

Real Property Law Section NEWSLETTER State Bar of Georgia

A Publication for Real Property Lawyers

Spring 2011



COMMENTS FROM THE CHAIR

*Patrise M. Perkins-Hooker
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"Protect and serve" has been the theme of the activities of the Real Property Law Section Executive Committee this year. We have acted on behalf of the section to seek confirmation and clarification of the Witness Only and Unauthorized Practice of Law ("UPL") provisions, designed to protect the public by preserving the definition of the practice of law and the responsibilities entrusted to attorneys. We are working with the Georgia Real Estate Closing Attorneys Association ("GRECAA") to seek an Opinion from the Formal Advisory Opinion Board to clarify the ambiguities created by the practices of many lenders.

Many of these lenders are trying to force licensed Georgia lawyers to close residential loan transactions without the closing attorney reviewing the title, explaining the contents and legal effects of the documents, and disburse monies through an IOLTA account. The actions of these lenders have created a complex situation which does not fit squarely under the legal definition of UPL. Their actions force us as a section to seek redress against the members of the legal community who engage in essentially "Witness Only" closings without adhering to the Rules of Professional Conduct. Our section has agreed to work with GRECAA on a joint taskforce to look at a comprehensive approach to address the problem. In the interim, we are encouraging our members to report actions by attorneys who engage in these practices to the State Bar Disciplinary process. Please take the time to stem the tide of lenders using these practices by reporting violating attorneys.

Our Legislative Committee has been doing an outstanding job with tracking legislation that the section has introduced, providing technical assistance to members of the legislature, and responding to real estate related legislation. Congratulations are due to John Taylor and Gayle Camp, our phenomenal Legislative Committee Co-Chairs, for the countless hours of time the two of them, and the members of their committee, have expended on our behalf.

In addition to the section's work in the above areas, we have received the results of the survey which was conducted in

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The Law and Reality of Confirmation Actions Step Closer Together: *Flat Shoals Land Holding, LLC vs. Decatur First Bank* *T. Matthew Mashburn Stites & Harbison*

As foreclosures continue to rise and remain a constant in Georgia, in the recently decided case of *Flat Shoals Land Holding, LLC v. Decatur First Bank*, 307 Ga. App. 536, 705 S. E. 2d 311 (2011), the Georgia Court of Appeals took the next logical step in reconciling the requirements of the Georgia confirmation statute with the realities of today's courthouse practices.

Georgia Confirmation law requires that the sale be reported to the Superior Court Judge of the County where the property is located within thirty days of the sale in order to collect a deficiency judgment.¹ Most prudent practitioners avoid difficulties by taking the law at its face value and actually reporting the sale directly in the presence of the Judge. Usual practice is to have the Judge sign an Order acknowledging that the report has been made and that the report was made within thirty days of the date of the foreclosure sale.

The property at issue was sold at foreclosure back to Decatur First Bank (hereinafter "the Bank") for \$175,000 on May 5, 2009. On May 13, 2009, the Bank filed a petition for confirmation of the foreclosure sale under OCGA § 44-14-161 with the clerk of the DeKalb County Superior Court. The petition was denominated "Report of Foreclosure Sale under Power of Sale and Petition for Confirmation of Such Foreclosure Sale." On the

¹ The failure to seek a confirmation does not eliminate the debt but merely prevents the Lender from collecting on the debt.

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December. Thank all of you who took the time to respond! A summary of the information provided in the survey is presented in this newsletter. We will be incorporating the information that we received as a part of our future planning.

We have also continued our efforts to reach out to areas outside of the Metro Atlanta area to sponsor workshops. Look for the announcement of the upcoming date for a Fundamentals Seminar scheduled for North Georgia. Noel Schweers, our RPLS Executive Committee Chair-Elect, has done an excellent job with finalizing the agenda for the Real Property Law Institute and we hope to see all of our members in Destin, Florida May 5th to May 7th. Our Annual Meeting will be held on Saturday, May 7th and all RPLS members are invited to be present to vote on our proposed slate of officers for the 2011-2012 year.

Finally, remember that the State Bar Elections will be held during the month of April. The ballots will be mailed out on April 1st and the deadline for submitting your vote is May 2nd at 11:59 p.m. Please take the time to vote!

Patrise

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same day that the petition was filed, Nicole Robben, legal assistant to the Bank's counsel, delivered a file-stamped copy of the petition to the court's receptionist at the central reception desk on the floor where the chambers of the assigned judge, Judge Daniel M. Coursey, Jr., were located. According to the affidavit of Cathy W. McCumber, the superior court administrator, attorneys and persons acting for attorneys routinely deliver packages and envelopes to the receptionist sitting at the reception desk on the floor where the judges' offices are located. Periodically, the receptionist alerts the judge's office that a delivery has been left for the judge; and staff members to the judges routinely stop by to check for packages left for their judge. Alleging improper service and notice to the trial Court Judge, the former borrower, Flat Shoals, moved to dismiss the confirmation action. At the hearing on Flat Shoals's motion to dismiss for failure to report the sale directly to the Judge, the Judge testified that due to security concerns at the DeKalb County Courthouse, no one is allowed to proceed past the receptionist without special permission. The Judge also testified, "Ms. Nicholson is my calendar clerk and she handles all these matters for me."

