraudulent.[29]

B. Defenses

1. We are not the tortfeasor (i.e. owner selection/design error).

If you do not represent the designer, take care to preserve defenses relating to poor design or poor specifications. Where a contractor or subcontractor is not the designer, it is always wise to explore this defense. Similarly, if one or more of the events complained of relate to an Owner choice (i.e. material selection), then again a contractor or subcontractor is not liable for a bad material choice. For example, if a window rots because it is cheap and cheaply made, the contractor cannot be held liable for having installed a cheap window selected by the Owner.

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[26] Paul v. Destito, 250 Ga.App. 681, 685-86 (2002); *see also* O.C.G.A. § 51-6-2.
[27] *See* McEntyre v. Edwards, 261 Ga.App. 843, 844 (2003).
[28] *Id.* at 845.
[29] 247 Ga.App. 113, 117 (2000).

2. Proper performance.

The center of all construction defect claims is whether any given defendant failed to adequately perform its work. Each participant's work tends to be defined by a contract scope of work. While it is true that a separate negligence claim exists, it would be a bit unusual for industry standards of care to exceed what the contract scope requires (except in home cases where ill defined scopes of work are the norm). In the commercial setting, scope of work terms usually incorporate every contract document, all applicable codes, and generally state the work will be performed in a professional manner. The scope of work in most commercial construction contracts at least as rigorous as the tort standard of care. Thus, one of the first items to study is your client's scope of work. Discovery should be crafted to narrow plaintiff's claims to specific scope items.

On the plaintiff's side of a case, you should study the scope of work with your expert so that reports are crafted in a manner that is connected to contract duties. Breach of a contract duty would most often also be a breach of a tort duty of care.

3. Over-stated damages/betterment.

An often raised defense is that the "fix" that the Owner bought and now seeks to recover for was greater than required or is otherwise a "betterment" over what the contractor/subcontractor originally purchased. Thus, this is a pure defensive attack on the quantum of damages sought. In other words, because the Owner had a Chevrolet to start with means that it can only be returned to the position of owning a Chevrolet – not a Mercedes-Benz. Insurance policies most often do not cover betterments.[30]

[30] State Farm Mut. Auto. Ins. v. Mabry, 274 Ga. 498, 556 S.E.2d 114 (2001).

4. Failure of a condition precedent.

This defense can be raised in a number of factual scenarios. Common ones include: mediation requirements, notice and opportunity to cure, and compliance with the Right to Repair Act.[31] Beware, failure of a condition precedent must be pled with specificity.[32]

5. Abnormal usage.

While less common, abnormal usage can be an effective defense and attack on causation. It is essentially the flip side of the "fit for a particular purpose" coin. For example, if an owner decides to park heavy equipment on a paved surface, a question arises regarding whether anyone designed or constructed such paving to withstand heavy loads. For this attack to be fruitful, som unusual and unanticipated use is required. Interrogatories and document requests seeking use information may be advisable.

6. Statute of Limitations.

As a general rule, all statutes of limitations for construction claims begin to run from the date of substantial completion. It is important to remember that Georgia does not follow a "discovery rule" except in cases of fraud, product liability or residential stucco claims.

Common statutes of limitations are shown below:

Breach of Contract:	Six Years – OCGA § 9-3-24
Sealed Instruments:	Twenty Years – OCGA § 9-3-23
Personal Injury:	Two Years – OCGA § 9-3-33
Injury to personalty:	Four Years – OCGA § 9-3-31
Injury to property: Construction/Design	Four Years – OCGA § 9-3-30 (except stucco claims)
Statute of Repose	Eight Years – OCGA § 9-3-51[33]

[31] *See generally*, Sasser & Co. v. Griffin, 133 Ga. App. 83, 210 S.E.2d 34 (1974).
[32] O.C.G.A. § 9-11-9(c)

Stucco claims Ten years -51-1-11[34]

7. Contractual bar/Contractual waiver/Release

In some circumstances, property owners (most often home owners) sign waivers, releases or limitations of claims. The same can be true for commercial buyers who are not the original owner where the rule of caveat emptor generally applies. Be certain to study the sales/title transaction documents to determine if the owner has waived, released or otherwise limited claims. The same is true of contracts, subcontracts, purchase orders and like agreements. They often contain waivers or other claims limitations.

8. Economic loss rule.

The economic loss rule generally posits that one cannot sue in tort for losses that are purely economic in nature (as opposed to damage to person or property). While the exceptions have eroded the rule, it remains a viable defense in the right case.

