

COUNTIES & THE LAW

A Newsletter of the Association County Commissioners of Georgia

November 2006

Vol. 9, No.1

ANTE LITEM NOTICE

Rabun v. McCoy

Georgia Court of Appeals
April 12, 2005
273 Ga. App. 311

This case combines two appeals (one from McCoy, one from Rabun). The original case was based on McCoy's claims for defamation, intentional infliction of emotional distress, and false light/invasion of privacy filed against the City and Rabun underlying his termination from his position as a senior

This edition of Counties & The Law includes decisions of interest to county attorneys published between January 1, 2005 and December 31, 2005. The next issue will cover cases published between January 1, 2006 and June 30, 2006.

We welcome your suggestions and opinions regarding Counties & The Law. Please contact Jim Grubiak or Kem Kimbrough with your comments.

James F. Grubiak
General Counsel

Kem Kimbrough
Assistant General Counsel

Donald Oliver, Walker County
County Attorneys Section
President 2006

K. C. Horne, Lumpkin County
County Attorneys Section
President 2005



50 Hurt Plaza
Suite 1000
Atlanta, Georgia
Telephone (404) 522-5022
Fax (404) 525-2477

building inspector for the City were false. McCoy filed a grievance against his supervisor with Rabun, who denied the grievance determining that it was the result of personal disagreements between McCoy and his supervisor. Rabun further concluded that several of the instances listed in the grievance were false and took disciplinary action against McCoy pursuant to Griffin's Personnel Policy that ultimately ended in McCoy's termination from employment. After an appeal and review of the termination circumstances by an independent Special Master, McCoy was reinstated. McCoy then filed suit based on published newspaper articles in which Rabun made statements regarding the reasoning for each action. The Georgia Court of Appeals held that the trial court had ruled correctly in its dismissal in that McCoy had failed to comply with the six month ante litem requirement of OCGA §36-33-5. In response to Rabun's complaint that the trial court erred in rejecting his motion for summary judgment based on his defense that his statements were privileged as statements made in good faith, the Court held that the trial court was indeed in error because Rabun established lack of the requisite malice in making the statements by producing evidence that he did not intentionally or negligently make any untrue accusations about McCoy and McCoy failed to present specific evidence of malice per the shifted burden of proof.

Davis v. City of Forsyth

Georgia Court of Appeals
September 9, 2005
275 Ga. App. 747

Plaintiffs filed suit seeking injunctive relief and damages for a continuing nuisance based on repeated sewage overflows onto their property. They later amended the claim to include personal injury. The trial court granted the City partial summary judgment with regards to the personal injury claim because of the plaintiff's failure

to assert that claim in the ante litem notice given to the City and also ruled that all claim for property damage occurring prior to six months preceding the date of the notice were barred. The plaintiffs appealed and the Court of Appeals affirmed holding that a claimant must give written notice to a municipality of a suit for damages to person or property within six months of the happening of the event upon which the claim is predicated. The notice must state the extent of the injury—the nature, character, and particulars of the injury—so as to provide enough information for the municipality to conduct an investigation and to determine if the claim should be settled without litigation. Even in the event of an ongoing nuisance, property owners are entitled to recover only damages incurred during the six months preceding the issuance of the ante litem notice.

Gambell v. Georgia Ports Authority

Georgia Court of Appeals
October 26, 2005
276 Ga. App. 115

Gambell appeals from the dismissal of his complaint against the Georgia Ports Authority (GPA) for monetary damages where he alleges that a GPA employee assaulted him during an altercation while he was making a delivery. As a result of this altercation, Gambell was barred from the terminal resulting in alleged severe economic loss as delivering to the terminal for his employer was his only source of income. The Court of Appeals affirmed the trial court's dismissal of the complaint and its ruling that GPA was entitled to sovereign immunity under the Georgia Constitution and the Georgia Torts Claim Act and that Gambell had failed to comply with the ante litem notice provision of the Georgia Torts Claim Act. The Court of Appeals ruled it need not reach Gambell's substantive argument because any claim he may have had under the Act is procedurally

barred because of his failure to comply with the Act's ante litem notice provision. The court ruled that in order for Gambell to recover under theories of due process or eminent domain provisions, he would be required to allege facts showing he had an enforceable private property interest improperly taken from him by the GPA. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead have legitimate claim of entitlement to it."

ATTORNEY FEES

Lines v. City of Bainbridge

Georgia Court of Appeals
May 24, 2005
273 Ga. App. 420

Lines, Schoenfisch, and Williams sued the City of Bainbridge for lost profits and attorney's fees after they purchased property during a tax sale that the City later declared void. Though the City returned all of the defendants' money, they claimed that the City should also be responsible for the lost profits that would be generated by the purchased property as well as the costs incurred in litigation and the purchasing process. The Georgia Court of Appeals affirmed the trial court's dismissal holding that there can be no lost profits from a sale that was void from the beginning. The Court also held that the defendants did not adequately plead for attorney's fees under OCGA §13-6-11 and that there was no evidence that the city engaged in any conduct that would authorize the awarding of the defendants' attorney's fees.