There are three distinct paths to comply with the statute's provisions on how to accomplish a confirmation action. First, there is an absolute safe harbor where the report is made directly to the Judge in the Judge's presence within thirty days of the sale. Second, there is a path that is always incorrect. The foreclosing lender may not simply file the confirmation action with the clerk

within thirty days without any attempt to present the petition to the judge (see *Lanier Bank & Trust Co. v. Nix*, 221 Ga. App. 323, 324, 471 S.E.2d 229 (1996)). Then, there is the third path which reflects the reality of courthouse procedures reflected in the line of cases culminating in *Cornelia Bank v. Brown*, 166 Ga. App. 68, 303 S.E.2d 171 (1983) of which Flat Shoals is the latest installment.

In *Cornelia Bank v. Brown*, the bank seeking confirmation presented its petition within 30 days of the sale at the chambers of the superior court judge in the proper county but the judge was not there. His secretary, acting upon authority given to her by judge, affixed the judge's signature stamp to the order and scheduled a hearing on the petition. The same judge later ruled that the bank had not complied with the reporting requirements of OCGA Section 44-14-161(a) because the petition had not been presented to the judge personally. The Court of Appeals reversed on the ground that the bank had presented its petition to the office of the superior court judge in the manner authorized by the judge.

The "third way" reflected by Flat Shoals and *Cornelia Bank v. Brown* also uphold the traditional deference allowed trial judges to govern their offices in the manner in which they deem best. If the foreclosing lender follows the instructions given to them by the judge, then the statutory requirements have been fulfilled.

In conclusion, when examining all trends, it is still the most prudent practice to directly report the sale to the judge in the judge's presence and have the judge order that the record reflect that the report has been made.

THE REAL PROPERTY SECTION HAS A PRO BONO COMMITTEE?

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Many members of the Real Property Law Section may not be aware of the existence of the Pro Bono Committee or what our committee does throughout the year. As the chair of the Committee, I would like to take this opportunity to inform the section of who the Committee is, what the Committee does and how section members can get involved.

Who we are: The Pro Bono Committee is currently made up of 5 volunteer attorneys: Anisa Abdullahi, Rob Brannen, Jillian Harmon, Angie McCord, and Andrew Stevens. The Committee was created in December 2005 to increase pro bono participation by real property attorneys. This year, the Committee began to offer volunteer opportunities for real property attorneys and their families.

What we do: The first project implemented by the Committee was The Pro Bono Match Maker Project. The purpose of the Pro Bono Match Maker Project is to match volunteer attorneys with pro bono opportunities throughout the State. The Pro Bono Match Maker Project has been active in helping organizations and individuals with their pro bono needs that are specifically tailored to

NOTICE

If you know someone who has not joined the Real Property Law Section, please encourage them to do so.

RPLS HONORS NEW TAX COMMISSIONER

On January 27th, 2011 the Property Tax Subcommittee of the RPLS along with the Taxation Section of the State Bar, co-hosted an event honoring the new incoming Georgia State Revenue Commissioner, Douglas J. MacGinnitie. Over 120 attendees were present in Atlanta at the Commerce Club to hear short presentations from the RPLS Subcommittee, including Co-chair Wheeler Bryant, and Commissioner MacGinnitie. The event was well attended and enjoyed by all.



Patrise M. Perkins-Hooker, Chair, Real Property Law Section.

Attendees at reception honoring new Georgia State Revenue Commissioner

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the real estate industry. Non-profit groups that participate in the Pro Bono Match Maker Project include The IMPACT! Group, Habitat for Humanity, Georgia Legal Services, Atlanta Volunteer Lawyers Foundation, the military section of the State Bar of Georgia, Atlanta Legal Aid and Pro Bono Partnership of Atlanta. There are currently over 120 attorneys on the volunteer list that are willing to take on the pro bono cases that come to our committee through these various organizations. Our volunteer attorneys have provided services such as title searches, land transfers, helping settle disputes over earnest money, landlord/tenant dispute resolution, and assistance to homeowners facing foreclosure.