OCGA § 51–1–11(a) provides:

> Except as otherwise provided in this Code section, no privity is necessary to support a tort action; but, if the tort results from the violation of a duty which is itself the consequence of a contract, the right of action is confined to the parties and those in privity to that contract, except in cases where the party would have a right of action for the injury done independently of the contract and except as provided in Code Section 11–2–318.[35]

"Although a tort is the unlawful violation of a private legal right other than a mere breach of contract, OCGA § 51–1–1, private duties may arise from relations created by contract, and the violation of a private duty accompanied by damage shall give a right of action. OCGA § 51–1–8."[36] In negligent construction cases, our courts have concluded that these claims arise "not from a breach of contract claim but from breach of a duty implied by law to perform the

[33] This can extend to ten years under certain circumstances in a wrongful death case.
[34] Note: synthetic stucco follows a discovery rule subject to the ten year limitation.
[35] OCGA § 11–2–318 extends warranties under the commercial code to members of a buyer's family or household.
[36] *Unger v. Bryant Equipment, etc.,* 255 Ga. 53, 54(1), 335 S.E.2d 109 (1985).

work in accordance with industry standards. This cause of action arises in tort and exists independently of any claim for breach of contract." (Citations and punctuation omitted.)[37]

When an independent cause of action exists and there is no allegation that a product is defective, our courts have traditionally held that "[t]he 'economic loss' versus 'physical damage' dichotomy that is used in products liability cases can find no application...." (Citations omitted.)[38] More recently, however, both the Georgia Supreme Court and this court have applied the economic loss rule outside of product liability cases.[39] The Georgia Supreme Court reasoned that application of the economic loss rule outside the product liability context was appropriate because it "provides the certainty of a bright-line rule, affords predictability to courts and parties alike, and avoids the unfairness to defendants that would come with duplicative liability for the same damage."[40]

9. Arbitration.

It is common for home builders to include arbitration clauses in sales contracts or warranty provisions. Further, arbitration clauses remain common in both prime contracts and

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[37] *Rowe Dev. Corp. v. Akin & Flanders, Inc.,* 240 Ga.App. 766, 769(2), 525 S.E.2d 123 (1999); See also *Schofield Interior Contractors v. Standard Building Co.,* 293 Ga.App. 812, 814, 668 S.E.2d 316 (2008) (independent cause of action exists for negligent supervision of construction work).

[38] *Unger,* supra, 255 Ga. at 54(1), 335 S.E.2d 109.

[39] See *Gen. Elec. Co. v. Lowe's Home Centers,* 279 Ga. 77, 608 S.E.2d 636 (2005) (applying economic loss rule to preclude suit for lost profits when land development contract for business expansion cancelled due to alleged contamination by defendant of adjacent non-owned property needed for expansion); *J. Kinson Cook of Ga. v. Heery/Mitchell,* 284 Ga.App. 552, 555–556(a), 644 S.E.2d 440 (2007) (applying economic loss rule to preclude negligent supervision claim seeking recovery for increased costs in construction contract); *Remax The Mountain Co. v. Tabsum, Inc.,* 280 Ga.App. 425, 427–428, 634 S.E.2d 77 (2006) (precluding tort suit for economic losses caused by damage to real property not owned by plaintiffs).

[40] *Gen. Elec.,* supra, 279 Ga. at 80(2), 608 S.E.2d 636.

subcontracts.[41] It can be advantageous to sever your defendant from the greater mass of the litigation.

"Georgia courts are required to uphold valid arbitration provisions in contracts."[42] A contract must be enforced where its "intention is clear and it contravenes no rule of law and sufficient words are used to arrive at the intention."[43] Where a contract is unambiguous, construction is unnecessary and the court simply enforces the contract according to its clear terms.[44] Georgia courts recognize the validity of arbitration agreements in separate documents incorporated by reference. Courts routinely hold that arbitration agreements are enforced even where multiple and disparate results can occur. Depending on the circumstances, arbitration can be advantageous to your client. Equally clear, your opponent will not be able to join your arbitration with another unless the arbitration agreement so provides.[45] Arbitration tends to be an "equitable" forum. Thus, if you wish to escape harsh contract terms, arbitration is likely a better forum. Further, some home builders refer arbitration to a small, home builder supported, arbitration group that is (as you might imagine) very home builder friendly.