CONDEMNATION

Carroll County Water Authority v. L. J. S. Grease & Tallow Inc.

Georgia Court of Appeals
July 12, 2005
274 Ga. App. 353

Carroll County Water Authority appealed the decision of a court appointed arbitrator awarding L.J. S. Grease & Tallow, Inc. (L.J. S.) \$265,000 as the value of the realty and \$1,250,000 for business loss value damages that was

entered by the superior court. The Georgia Court of Appeals held that where the "eminency of condemnation forces an established business to close before the date of the condemnation, the absence of a business in operation on the property on the date of the taking does not automatically end all inquiry into the relevancy of business loss evidence." The Court concluded that the arbitrator was authorized to find the Water Authority responsible for failure to relocate the business because the Water Authority refused to help with relocation costs which exceeded the estimated value of the business. The Court also held a "condemnee is entitled to recover just and adequate compensation for the loss of his property" and that business losses may be recovered as a separate item if the condemnee "operated an established business on the property, if the loss is not remote or speculative, and if the property is unique." The Court noted three general rules for making the determination of a property's classification as "unique": (1) If the property must be duplicated for the business to survive, and if there is no substantially comparable property within the area, then the loss of the forced seller is such that market value does not represent just and adequate compensation to him; (2) The property must have a value particular to the owner incapable of being passed to a third party before the property can be considered unique; (3) Unique properties are generally not of a type bought or soled on the open market. Only one of these three criteria must be satisfied to establish a classification as "unique."

Thornton v. Department of Transportation

Georgia Court of Appeals
September 7, 2005
275 Ga. App. 401

Thornton filed a notice of appeal demanding \$19,500 as the value of .150 acre of his property condemned by the Georgia Department of Transportation for a highway widening project. Thornton also sought \$30,000 in consequential damages arguing that the DOT's determination that \$1300 was just and adequate compensation

for the property was incorrect. After the trial court granted the DOT's motion in limine to prevent Thornton from testifying that he lost the specific performance of a \$10,000 billboard contract because of the taking and denied Thornton's motion for a new trial, Thornton appealed. The Court of Appeals affirmed holding that the trial court did not abuse its discretion in limiting Thornton to evidence of the value of the property taken and consequential damages to the remainder because Thornton did not claim lost profits or business losses. Further, the court ruled that a value finding in a condemnation case will not be set aside where it is within the range of the evidence.

CONTRACTS

Greene County School District v. Greene County

Supreme Court of Georgia
January 10, 2005
278 Ga. 849

Greene County and the Greene County School District entered into an agreement, which contained no time limit, from 1998 to 2003. In 2003, the Board of Commissioners voted to end the contract and the Board of Education brought suit, claiming that in the absence of an explicit time limit in the contract, the contract was enforceable for 50 years as an intergovernmental contract. Generally, a municipal government may not enter into a contract that lasts longer than that government's term of office because "one council may not, by an ordinance, bind itself or its successors so as to prevent free legislation in the matters of municipal government." The intergovernmental contract clause provides an exception to that rule, and allows political subdivisions to contract with one another or with other public agencies, so long as the term of the contract does not exceed 50 years. The Supreme Court of Georgia agreed with the trial court that this agreement did not qualify as an intergovernmental contract, because the contract did not involve the provision of services as laid out by the Georgia Constitution, and even though the contract facilitated a real estate transaction, it did not effect Greene

County's tax collection service. In addition, the tax collection service was the county tax commissioner's, and not the Greene County's.

ELECTIONS

DeLeGal v. Burch

Georgia Court of Appeals
June 21, 2005
273 Ga. App. 825

DeLeGal challenged the results of a special bond election, claiming that the results were void because the election was held without proper notice due to an error printed in one of the advertisements intended to notify the public of the election. The trial court dismissed DeLeGal's claim concluding that all of the advertisements satisfied the notice requirements and the error in one of the advertisements was a simple typographical error that did not place the result of the election in doubt. The Georgia Court of Appeals affirmed the trial court's dismissal because DeLeGal failed to preserve or pursue his injunctive remedies thus electing to pursue only a post-election challenge by failing to seek a hearing on the temporary restraining order (TRO) prior to the election. The Court further ruled that the notice of the election was sufficient under OCGA §21-2-45 and OCGA §36-82-1 (b) and that an irregularity in an election notice provides no basis to contest election results unless the irregularity is sufficient to change or place the result in doubt.

Jones v. Jessup

Supreme Court of Georgia
June 30, 2005
279 Ga. 531

After losing the election to incumbent Sheriff Jones, Jessup filed a petition contesting the elections for McIntosh County Sheriff, asserting that there were sufficient irregularities, based on problems with the absentee ballots of approximately thirty voters, to place the results of the election in doubt. The trial court agreed with Jones' assertion, invalidated the first election and ordered that a new election be held. The Supreme Court of Georgia reversed the trial court's order holding

that not every irregularity in an election will invalidate the elector's vote. The Court ruled that "where the election is held in substantial compliance with the law, it should not be rendered void merely because of isolated failures to strictly conform with the law, unless it appears that such failures changed the results of the election." The Court further ruled that an absentee ballot is to be rejected only where the elector has failed to furnish required information. The Court ordered that the new election ordered by the trial court be stayed and reversed the order invalidating the first election.