In addition to the Pro Bono Match Maker Project, this year our Committee has worked diligently in providing volunteer opportunities for real property attorneys and their families. Volunteer events throughout the year give real property attorneys a chance to network with other practitioners while participating in an event that benefits the community. The first organized volunteer event was held at Project Open Hand on Sunday, January 30, 2011. Open Hand helps people prevent or better manage chronic disease through Comprehensive Nutrition Care. This care combines home-delivered meals and nutritional education as a means to reinforce the connection between informed food choices and improved quality of life. The organization has been serving metro Atlanta for over 20 years. Open Hand prepares and sends out over 4,500 meals a day. We were extremely pleased with the response we received from attorneys in our section who were interested in participating in the event. I would personally like to thank the following attorneys who donated their Sunday afternoon for this event: Richard Rubin, Josefina Knapp, Lauren Carey and Andy Shuping. These attorneys, along with some of their family members, spent a Sunday afternoon in the kitchen packaging plates and putting together meals to be delivered to the home bound.

Due to the interest and success of the first event at Open Hand, the Pro Bono Committee is planning to provide a volunteer

opportunity for our members at least once a quarter. Our next event will be participating in Service Juris Day through Hands On Atlanta on Saturday, June 18, 2011 from 9:00-1:00. Every year Hands On Atlanta encourages the legal community to come out one day and participate in a hands on volunteer experience.

This year the project will be cleaning up and beautifying the Lakewood Heights Community in Atlanta. Many of the larger firms around Atlanta participate in this event; however, we are forming a group for attorneys whose firm is not planning on participating in this event. This will be a wonderful opportunity to spend a day outside helping clean up a community and getting to know other real estate attorneys. Our third quarter event will be a build day in the fall with Habitat for Humanity. We will send out the details of how to participate for these events via e-mail closer to the actual day of the event, so be sure to look for these announcements. If you do not receive e-mails from the Real Property Section, check with the State Bar to make sure they have your correct e-mail address in the system.

How to Get Involved: The Pro Bono Committee is always looking for additional volunteers. We receive pro bono requests for transactional and litigation real estate attorneys. If you are interested in becoming a volunteer please contact our project coordinator, Jillian Harmon at jharmon@lawstevens.com. Jillian will add your information to our list of volunteer attorneys. When we are contacted by a group or individual that is looking for assistance, we send an e-mail to all volunteer attorneys on our list with a project description and location. After a volunteer attorney responds to the e-mail agreeing to provide assistance, we put the organization and attorney in direct contact with one another so the two can coordinate the handling of the project. By agreeing to be included on the volunteer attorney list, you are only agreeing to receive e-mails about pro bono projects. You are not obligated in any way to take on projects. Once a project is accepted the volunteer attorney is expected to handle the case and waive their attorney fee; however, volunteer attorneys are never required or expected to pay fees or expenses on behalf of the pro bono client.

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If you would be interested in volunteering but are concerned about the time commitment, our committee can help pair up attorneys based on their specialty. We also have many law students that would be willing to donate their time for our cases but require attorneys to oversee their work. Let us know of your level of interest when you sign up.

If you are aware of any non-profit organizations in Georgia that could use our assistance, please send their contact information to missy@nationsandrobinson.com. While we have done our best to reach out to organizations around the state, we know that there may be smaller organizations that have never been contacted by our group. Also, if you are aware of any volunteer opportunities in your community please let me know. Our goal is to offer events all throughout Georgia but we need the help of our section members to inform us of ways that our section can best help each community.

THE LAW OF FLUIDIC PRECIPITATION A SUMMARY OF GEORGIA LAW REGARDING SURFACE WATER INVASION

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Editor's Note: This is the second part of this article which will appear in three parts over the course of future newsletters—part one appeared in the Winter 2010/2011 edition

C. The Causation Requirement

Liability of uphill owners is by no means absolute. Regardless of whether a plaintiff's claims sound in nuisance, trespass, or negligence, causation remains a central element of a plaintiff's case, as an essential element of a tort claim under Georgia law is the existence of damage proximately caused by the alleged tortious act.¹ A temporal connection between the uphill project and conditions downhill is not enough, because "[t]he mere fact that one event chronologically follows another is along insufficient to establish a causal relationship between them." In order to prevail, a plaintiff must "link the work performed" uphill to his drainage problems in order to establish causation.² As to a claim of nuisance, "[t]he essential element of nuisance is control over the cause of the harm. The tortfeasor must either be the cause or a concurrent cause of the creation, continuance, or maintenance of the nuisance."³

An example of a plaintiff's failure to prove causation is *Bennett Street Properties, L.P. v. CSX Transportation, Inc.*, 248 Ga. App. 686, 548 S.E.2d 619 (2001). In *Bennett Street*, the Georgia Court of Appeals affirmed a directed verdict for the defendant property owners, holding that the plaintiff had failed to present a prima facie showing that its adjoining property owner acted in any way to cause or contribute to the plaintiff's intermittent flooding, where the plaintiff's expert did not know whether a culvert on the adjoining property actually caused the flooding, where the flooding may have

been the result of uphill construction, and no studies had been conducted to determine whether water from sources other than the culvert might have caused the flooding problem.⁴