In *Wise v. Tidal Construction Company*, the court held that a mandatory arbitration agreement located in a home buyer's warranty booklet was incorporated into the sales contract by reference.[46] The parties in *Wise* entered into a sales contract which provided a condition that the seller was to furnish a "2/10 HOME WARRANTY."[47] The seller issued the express

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[41] Bellsouth Corp. v. Forsee, 265 Ga.App. 589, 590 (2004). Arbitration clauses are not binding "on any sales agreement or loan agreement for the purchase or financing of residential real estate unless the clause agreeing to arbitrate is initialed by all signatories at the time of the execution of the agreement." *See* O.C.G.A. § 9-9-2(c)(8).
[42] Saturna v. Bickley Constr. Co., 252 Ga.App. 140, 141 (2001).
[43] Choate Constr. Co. v. Ideal Elec. Contractors, Inc., 246 Ga.App. 626, 627-28 (2000).
[44] *See* Holt & Holt, Inc. v. Choate Constru. Co., 271 Ga.App. 292 (2004).
[45] See case decided under the Federal Arbitration Act: Volt Info. Scis. Inc. v. Bd. Of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 109, S.Ct. 1248 (1989); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp. 460 U.S. 1, 103 S.Ct. 927 (1983)
[46] 261 Ga.App. 670, 671-72.
[47] *Id.*

warranty, which the buyer signed. Attached to this express warranty was a home buyer's warranty booklet, which included a mandatory arbitration provision.[48] Based on these facts, the court held that "[t]he express warranty was issued to the [buyer] as part of the sales contract, which incorporated the warranty booklet with the mandatory arbitration clause."[49] Under Georgia law, a party "aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration."[50]

Like many potential defenses, raising arbitration should be carefully considered. Whether arbitration is advantageous will depend on the facts of each matter.

10. Acceptance Doctrine.

The long established acceptance doctrine provides that where the work of an independent contractor is completed, turned over to, and accepted by the owner, 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.[51]

In the fairly recent case of Bragg v. Oxford Const. Co., the acceptance doctrine was held to bar claims against a general contractor (road builder) relating to a mother who sustained injuries in car wreck resulting in injuries which caused a pregnancy to end in a stillborn child.[52] The estate claimed that the car wreck and injuries resulted from negligent construction of the road where the accident took place. The trial court granted summary judgment on the acceptance doctrine. Both the Court of Appeals and the Supreme Court affirmed the trial court's ruling. In

[48] *Id.*
[49] *Id.*
[50] O.C.G.A. § 9-9-6(a).
[51] Smith v. Dabbs-Williams General Contractors, LLC, 287 Ga. App. 646, 653 S.E.2d 87 (2007).
[52] Bragg v. Oxford Const. Co., 258 Ga. 98, 674 S.E.2d 268 (2009).

so doing, the Supreme Court held that : where a contractor who does not hold itself out as an expert in the design of work such as that involved in the controversy, performs its work without negligence, and the work is approved and accepted by the owner or the one who contracted for the work on the owner's behalf, the contractor is not liable for injuries resulting from the defective design of the work. The exceptions [to this rule] for inherently or intrinsically dangerous work, for nuisances per se, and for work so negligently defective as to be imminently dangerous to third persons, apply in cases where the contractor is guilty of negligence in the performance of its work.[53]

In so holding, the Court found that the contractor was only responsible for construction, not design.[54] Where to contractor properly performs its work, it is accepted by the owner, a tort plaintiff cannot thereafter sue the contractor.

11. Statutory Immunity.

In some unusual circumstances, a statutory immunity might arise. For example, in Mays v. Valley View Ranch, Inc. the court held that personal injury claims associated with allegations of a negligently constructed horse hitching rail was barred by the civil immunity afforded in the Injuries from Equine or Llama Activities Act (OCGA § 4-12-3(b)).[55]

[53] Id. at 99.
[54] *Id.* at 100.
[55] Mays v. Valley View Ranch, Inc. ___ S.E.2d____, WL 2866409 (2012).

III. Notice of Claims/Procedural Issues

A. Notice of Claims

1. Right to repair.

The General Assembly adopted a law specifying the proper procedure to provide service of written notice of claim on a contractor in residential construction disputes.[56] The purpose of the law was to facilitate a method of alternative dispute resolution in the construction context.[57] Under O.C.G.A. § 8-2-38 of the "Repair Act," a claimant must provide a notice of claim no later than 90 days prior to the initiation of an action[58] against a contractor.[59] The notice provides the contractor with the following information: the asserted construction defect, the nature of the asserted construction defect, the results of the defect, and the evidence that depicts the nature and cause of the construction defect.[60] These pre-litigation requirements are meant to provide "the contractor with the opportunity to resolve the claim without litigation."[61]

