COUNTIES & THE LAW

This edition of *Counties & the Law* includes decisions of interest to county attorneys published in the Daily Report Opinions Weekly between July 23, 2016, and July 29, 2016.

We welcome your suggestions and opinions regarding Counties & the Law. Please contact Kelly Pridgen at kpridgen@accg.org or Joe Scheuer at jscheuer@accg.org with your comments.

APPELLATE PRACTICE

Murphy v. Freeman

Georgia Court of Appeals
July 25, 2016; A16A0423

This case involves a multitude of issues, one of which was an attempt to use the OMOR Act to get a copy of the audio transcript of a hearing from the court reporter. Even though the court reporter ultimately provided a sealed copy for the court record and an unsealed copy to the clerk for use by the parties, a subsequent action was brought against the court reporter. The trial judge ruled that any further requests for transcripts or audio recordings would be under O.C.G.A. 5-6-41 et seq. The ruling was appealed but the Court of Appeals never reached any of the underlying issues because "glaring deficiencies" of the appellant's brief rendered all enumerations of error therein as abandoned under Court Rule 25. The appeal was dismissed and counsel was reprimanded and fined by the Court. The case is worth a read in order to see how not to structure an appellate brief.

Schumacher v. City of Roswell

Georgia Court of Appeals
July 27, 2016; A16A0582

Plaintiff's property was rezoned following the adoption by the city of a unified development code and a new zoning map. Plaintiff sued the city alleging violations of O.C.G.A. 36-66-1 et seq. and 36-76A-1 et seq. and due process. The city sought and was granted judgement on the pleadings. Plaintiff filed a direct appeal to the Court of Appeals under O.C.G.A. 5-6-34. The Court of Appeals followed the *Trend* case and dismissed the appeal since it was required to be a discretionary appeal under O.C.G.A. 5-6-35. Discretionary appeals are required not only where a

party appeals to the superior court after a zoning decision but also where a party collaterally attacks the local government's zoning decision by filing for mandamus. Plaintiffs argued that the decision here was a legislative decision (approving a new zoning ordinance and map) rather than an administrative decision (rezoning a specific piece of property). The Court called this misguided and said that even under *Trend*, a zoning decision that could be characterized as legislative in other contexts still falls under a discretionary appeal.

COUNTY ROADS

Pass v. Forestar GA Real Estate Group, Inc.

Georgia Court of Appeals
July 25, 2016; A16A0243

This case involves the questions of whether a road and the plaintiff's right of access to that road have been abandoned. In 1953 a property owner was sued for blocking access to the plaintiff's tract. A jury trial found the road to be a public road. The property owner continued to deny that the road was a public road. A padlocked gate was put up as well as a no trespassing sign. The plaintiff sued again in 2012. The trial court granted the plaintiff's motion for summary judgement finding the road to be a public road. The Court of Appeals reversed because questions of fact remained as to abandonment. The record shows that the roadway had not been used for many years and was impassable. Further, in 2012 the county abandoned a portion of it under O.C.G.A. 32-7-2. There was an issue of fact for a jury to decide the abandonment of any private access easement.

WHISTLEBLOWER

Franklin v. Eaves

Georgia Court of Appeals
July 26, 2016; A16A0616

A county employee brought a whistleblower action against the county manager alleging retaliation by the county for raising HIPAA issues following her relocation from an office to a cubicle. The suit was temporarily moved to federal court and then back to trial court. The county's answer to the suit was late, but a motion to open default was granted because the county had diligently checked the trial court docket daily waiting for the federal order to be filed. The trial court granted the county's motion for summary judgment on the ground the lawsuit was untimely. The Court of Appeals upheld the granting of the motion to open default. The answer was filed the same day the federal remand order was filed. The Court reversed the granting of summary judgement. There were many alleged instances of acts of retaliation and

the record does not include evidence of when they might have occurred. It is an affirmative defense of the county to show that they were time barred. In an interesting statement of candor, the Court notes that it is odd that an employee could be relieved of their core job duties and not realize it for two months, but that sort of credibility question creates an issue of fact for a jury and not an appellate court.

Fuciarelli v. McKinney

Georgia Court of Appeals
July 29, 2016; A15A0223

A tenured faculty member at a state college who had his administrative duties halted and his salary and benefits reduced sued alleging false claims whistleblower retaliation under O.C.G.A. 23-3-122. The trial court dismissed the claim on the ground that written approval of the Attorney General had not been acquired prior to bringing the claim as required under O.C.G.A. 23-3-122(b)(1). The Court of Appeals initially reversed finding that O.C.G.A. 23-3-122(l) creates a cause of action that is personal to the plaintiff and separate from the notice requirements under O.C.G.A. 23-3-122(b)(1). The Supreme Court reversed the Court of Appeals holding that the plain meaning of (b)(1) requires written consent of the Attorney General. The Court of Appeals adopted the decision of the Supreme Court as its own.