Burton-Callaway v. Carroll County

Supreme Court of Georgia
September 19, 2005
279 Ga. 590

Burton-Callaway appeals from the trial court's order upholding the validity of a Carroll County referendum that shortened her term in office. The appellant argued that the referendum failed to satisfy OCGA §1-3-11 because voters were not informed that their approval of the bill would shorten her term in office. The Court reversed the lower court's decision and remanded for further proceedings consistent with their holding that in order for the people of a jurisdiction to alter an elected official's term, they must be informed of how their vote would affect such a change to satisfy the requirements of §1-3-11.

EMPLOYMENT

Reid v. The City of Albany

Georgia Court of Appeals
November 2, 2005
276 Ga. App. 171

Reid appealed the trial court's "failure to state a claim" dismissal of his wrongful termination claim against the City of Albany. The Georgia Court of Appeals affirmed the trial court's ruling, holding that Reid was an at-will employee and at-will employees may be terminated for any or no reason under Georgia law and they generally cannot recover. The court noted that motivation usually does not matter; an employer may discharge an at-will employee with no liability. The court

further held that though there are limited exceptions created by the Legislature, no exceptions have been found to apply in the case at bar and nothing in the statutes authorized a wrongful discharge claim on the basis of Reid's argument that the defendants falsified his separation notice filed with the Georgia Department of Labor and conspired to deceive Department of Labor Investigators.

FREE SPEECH

Coffey v. Fayette County

Supreme Court of Georgia
March 7, 2005
280 Ga. 656

In 1999, Fayette County adopted a sign ordinance that, among other things, restricts non-commercial signs in residential areas to one sign per lot and to a size of no more than six square feet. Appellants Curtis Coffey and Wayne Charles, individual residents of Fayette County, filed suit, contending that the county's sign ordinance is unconstitutional. The trial court denied the appellants' motion solely on the ground that "there is a rational relationship between the County's sign restrictions and its interests in aesthetics and traffic safety" and appellants assert that the trial court applied an incorrect standard for determining the validity of the county's sign restrictions. The Supreme Court of Georgia agreed and reversed the trial court's judgment. Under Georgia Constitution, a government must "draw its regulations to suppress no more speech than is necessary to achieve [its] goals." Therefore, the trial court failed to determine whether Fayette County had a significant governmental interest in aesthetics and traffic safety, and the Supreme Court of Georgia remanded the case back to the trial court.

HABEAS CORPUS

Preer v. Johnson

Supreme Court of Georgia
March 7, 2005
279 Ga. 90

On June 13, 2003, Preer filed a habeas corpus petition in Muscogee County, where he was incarcerated. Shortly

thereafter, Preer was transferred to a Gwinnett County prison, and Preer's habeas petition was transferred to Gwinnett County Superior Court over his objection, and he was granted an interlocutory appeal. The Supreme Court of Georgia affirmed that a petition for habeas corpus had to be filed in the superior court of the county in which the petitioner was being detained and that allowing a habeas petition to be transferred if a petitioner was transferred was in accordance with Georgia's policy. The Court limited its holding, however, to instances when a petitioner's county of incarceration is changed for legitimate or routine reasons. When, on the other hand, it is done to forum shop for a less petitioner-friendly habeas court, or would otherwise frustrate habeas relief, the petition should not be transferred.

IMMUNITY

Common Cause/Georgia v. City of Atlanta

Supreme Court of Georgia
June 16, 2005
279 Ga. 480

Common Cause and Barnett brought suit on behalf of the City and its taxpayers seeking a judgment against former mayor Campbell for the approximately \$300,000 paid to Parking Company of America in excess of its new contracted rate for services after Campbell failed to sign the new contract in a timely manner. The Supreme Court of Georgia affirmed the appellate court's ruling dismissing the Common Cause's claims. The Court held no basis in Georgia law for derivative actions against an officer of a municipality brought by taxpayer citizens of that municipality. As municipal corporations are creatures of the State, it is for the General Assembly to specify any power to sue on the part of the taxpayers. The Court held that Campbell, as a municipal official, could only be held liable in his individual capacity for negligently performing or failing to perform a ministerial duty or for acting with actual malice or actual intent to cause injury. The Court ruled the failure to execute a contract is an act of discretion, not a violation of a ministerial duty. Campbell had immunity

from liability for the negligent performance of a discretionary duty.