After the contractor has been served the notice of claim, he has less than 30 days to respond to either the claimant or any other contractor who was also a recipient of the notice of claim.[62] Possible responses to the notice of claim include an offer to settle through monetary payments, repairs of the asserted defect, or both, without having to inspect the dwelling or common area.[63] A contractor who is not willing to settle the claim should respond with a proposal to inspect the area that is subject to the claim.[64] It is unwise for a contractor to wholly reject the claim or make an untimely response to the notice of claim because he may lose his

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[56] *See generally* O.C.G.A. § 8-2-38. *See also* Dennis J. Webb, Jr., Henry L. Balkcom IV and Dana R. Grantham, *Construction Law*, 56 MERCER L. REV. 109, 142 (2004).
[57] O.C.G.A. § 8-2-38.
[58] An "action" is not only litigation, but also includes arbitration.
[59] O.C.G.A. § 8-2-38(a).
[60] *Id.*
[61] Lumsden v. Williams, 307 Ga.App. 163, 168 (2010).
[62] *Id.* at § 8-2-38
[63] *Id.* at § 8-2-38(b)(1).
[64] *Id.* at § 8-2-38(b)(2).

right to assert, for instance, that the claimant failed to file the requisite documents requiring the contractor to meet his obligations.[65]

In the case that the claimant files an action without first providing a notice of claim, the Repair Act simply stays the action until the claimant complies with the requirements of O.C.G.A. § 8-2-38.[66] The stay is another mechanism within the Repair Act to encourage parties to resolve the dispute without the complications of litigation.[67] In *Lumsden v. Williams*, the Georgia Court of Appeals held that nothing in the Repair Act prevents a potential claimant from mitigating losses by making his own repairs.[68] The court held that remedial repair efforts did not entitle the vendors to summary judgment.[69]

In addition to the statutory requirement to provide notice of claim, there may be a contractual notice requirement. For example, a contract between a contractor and owner could require prompt written notice to the contractor in the case that any work is found to be defective.[70] An example of such language includes, "If within one year after acceptance by Owner or within such longer period of time as may be prescribed by law any of the work is found to be defective or not in accordance with contract documents, the contractor shall correct it promptly after receipt of written notice to do so unless Owner has given written acceptance of such condition."[71]

2. Contract Notice Obligations.

It is common that construction contracts require notice of default and opportunity to cure. Similarly, it is common that disputes clauses have certain notice obligations that can impact the

[65] *Id.* at § 8-2-38(c).
[66] O.C.G.A. § 8-2-37.
[67] Lumsden v. Williams, 307 Ga.App. 163, 169 (2010).
[68] *Id.*
[69] *Id.*
[70] *See, e.g.*, McDevitt & Street Co. v. K-C Air Conditioning Serv., Inc., 203 Ga.App. 640 (1992).
[71] *Id.* at 641.

right to pursue remedies. Be certain to study the contracts closely to determine if a notice provision presents a potential defense.

3. Practical challenges with failure to provide notice and opportunity to cure.

Notice and opportunity to cure seems fair. Regardless of rights, it can be difficult to explain to a trier of fact that you never told your opponent of a problem. You never gave them the chance to make good on their work. Why? Consideration of this pragmatic attack on a plaintiff's credibility merits consideration as you advise clients how best to proceed once a defect is uncovered. Similarly, it may be a point to be woven into defense counsel's trial strategy.

B. Procedural Issues

There are several procedural issues that apply to litigation that arise from a construction defect claim. A non-exhaustive list of these issues includes standing, contractual limitations and relevant statutes of limitation.

1. Standing

To have standing to prosecute a construction defect claim on behalf of a Georgia townhome, residential condominium and commercial condominium owner, an association must prove: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) [sic] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." This test was set forth by the Supreme Court in *Hunt v. Washington State Apple Advertising Commission*.[72]

The Supreme Court further observed that associational standing has only been recognized where the association seeks "a declaration, injunction, or some other form of prospective relief

[72] 432 U.S. 333, 343 (1976).

… [that] will inure to the benefit of those members of the association actually injured."[73] Monetary damages, as opposed to prospective relief, are not common to the entire membership of an association, cannot be shared in equal degree by the association's members and are consequently not normally allowed.[74]

In *Newton County*, for instance, a plaintiff homebuilder's association sued the Newton County government to recover development impact fees which many of its members had paid and which the plaintiff claimed were illegal.[75] The court found that the association did not have standing to bring its lawsuit for damages on behalf of its members because the association's claim for monetary damages was not "common to the entire membership nor shared in equal degree."[76] The plaintiff therefore could not make the necessary showing for standing without the participation of its members.[77]

In a condominium or homeowners association suit, this line of case authority may well serve to limit damages available to an association to common elements only. If damage to individual homes or units are part of the claim, consider a motion to dismiss or a motion for summary judgment on the basis of lack of standing. Accordingly, be certain to study the documents governing the association. Those documents most typically are a declaration of condominium, restrictive covenants and board governing rules (if separate from recorded instruments).