Thompson v. City of Atlanta

Georgia Court of Appeals
June 23, 2005
274 Ga. App. 1

Thompson brought an action against the City of Atlanta for personal injuries, wrongful death, negligent infliction of emotional distress, and nuisance after her vehicle hydroplaned on a large body of water covering the roadway, resulting in injuries and the death of her infant son. Thompson argued that the City was responsible for the maintenance of the drainage system that caused the overflow of water on the roadway. The Georgia Court of Appeals affirmed the trial court's dismissal of the case, holding that the City is immune from negligence liability because the power to construct and maintain a sewer and drainage system is a governmental function and a municipality is immune from liability when performing governmental functions. The Court further ruled that Thompson's nuisance claim also fails because she failed to show the City had any notice of any defect as required to show nuisance per OCGA §32-4-93 (b).

Goode v. City of Atlanta

Georgia Court of Appeals
July 8, 2005
274 Ga. App. 233

Goode filed an action for negligence against the City of Atlanta alleging that the water main rupture that caused flooding to his basement damaging his real and personal property was caused by the City's negligent repair of a nearby sewer cave-in approximately one month prior to the flooding. Goode amended his original complaint to include a claim of nuisance against the City following the City's motion for summary judgment. The trial court ruled in favor of the City concluding that recovery under a theory of negligence was barred by the doctrine of governmental immunity. The Georgia Court of Appeals affirmed this ruling holding that under Georgia law, a municipality is not liable for the negligent acts of its employees in the

performance of purely governmental functions and finding the construction and maintenance of a sewer and drainage system to be a governmental function. With respect to Goode's nuisance claim, the Court noted that although a municipality could not be held liable for negligence in the exercise of a government function, it may be held liable for damages caused by the operation and maintenance of a nuisance whether it is exercising a governmental function or not. The Court ruled that to show a nuisance, the following factors must be present: (1) the defect or degree of misfeasance must be to such a degree as would exceed the concept of mere negligence; (2) the act must be of some duration and the maintenance of the act or defect must be continuous or regularly repetitious; (3) failure of the municipality to act within a reasonable time after knowledge of the defect of dangerous condition (requiring either notice of knowledge of the dangerous condition). The Court concluded that the facts of Goode's claim were insufficient to show the existence of a nuisance because the one-time repair of the sewage system could not be deemed continuous or repetitious even if the repair was negligent—an isolated incident is not sufficient to show nuisance—and there was no evidence that the city had knowledge or notice of the dangerous condition.

McElmurray v. Augusta-Richmond County

Georgia Court of Appeals
July 11, 2005
274 Ga. App. 605

The McElmurrays, owners/operators of a dairy and crop farming business in Richmond County, brought suit against Augusta-Richmond County seeking damages on theories of inverse condemnation, breach of contract, fraud, strict tort liability, negligence, products liability, nuisance, trespass, conversion, and violation of the Georgia Hazardous Site Response Act (HRSA). The appellants argued that from 1979 to 1990, the sludge disposed of on their land by the city from the wastewater treatment plant contained metals and high concentrations of toxic constituents which damaged their crop lands and killed their

cows. On appeal, the McElmurrays argued that the trial court was in error when it dismissed their inverse condemnation claim. The Georgia Court of Appeals found no merit in this contention because the 5th amendment takings clause is not meant to protect property owners in their voluntary dealings with government. The Court also held the County had waived its sovereign immunity with regards to claims arising out of the negligent use of the insured vehicle through its purchase of liability insurance because of the express provisions OCGA §343-24-51(b). The Court further ruled that the claims arose out of the negligent use of the insured vehicles because the county used those insured vehicle to apply the sludge to the appellants' property. "Whether or not an injury arose from the use of a motor vehicle with the contemplation of a liability policy or statute depends upon the factual context of each case. . . the term does not imply remoteness but does extend beyond actual physical contact and it would seem to extend at least to the point, beyond physical contact, where control over the instrumentality is easily or reasonably at hand, and particularly when it is still being utilized." With regards to the breach of contract and statutory violation claims, the Court upheld the trial court's dismissal of both claims.

Wallace v. Greene County

Georgia Court of Appeals
 July 13, 2005
 274 Ga. App. 776

Wallace, the former maintenance supervisor for Greene County's Buildings and Grounds, filed a complaint after his termination from employment against Greene County, the county manager, and the county attorney seeking injunctive relief and damages for their alleged violation of OCGA §9-11-65 (b) by obtaining an ex parte temporary restraining order (TRO) against him without notice and for a violation of the Georgia Open Records Act by failing to provide a timely response to his request for a copy of his personnel record. The Georgia Court of Appeals affirmed the trial court's ruling that Greene County is entitled to sovereign immunity from damage claims

per Article I, Section II, Paragraph IX of the Georgia Constitution of 1983. The Court ruled that sovereign immunity extends to county employees acting within their official capacities, extending to errors in determination of both law and fact. The Court also affirmed the trial court's ruling with respect to the county attorney on violation of the Open Records Act as the open records request was never made to him. They affirmed the ruling regarding injunctive relief and claims for compensatory and punitive damages because the records were sent after the lawsuit was filed and the Open Records Act does not permit recovery of compensatory or punitive damages. The Court reversed the trial court's ruling regarding the attorney fees for violation of the Open Records Act. To obtain these fees, a plaintiff must first show the county manager violated the Open Records Act by not producing the requested records before the suit was filed and if a violation did in fact occur, Wallace must show that the appellees lacked substantial justification for the violation. The Court concluded that Wallace had satisfied the first prong and remanded the case to the trial court for a determination as to the second prong.