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[73] Sawnee Elec. Membership Corp. v. Georgia Dept. of Revenue, 279 Ga. 22, 24-25 (2005) (quoting *Hunt*, 432 U.S. at 342).
[74] Newton County Home Builders Ass'n, Inc. v. Newton County, 286 Ga.App. 89, 90-91 (2007); *see also* Equitable Life Assurance Soc'y of U.S. v. Tinsley Mill Village, 249 Ga. 769, 772 (1982) (holding an unincorporated condominium association did not have standing to bring a suit for monetary damages on behalf of individual unit owners because award of damages to the association without specifying the amount to be awarded each recipient could easily create discord within the Association and foster more litigation).
[75] *Id.* at 89-90.
[76] *Id.* at 91.
[77] *Id.*

4. Contractual Limitations

Certain covenants found within a real estate contract can limit a potential litigant's cause of action. For instance, in the case that residential and commercial owners agree that the Association shall not bring an action based on any alleged defect, *Phoenix on Peachtree Condominium Association, Inc. v. Phoenix on Peachtree, LLC* is controlling.[78] In *Phoenix*, the plaintiff condominium association filed a complaint against numerous defendants seeking damages for construction defects in the common areas of a residential condominium building.[79] In their answer, the defendants asserted that the plaintiff lacked standing to bring those claims based on the condominium declaration to which the plaintiff association was subject.[80] Specifically,

> [a]ll owners hereby acknowledge and agree that the association shall not be entitled to institute any legal action against anyone on behalf of any or all of the owners which is based on any alleged defect in any unit or the common elements, or any damage allegedly sustained by any owner by reason thereof, but rather, that all such actions shall be instituted by the person(s) owning such units or served by such common elements or allegedly sustained such damages.[81]

Because the plaintiff association's claims were based on defects in the condominium building, the court found that the plaintiff lacked standing because the complaint fell squarely within the scope of the declaration's prohibition.[82]

Statute of Limitations

In addition to standing and contractual limitations, the statutes of limitations for a potential claim are important to consider. The scope of the limitations period is dependent on the

[78] 294 Ga.App. 447 (2008).
[79] *Id.* at 447-48.
[80] *Id.* at 448.
[81] *Id.* at 451.
[82] *Id.*

type of injury sustained.[83] For instance, there is a statute of limitations of six years on a claim for breach of an express warranty that begins to run once the builder attempts to repair the defects.[84] The six year statute of limitations also applies to a breach of implied warranty or breach of a construction contract.[85] Under Georgia law, there is also a four-year period set out in O.C.G.A. § 9-3-30(a) that provides the statute of limitations for tort claims. This four-year statute of limitations begins to run upon the date that the construction contract has been substantially completed.[86] See prior section II B6 on page 9.

IV. Experts.

There is an expert who will give a lawyer the opinion she/he is looking for. Regardless what that opinion might be. The problem with an expert is that parties (homeowners in particular) tend to cling to an expert opinion as though it is irrefutable. Further, plaintiff's experts tend to hold contractors and designers to a "perfection" standard. Be careful that your expert does not over-sell the scope or impact of a defect. At trial credibility is the critical element of any expert's testimony and will be a significant source of attack on cross examination.

It is also important to remember that Ga. rules of evidence change effective January 1, 2013. The new rule regarding expert testimony provides the following:

(a) Except as provided in Code Section 22-1-14 and in subsection (g) of this Code section, the provisions of this Code section shall apply in all civil proceedings. The opinion of a witness qualified as an expert under this Code section may be given on the facts as proved by other witnesses.

(b) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data;
(2) The testimony is the product of reliable principles and methods; and
(3) The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact.

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[83] O.C.G.A. § 9-3-30.
[84] Feinour v. Ricker Co., 255 Ga.App. 651, 651-52 (2002).
[85] O.C.G.A. § 9-3-24.
[86] Hickey v. Bowden, 248 Ga.App. 647, 648-49 (2001).

(c) Notwithstanding the provisions of subsection (b) of this Code section and any other provision of law which might be construed to the contrary, in professional malpractice actions, the opinions of an expert, who is otherwise qualified as to the acceptable standard of conduct of the professional whose conduct is at issue, shall be admissible only if, at the time the act or omission is alleged to have occurred, such expert:

(1) Was licensed by an appropriate regulatory agency to practice his or her profession in the state in which such expert was practicing or teaching in the profession at such time; and
(2) In the case of a medical malpractice action, had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:
(A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or
(B) The teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; and
(C) Except as provided in subparagraph (D) of this paragraph:
(i) Is a member of the same profession;
(ii) Is a medical doctor testifying as to the standard of care of a defendant who is a doctor of osteopathy; or
(iii) Is a doctor of osteopathy testifying as to the standard of care of a defendant who is a medical doctor; and
(D) Notwithstanding any other provision of this Code section, an expert who is a physician and, as a result of having, during at least three of the last five years immediately preceding the time the act or omission is alleged to have occurred, supervised, taught, or instructed nurses, nurse practitioners, certified registered nurse anesthetists, nurse midwives, physician assistants, physical therapists, occupational therapists, or medical support staff, has knowledge of the standard of care of that health care provider under the circumstances at issue shall be competent to testify as to the standard of that health care provider. However, a nurse, nurse practitioner, certified registered nurse anesthetist, nurse midwife, physician assistant, physical therapist, occupational therapist, or medical support staff shall not be competent to testify as to the standard of care of a physician.

(d) Upon motion of a party, the court may hold a pretrial hearing to determine whether the witness qualifies as an expert and whether the expert's testimony satisfies the requirements of subsections (a) and (b) of this Code section. Such hearing and ruling shall be completed no later than the final pretrial conference contemplated under Code Section9-11-16.

(e) An affiant shall meet the requirements of this Code section in order to be deemed qualified to testify as an expert by means of the affidavit required under Code Section 9-11-9.1.

(f) It is the intent of the legislature that, in all civil proceedings, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); General Electric Co. v. Joiner, 522 U.S. 136 (1997); Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.

(g) This Code section shall not be strictly applied in proceedings conducted pursuant to Chapter 9 of Title 34 or in

administrative proceedings conducted pursuant to Chapter 13 of Title 50.

This new standard for admission of expert testimony should be fairly easy to navigate. However,

it is fair to say that current construction defect matters seldom involve challenges to expert qualifications or admission of expert testimony. It can be expected that with the introduction of Rule 702, Daubert motions will be filed with some degree of frequency. Be ready.

V. Preservation of Evidence

A duty to preserve evidence arises when there is some form of notice that the evidence may be relevant to a claim or lawsuit. When a party can easily anticipate that preservation of evidence is desired for litigation, the common law imposes a duty to preserve that evidence. Similarly, to meet the standard of spoliation, the injured party must show that the alleged tortfeasor was put on notice that the party intended to pursue litigation.[87] The fact that someone was injured by a construction defect is not enough to automatically trigger the rule of spoliation.[88] This is because a notice of potential liability is not tantamount to a notice of potential litigation.[89] Further, even if evidence was wrongfully and willfully destroyed, this must lead to prejudice in order to prove spoliation.[90]

In Silman v. Associates Bellemeade, the Georgia Supreme Court held that Silman could not establish that the property management company or owners were guilty of spoliation.[91] Silman was injured when the deck she was standing on collapsed beneath her.[92] The management company decided to remove and demolish the old deck that collapsed.[93] In this case, the court found that there was no duty to preserve the remains of the collapsed deck because there was a

[87] Craig v. Bailey Bros. Realty, Inc., 304 Ga.App. 794, 796 (2010).
[88] *Id.*
[89] *Id.*
[90] *Id.* at 797.
[91] 286 Ga. 27, 28 (2009).
[92] *Id.*
[93] *Id.*

lack of constructive knowledge indicating that litigation would ensue.[94] Therefore, the plaintiff could not establish that the owners were guilty of spoliation.

The preservation and spoliation of electronic evidence is a noteworthy issue in the construction litigation context as storing corporate information electronically is commonplace. This spurs the interesting question of what exactly are the duties to preserve and produce electronic information for evidentiary purposes and what constitutes spoliation. Electronic information comes in a variety of forms: it may be stored on a hard drive or thumb drive[95], it may be embedded information[96], or come in the form of a video recording.[97] The durability of electronic data is subject to crashing servers, erased data, stolen hard drives, or computers that have been wiped clean.