Spalding County v. Blanchard

Georgia Court of Appeals
 September 8, 2005
 275 Ga. App. 448

In this interlocutory appeal by Spalding County, the Court of Appeals answered the question of who bears the burden of showing waiver of well-pled defense of sovereign immunity. Blanchard, an inmate at the Spalding County Correction Institute, sued the county, the warden and the correctional officers in their official capacities for injuries he sustained while working in a work detail. The trial court denied Spalding County (and the officers') claims for summary judgment holding that there was a material issue of fact as to the existence of a waiver of sovereign immunity through insurance purchase. The Court of Appeals reversed the trial court's ruling based on case law which established that waiver of sovereign immunity must be established by the part seek-

ing to benefit from the waiver. Thus, Blanchard bore the burden of proving that the county had waived its right to sovereign immunity by purchasing insurance protection to cover his claim.

JUDGES

Uzomba v. Cobb County Magistrate Court

Supreme Court of Georgia
 September 19, 2005
 279 Ga. 629

Appellant Uzomba appealed from the decision of the Cobb County Superior Court dismissing his petition for mandamus which alleged that a magistrate judge abused his discretion in refusing to issue a warrant for a person who had allegedly attacked Uzomba. The Supreme Court affirmed the ruling of the Superior Court holding that the magistrate judge has discretion to determine whether or not probable cause exists for a warrant and mandamus will not lie to compel the magistrate judge to perform a discretionary act in the absence of gross abuse of discretion. The Supreme Court further noted that it lacks jurisdiction over the case because it involves an original petition against the judge of the Superior Court.

PREEMPTION

Pawnmart, Inc. v. Gwinnett County

Supreme Court of Georgia
 February 7, 2005
 279 Ga. 19

Pawnmart, Inc. contends that a Gwinnett County ordinance imposing certain requirements on pawnbrokers is preempted by state law. The ordinance requires pawnbrokers to maintain certain records and obtain certain information from persons pawning property, including fingerprints, digital photographs, and sales receipts for new merchandise. Under the Georgia Constitution, general laws preempt local or special laws on the same subject except for local laws permitted by, and not conflicting with, the general law. OCGA § 44-12-130 through 44-12-138 are the general laws regulating Georgia pawnbrokers. The Gwinnett County ordinance, because it also regulates

Georgia's pawnbrokers, is preempted unless it is (1) authorized by general laws, and (2) does not conflict with them. The Supreme Court of Georgia found that because the ordinance's stated purpose was to impede the sale of stolen property, and its requirements were designed to achieve that end, it was a proper use of the county's police power, and does not conflict with OCGA § 44-12-138. Therefore, there was no preemption.

PUBLIC OFFICIALS

Pope v. Board of Commissioners of Fulton County

Georgia Court of Appeals
October 27, 2005
276 Ga. App. 121

The Georgia Court of Appeals granted the plaintiffs' application for discretionary review after their removal from their positions on the county's Board of Tax Assessor's was upheld by the superior court. The Court of Appeals affirmed the superior court's ruling, holding the plaintiffs' letter to the Board in response to notice of the Board's proposal to remove them essentially admitted their failure to comply with OCGA§ 48-5-302. The court ruled that tax assessors may be removed for failing to comply with §48-5-302 even though the section's deadline may be only directory. The court noted it found no evidence to support plaintiffs' claim they were harmed by procedures used to remove them from office.

Griffin v. City Council of Milledgeville

Supreme Court of Georgia
November 7, 2005
279 Ga. 835

Mayor Griffin appeals the superior court's ruling denying him injunctive relief and finding that the office of mayor was not abolished in violation of OCGA§1-3-11 and that the local legislation passed by the General Assembly to accomplish the city council's attempt to change the city's form of government was not unconstitutional. The Supreme Court of Georgia affirmed the lower court's ruling finding that nothing in §1-3-11

prohibits the Legislature from altering the nature of the duties that devolve upon the holder of an office as long as the remaining duties are appropriate to the office. The court noted that the act did not abolish the office of mayor, it only restructured it. The court further ruled that no referendum was required to be held pursuant to §1-3-11 because the Act did not abolish the office of mayor and the statutory procedure for enactment of local legislation does not require the holding of public hearings.