The duty to preserve electronic information is discoverable. One of the first courts to review the discoverability of electronic information stated in 1985, "It is now axiomatic that electronically stored information is discoverable under Rule 24 of the Federal Rules of Civil Procedure if it otherwise meets the relevancy standard prescribed by these rules."[98] Consequently, there is a duty to preserve relevant electronic information if litigation is pending or reasonably foreseeable.[99] Recent Georgia cases have settled the issue of whether the reasonable foreseeability of litigation on construction projects includes an obligation to preserve all electronic information. Spoliation of evidence is when there is "destruction or failure to preserve evidence that is necessary to contemplated or pending litigation."[100]

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[94] *Id.*
[95] *See* Antioch Co. v. Scrapbook Borders, Inc., No. CIV. 02-100 (MJD/RLE, 2002 WL 31387731, at *6.
[96] *See, e.g.,* Armstrong v. Executive Office of the President, 1 F.3d 1274, 1277 (D.C. Cir. 1993) (discussing electronic records in the context of the Federal Records Act).
[97] Pacheco v. Regal Cinemas, Inc., 311 Ga.App. 224 (2011).
[98] Bills v. Kennecott Corp., 108 F.R.D. 459, 461 (D. Utah 1985).
[99] *See Silman*, 286 Ga. at 28; Baxley v. Hakiel Industries, Inc., 282 Ga. 312, 314 (2007); ABC Home Health Serv. v. Int'l Bus. Mach. Corp., 158 F.R.D. 180, 182 (S.D. Ga. 1994).
[100] *Baxley*, 282 Ga. At 313.

While the Silman case does not deal directly with electronic information, the Court answered the question of when the destruction of any form of evidence warrants sanctions. After Bellemeade destroyed the defective deck, Silman argued that there was a potential for litigation even if it was not "contemplated or pending." The Court looked to *Baxley v. Hakiel Industries* and held that the phrase "potential for litigation" is actually "'contemplated or pending,' and nothing more."[101] The Court refused to expand the definition for preservation of evidence to any instance where the litigation was not already "contemplated or pending."

Failure to preserve evidence that is contemplated or pending could lead to severe consequences, including monetary sanctions, adverse inference instructions, and even default judgment.

VI. Damages

Damages in construction cases are meant to place an injured party, as nearly as possible, in the same position he or she would have been in had the injury never taken place.[102] When juries are given the responsibility of measuring damages, they are given wide latitude, in determining the proper amount of damages because each case has its own set of unique facts.[103]

A. Cost of Repair

In Georgia, a cost to repair recovery must be reasonable and bear some proportion to the injury sustained.[104] The cost of repair is generally "the difference between the value of the work as actually done and the value which it would have had if it had been done properly [under] the contract."[105] Under Georgia law, calculations for reasonable costs to repair are flexible.[106] One

[101] *Silman*, 286 Ga at 28.
[102] *See* BDO Seidman v. Mindis Acquisition Corp., 276 Ga. 311 (2003; Redman Dev. Corp. v. Piedmont Hearing. etc., 128 Ga.App. 447 (1973).
[103] *See* Rafferzeder v. Zellner, 272 Ga.App. 728 (2005).
[104] Wise v. Tidal Construc. Co., 270 Ga.App. 725 (2004).
[105] Williams Tile &c. v. Ra-Lin & Assoc., 206 Ga.App. 750, 751-52 (1992).
[106] John Thurmond & Assocs., Inc. v. Kennedy, 284 Ga. 469, 472 (2008).

method used in calculating reasonable cost to repair is "circumscribed by the fair market value of the property and the contract price."[107] The fair market value of the improved property may not be a necessary element to calculate damages as long as the injured party furnishes the jury with data sufficient to estimate with reasonable certainty the amount of damages.[108]

Another method of calculating damages is used when the construction defects are permanent. In this type of situation, courts have determined damages by measuring the diminution in value of the property after the injury occurred.[109] The cost to repair may exceed the diminution in value, but it may not be disproportionate to the diminution in value and must be reasonable and bear some proportion to the injury sustained.[110] For instance, in Small v. D.J. Lee & Bros., a homeowner contracted with a builder to build her home. The builder failed to comply with the exact length and width for the size of each of the rooms within the home.[111] The court held that the measure of damages should not be the cost of tearing down the home and rebuilding it, but the estimated cost of making the house conform to the contract.[112] The court explained that, otherwise, the damages would "give an unconscionable advantage to the owner, and would deprive the contractor of adequate compensation for his work and materials."[113]

Almost a hundred years later, the Georgia Court of Appeals reinforced the conclusion as stated in Small.[114] The court explained that in the instance where repairing a botched construction defect would be an "absurd undertaking," the proper amount of damages is "the fair market value of the property if the contract had been properly performed plus the cost to the