PUBLIC ROADS

Roquemore v. City of Forsyth

Georgia Court of Appeals
July 14, 2005
274 Ga. App. 420

Roquemore, Griffin, and McClay brought suit against the City of Forsyth and Parsons after Parsons' automobile struck plaintiffs Roquemore and Griffin resulting in injuries. The plaintiffs allege that the accident was the result of impaired night vision caused by a malfunctioning street light that was the responsibility of the City's electrical department. The Georgia Court of Appeals affirmed the trial court's dismissal of the claims against the City holding that the decision whether to provide lighting on a particular city street is a discretionary function and for the exercise or failure to exercise such a power, no cause of action accrues. Further, "mere absence of an ordinary street light at a given point will not constitute such negligence as to render the City liable if it has otherwise performed its obligation to keep the streets safe and free from defects."

TAX SALE

Scott v. Vesta Holdings I, LLC

Georgia Court of Appeals
August 23, 2005
275 Ga. App. 196

Scott, Dekalb County's Tax Commissioner, and Vesta Holdings cross-appealed the trial court's ruling regarding Vesta Holdings' money rule petition. Scott argued that the petition shouldn't have been granted and Vesta Holdings argued that they were also entitled to the 20 percent interest

authorized by OCGA§15-13-3 and the interest on its tax executions authorized by OCGA§§ 48-3-20 and 48-2-40. The Georgia Court of Appeals affirmed the trial court's granting of the money rule, holding that, as transferee of the tax executions, Vesta Holdings was entitled to recover the amounts necessary to pay its tax executions from the excess proceeds of the tax sale before any payments were made to the owners of record at the time of the sale. The Court further ruled that Vesta Holding stood in the same shoes as a county seeking funds from an excess tax sale, giving their tax executions higher priority than any other claims or liens except those for State and County taxes and that the Commissioner was subject to a money rule as an ex-officio sheriff under OCGA §48-5-137. Because the trial court made no finding that the Tax Commissioner showed good cause for its refusal to honor Vesta Holdings' demands, the case was remanded for determination as to whether the 20 percent interest required by OCGA §15-13-3 was warranted as part of the judgment.

TAXATION

Pulaski County Board of Tax Assessors v. JFS Properties, Inc.

Georgia Court of Appeals
July 19, 2005
274 Ga. App. 520

JFS Properties filed suit against the Pulaski County Board of Tax Assessors disputing the fair market value of a manufacturing plant it purchased in the County for \$250,000. JFS Properties argued that the County's assessment of the value of the property at \$491,480 was incorrect and the ad valorem taxes it paid on the property based on this assessment was also incorrect. After a trial court jury found the fair market value to be \$250,000, the trial court awarded JFS Properties interest, attorney's fees, and the costs of litigation. In response to the County's appeal of the award for the costs of litigation, which the County argued was only intended by the legislature to include "court costs", the Court affirmed the trial court's ruling holding that OCGA§48-5-311 (g)(4)(B)(ii) provides for the recovery of costs of

litigation and attorney's fees if the final determination of value on appeal is 80 percent or less than the value set by the county board. The Court reasoned that this provision is for the recovery of "costs of litigation", not simply for the limited term "costs" of OCGA §9-4-9, which does not include attorney's fees or expenses of litigation.

Barnes v. City of Atlanta

Georgia Court of Appeals

September 6, 2005

275 Ga. App. 385

Plaintiffs (a group of attorneys) appealed the trial court's ruling in a class action suit against the City of Atlanta for refunds of occupational taxes paid during reporting periods 1996-1998. The trial court divided the group into two classes: Class I—those who had not made a refund request prior to litigation and Class II—those who had. The trial court granted the plaintiffs' motion for summary judgment was granted in 2002 holding that the city's occupational tax as applied to attorneys was an unconstitutional precondition on the practice of law. This order was affirmed on appeal by the Supreme Court of Georgia in *City of Atlanta v. Barnes*. The plaintiffs now appeal from the trial court's 2003 decision made on remitter from the Supreme Court that Class I plaintiffs had not exhausted the administrative remedies because they failed to make a demand for a refund prior to litigation and that their counsel was unauthorized to make such pre-litigation refund requests on behalf of Class I plaintiffs without their approval. The City also appeals the decision on the amendment of class certification. On appeal, the plaintiffs argue that the trial court erred in its findings that their attorney did not have the authority to demand a tax refund on behalf of all Class I members; the statute of limitations for Class I refunds began to run on Feb. 27, 2004 when the class certification was amended and was not tolled upon the filing of the complaint, and that those who opted out of the class action would not be responsible for attorney's fees and litigation expenses. The Georgia Court of Appeals affirmed all of the trial court's holdings, ruling that although the common law right

to sue for a refund existed, the Class I plaintiffs must still comply with the requirements of OCGA§ 48-5-380 requiring a taxpayer to demand a refund before proceeding to superior court and bringing a common law action for a refund. The court ruled that this section applies to any tax levied by a municipal governing authority—even illegal collections. The court further held that the statute of limitation did not begin to run at the filing of the complaint for the Class I plaintiffs because they had not satisfied the prerequisites for suit under §48-5-380. The court noted that class counsel was unauthorized under the class certification order to make a pre-litigation refund demand on behalf of Class I plaintiffs, thus making his claim insufficient to satisfy the pre-litigation refund requirement of §48-5-380. The court also affirmed the trial court's ruling that those who opted-out of the class pursuant to June 2003 and February 2004 orders and notices were not responsible for attorney's fees and litigation costs because "a party may not be forced to pay for benefits imposed on him or her with no opportunity to refuse.