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[107] *See* Ryland Group v. Dalye, 245 Ga.App. 496, 502, n. 18 (2000); *see also* Small v. D.J. Lee & Bros., 4 Ga.App. 395 (1908).
[108] David Enterprises v. Kingston Atlanta Partners, 211 Ga.App. 108, 111 (1993).
[109] *See, e.g.*, Ryland Group v. Daley, 245 Ga.App. 496 (2000).
[110] Georgia Northeastern R.R., Inc. v. Lusk, 277 Ga. 245 (2003).
[111] 4 Ga.App. 395 (1908).
[112] *Id.*
[113] *Id.* at 398.
[114] City of Atlanta v. Conner, 262 Ga.App. 423 (2003).

plaintiff for removing the existing structure, then subtract the value of the existing structure following the breach, and subtract the value of the lot."[115]

The cost of repair and diminution in value principles are reiterated in the Restatement (Second) of Contracts, which states:

> (2) If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, he may recover damages based on
> (a) the diminution in the market price of the property caused by the breach, or
> (b) the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him.[116]

Therefore, under Georgia law, these two principles of damages in cases such as breach of contract and negligent construction are interchangeable depending on the facts of the case.

B. Consequential Damages

Potentially available are consequential or remote damages. Common consequential damages include lost rents, payment of double rent/holdover rent, expense of alternate office space or housing and related claims. Remote or consequential damages are not recoverable for a breach of contract unless they can be traced solely to the breach of the contract or unless they are capable of exact computation, such as the profits which are the immediate fruit of the contract, and are independent of any collateral enterprise entered into in contemplation of the contract.[117] In a negligent construction claim, consequential damages are the necessary and connected effect of the tortious act, even though they are to some extent depending on other circumstances.[118]

C. Punitive Damages

"Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice,

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[115] *Id*. at 425-26.
[116] Rest. (2d) of Contracts: Alternatives to Loss in Value of Performance, § 348.
[117] O.C.G.A. § 13-6-8; DOT v. Arapaho Construction, Inc., 180 Ga. App. 341, 349 S.E.2d 196 (1986).
[118] O.C.G.A. § 51-12-3

fraud, wantonness, oppression, or the entire want of care which would raise the presumption of conscious indifference to consequences."[119] In reviewing punitive damages awards, courts must look to three guideposts: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."[120] In Hulsey Pool Company v. Troutman, punitive damages were authorized where the complaint alleged material misrepresentations were made with the intent to deceive.[121]

D. Attorney's Fees

As an initial matter, the question of attorney's fees is controlled by the terms of the contract. In addition, attorney's fees are proper where there is ample evidence in the record to support a defendant's litigious attitude, resulting in unnecessary trouble and expense to the plaintiff.[122] Under O.C.G.A. § 13-6-11, successful plaintiffs can only recover attorneys fees and expenses of the construction litigation to the extent the fees are attributable solely to the claims on which they prevailed.[123] For example, an award of attorney's fees were affirmed by the court of appeals because it found that the Department of Transportation was "stubbornly litigious" and caused plaintiff unnecessary trouble and expense when the DOT refused to pay for lake restoration work during the course of the execution of the contract.[124] Under Georgia law, nominal damages are sufficient to entitle a party to attorney's fees.[125] However, it can be very

[119] O.C.G.A. § 51-12-5.1(b).
[120] Bowen & Bowen Construction Co. v. Fowler, 265 Ga.App. 274, 277-78 (2004)
[121] 167 Ga.App. 192 (1983).
[122] Clearwater Construction Co. v. McClung, 261 Ga.App. 789, 791-92 (2003).
[123] United Cos. Lending Corp. v. Peacock, 267 Ga. 145, 147 (1996).
[124] Dep't of Transp. v. Hardin-Sunbelt, 266 Ga.App. 139, 146 (2004)
[125] *McEntyre*, 261 Ga.App. at 846 (2003).

important to segregate fees by claim to ensure proof of fees due is not the subject of a punishing cross examination.

Defendants can also be held liable for plaintiff's attorney's fees in a breach of contract action if they committed the breach in bad faith.[126] Bad faith can occur in either the making or the performance of the contract.[127] In Hendon v. Superior Roofing Company of Georgia, spurious claims against a roofer to avoid payment constituted bad faith.[128]

[126] Young v. A.L. Anthony Grading Co., Inc., 225 Ga.App. 592 (1997).
[127] Robert E. Canty Building Contr. v. Garrett Machine & Const., Inc., 2004 WL 2786923 (Ga.App. Dec. 1, 2004).
[128] 242 Ga.App. 307 (2000).