Hill v. Hall County Board of Tax

Assessors

Georgia Court of Appeals

September 15, 2005

275 Ga. App. 504

The plaintiff appeals from the trial court's order finding that the tax assessor's 2003 appraisal of his property met required uniformity standards and represented the fair market value of the property. The Court of Appeals affirmed the order of the trial court holding that just and fair market valuation of property is a question to be determined by the fact-finder and this determination must be affirmed on appellate review unless it is clearly erroneous. The court further ruled that the burden of proof in a tax appeal to the superior court is on the party initiating that appeal and that evidence of a previous year's assessment is admissible at the insistence of the taxpayer as evidence of value but is not conclusive. Further, all properties in the County were appraised on a mass basis—the plaintiff's was not singled out—and taxpayers do not have standing to dis-

pute decisions of the tax commissioner with regard to county tax digests.

DeKalb County v. Wellborn Road

Common Tenancy

Georgia Court of Appeals

October 19, 2005

276 Ga. App. 14

DeKalb County appeals from the trial court's ruling granting Wellborn Road Common Tenancy's declaration that the County could not challenge a previous jury adjudication of the fair market value of their property for the 2001 tax year. The County argued on appeal that OCGA§ 48-5-299 (c) and Georgia Department of Revenue Rules and Regulations require reversal because the property was not reassessed for the sole purpose of changing the valuation but instead a change in value was authorized by the sale of a portion of the property. The Court of Appeals affirmed the trial court's ruling holding that the evidence does not support the county's argument that the sale substantially changed the value of the retained portion of the property. The court noted that a change in valuation under §48-5-299(c) or the relevant rules and regulations would be authorized only if the sale affected the fair market value of the property retained by the owner.

TORTS

Lewis v. Champion

Georgia Court of Appeals

September 1, 2005

275 Ga. App. 496

The Georgia Court of Appeals granted appellant Lewis' application for interlocutory appeal following the trial court's denial of his motion for summary judgment in a suit brought by Officer Champion alleging that Lewis was responsible for injuries he sustained while helping Lewis move a steel grill. Lewis argued on appeal that the trial court erred in denying his motion because the Fireman' Rule, which states that a public safety officer may not recover for the negligence that caused the situation to which he responded, but may recover independent of that negligence, prevented Champion from recovering for his injuries. The Court

of Appeals held that the trial court was not in error in denying Lewis' motion for summary judgment because Champion was called "to assist the fire marshal" not to help Lewis move a grill and factual dispute exists as to what caused Champion's injury.

ZONING

105 Floyd Road, Inc. v. Crisp County

Supreme Court of Georgia
 May 23, 2005
 279 Ga. 345

Appellant 105 Floyd Road, Inc (Floyd Road) began operating his business without a special use permit in Crisp County after acquiring the leasehold and assets of a prior business that dealt primarily in sexually-explicit material. Before beginning its operations, Floyd Road decreased both the inventory of sexually-oriented product and the space designated for display of such product. The County's Land Development Code provides that establishments meeting the definition of "sexually-oriented adult use" may only operate in designated zoning districts upon approval of a special use permit. Once operations began, the County sought and was granted injunctive relief after the trial court found that Floyd Road had a "substantial business purpose" to offer for sale "sexually-explicit materials intended to provide sexual stimulation or gratification to the customer." Floyd Road posed a constitutional challenge on grounds of vagueness to the phrase "substantial business purpose" in the definition of "sexually-oriented adult use" in Section 3.01.02 of the Code. The Supreme Court of Georgia held that the statute was indeed vague because it defined sexually-oriented adult uses based on an establishment's "substantial business purpose" yet provided no further definition or explanation as to how "substantial business purpose" is to be determined. The statute fails to give fair notice to reasonable persons as to whether their establishments qualify as sexually-oriented adult uses and it provides no clear guidelines to the County's employees charged with enforcing the statute

Lancaster v. Effingham County

Georgia Court of Appeals
 May 24, 2005
 273 Ga. App. 544

Lancaster and other taxpayers filed suit against Effingham County and members of its Board of Commissioners claiming that the Board took several unauthorized actions regarding the purchase and sale of land, the re-zoning of property, and the calling of meetings following the County's acquisition of land in efforts to construct a new water treatment facility. The Georgia Court of Appeals affirmed the trial court's ruling in favor of the County holding that the County's purchase and sale was not improper because a county has broad discretion in determining the manner and extent to which it will acquire property for its use. County actions taken in good faith will not be disturbed by the courts. Further, the County did not violate the requirements of the Open Meetings Act because it gave proper notice of the meeting to amend the budget and there was no evidence that the Board intentionally omitted the "general reserve fund discussion" (the subject of one of the defendants' complaints) from the agenda prior to the meeting for the purpose of deceiving the public. The Court also held that the defendants did not have standing to challenge the rezoning of the property because neither of them lived adjacent to the property nor would they be significantly affected by the change.

Screven County Planning Commission v. Southern States Plantation LLLP

Supreme Court of Georgia
 June 6, 2005
 279 Ga. 404

The Supreme Court of Georgia partially reversed and partially affirmed the trial court's granting of mandamus relief to Southern States Plantation. The Court held that the trial court was correct in ruling that Section 6.1 of the County's Land Development Act was ambiguous and could not be construed to require Southern States to pave two existing unpaved County roads in order to have their sketch

plan approved. The Court ruled that the phrase "within the subdivision" appears to contemplate streets that are interior streets of the subdivision and if "streets" included existing county roads, the Act would unreasonably require developers to pave existing unpaved county roads abutting a subdivision regardless of the subdivision size. The Court further held that though this section of the Act was ambiguous, the trial court erred in its decision that Southern States had a vested right to the approval of their sketch plan because the subdivision's impact on traffic was in dispute. The Court ruled that the Planning Commission was not given an opportunity to exercise its discretion in the determination of whether existing roads providing primary access could adequately serve the additional traffic that would be generated by the subdivision.

Buckner v. Douglas County

Georgia Court of Appeals
 June 20, 2005
 273 Ga. App. 765

Buckner entered into an agreement to purchase property in Douglas County in April 2002 that was reclassified by a May 2002 zoning amendment. Buckner filed suit against the County and its Board of Commissioners for the County's refusal to issue building permits in conformity with his property's classification under the prior zoning ordinance after he had received promises and a written agreement from County officials and the Board of Commissioners that he would be allowed to develop the property under the prior ordinance. The Georgia Court of Appeals affirmed the trial court's ruling that the agreement between Buckner and the Board was unenforceable because the Board's letter (the agreement) to Buckner amounted to an agreement to amend the zoning ordinance that invoked the notice and hearing requirements of the Zoning Procedures Law. These requirements were not followed by the Board and an amendment of a zoning ordinance in violation of such requirements is without any legal force or effect. The Court further ruled Buckner did not acquire a vested right to develop property in conformity with prior zon-

ing rules because he did not conclude his purchase nor make any substantial expenditures in reliance on issuance of a building permit until after the ordinance had been amended.

Northside Corporation v. City of Atlanta

Georgia Court of Appeals
July 26, 2005
275 Ga. App. 30

Northside Corporation filed suit against the City of Atlanta appealing the decision of the City's zoning board denying Northside's building permit to add floor space to the back of its package store. The dispute was based on whether the term "location" in the ordinance, which set the distance requirements that were the basis of the City's denial of the permit, referred to the building itself or to the parcel of land. The trial court refused to interpret the zoning ordinance, determining that the critical issue was the Board's interpretation of the City's zoning code and the court's function was only to determine if the Board's interpretation of the Code was reasonable--not to interpret the Code. The Georgia Court of Appeals held that the trial court erred in its refusal to interpret the Code. The Court noted that the "arbitrary or capricious" standard relied on by the superior court in its refusal applies to the review of a zoning board decision, not to the interpretation of a zoning ordinance. "Construction of a zoning ordinance, under the facts, is a question of law for the courts." The Court ruled that the ordinance plainly highlights that compliance with distance requirements are to be determined by a measurement of a straight line from the closest point of the property line of the package store site to the closest property line of any of the specified uses listed in the ordinance.

Massey v. Butts County

Georgia Court of Appeals
September 1, 2005
275 Ga. App. 478

Massey filed suit against Butts County and other defendants seeking removal and a permanent injunction alleging that a barn constructed on the property of his neighbor, authorized by a build-

ing permit from the County, violated certain zoning ordinances. The Georgia Court of Appeals affirmed the trial court's dismissal of Massey's claims holding that because Massey is essentially challenging the government's decision to grant his neighbor's building permit for the construction of the barn and seeks the affirmative relief of having the permit rescinded and the barn destroyed, Massey is required to show special damages in order to have standing to file suit. The Court further noted that the remedy by injunction is "to prevent, prohibit, or protect from future wrongs.. and does not afford a remedy for what is past."

Legacy Investment Group, LLC v. Kenn

Supreme Court of Georgia
October 24, 2005
279 Ga. 778

The Supreme Court granted Legacy Investment Group's application for discretionary appeal after the superior court granted summary judgment to the defendants in Legacy's suit against Fulton County and its commissioners where Fulton County denied Legacy's request to rezone certain property owned in the county by Legacy. The Supreme Court of Georgia reversed the superior court's judgment holding that summary judgment was improper because factual issues exists as to whether there is a viable economic use for the property under current zoning, thus creating a factual issue regarding whether the existing zoning is significantly detrimental to Legacy. The Court further noted that an issue of fact also exists regarding whether the existing zoning is substantially related to public welfare.