The recent case of *Lore et al. v. Suwanee Creek Homeowners Association, Inc.*, 305 Ga. App. 165, 699 S.E.2d 332 (2010) further demonstrates the pivotal nature of the causation requirement. In *Lore*, Rebecca and David Lore sued their homeowners' association, alleging claims for nuisance, trespass, and negligence based on water runoff from a recreation area owned by the association, adjacent to the Lores' property. The Lores also asserted a personal injury claim based upon injuries Mrs. Lore sustained when the ground upon which she was standing collapsed, attributing the collapse to the repeated flowing and storm water runoff washing away the earth under what appeared to be solid ground. The trial court granted summary judgment to the homeowners' association as to the Lores' personal injury claims and denied summary judgment as to the remaining claims for trespass, nuisance, and negligence based on water runoff. The Court of Appeals reversed both of these decisions. As to the stormwater runoff claims, the Court of Appeals reiterated the rule that "[c]ausation is an essential element of nuisance, trespass, and negligence claims":

To establish proximate cause, a plaintiff must show a legally attributable causal connection between the defendant's conduct and the alleged injury. The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to grant summary judgment for the defendant.

Lore et al. v. Suwanee Creek Homeowners Association, Inc., 699 S.E.2d at 338-39. The Court closely scrutinized the Lores' evidence, and concluded as follows:

Here, premitting the efficacy of SCHOA's other defenses, the Lores have failed to demonstrate a causal connection between their damages and any action (or inaction) on the part of SCHOA that artificially increased the water runoff from its upper land to the Lores' lower property or caused the water to concentrate, collect, and discharge on their property in a harmful manner different from that which it would have received if it simply ran down upon it by the laws of gravity. Mrs. Lore's testimony that she observed water "coming specifically from the [SCHOA] property" from pipes is simply insufficient. There is no evidence regarding the amounts or sources of water runoff from the Recreation Area to the Lores' property before the property was developed. And the Lores have presented no testimony, expert or otherwise, that any damage to their property was a result of an increase in quantity or concentration of water caused by SCHOA and different than if "[the water] simply ran down upon it from the upper [property] by the law of gravitation. Rather, the Lores rely on the

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mere fact that the drainage ditch was not installed by the developer or SCHOA thereafter, but they do not causally link this fact to the soil and landscaping washing away. The Lores' failure to present evidence of proximate cause is fatal to their claims for nuisance, trespass, and negligence based on water runoff from SCHOA property. Accordingly, the trial court erred by denying summary judgment to SCHOA on these claims.

Lore, 699 S.E.2d at 339.

These findings are entirely consistent with Georgia precedent on the causation issue. What makes them remarkable in the *Lore* case, however, is the other half of the Court's opinion. The trial court had granted summary judgment to the homeowners' association on Mrs. Lore's personal injury claims. The Court of Appeals reversed that ruling, finding that there were genuine issues of material fact as to (a) whether the association had failed in its duty to conduct a reasonable inspection of the sinkhole and surrounding area, and (b) whether Mrs. Lore had exercised ordinary care for her personal safety. The Court of Appeals specifically concluded "that the issue of whether SCHOA had constructive knowledge of the hazards associated with the sinkhole and surrounding areas were raised both before the trial court and on appeal." *Id.* What makes the Court's ruling on the stormwater runoff issues remarkable is the Court's apparent acknowledgment that the sinkhole presented or could have presented a hazard, and that jury questions existed regarding whether the homeowners' association could be held liable for Mrs. Lore's personal injuries. Without saying so in so many terms, the Court's opinion seems to suggest that while the Lores failed to establish proximate cause of increased water runoff, they had adequately presented evidence that Mrs. Lore's personal injuries may have been proximately caused by the actions or inactions of the homeowners' association relative to the sinkhole. An explanation for this apparent contradiction may be the fact – although the opinion is somewhat unclear on this point -- that the sinkhole was on the homeowners' association's recreation area property and not on the Lores' property, whereas the Lores' claims for trespass and nuisance related to stormwater runoff onto their own property. Nevertheless, in view of the Court's receptiveness to Mrs. Lore's personal injury claims, *Lore* clearly demonstrates that proximate cause absolutely must be established for a plaintiff's water runoff claims to be viable.

Related to the causation requirement is the issue of the plaintiff's own contributory negligence. To the extent that the plaintiff's claims sound in negligence, evidence of the plaintiff's contributory negligence or failure to avoid consequences will be admissible. In *Bailey v. Annistown Road Baptist Church, Inc.*, the plaintiff asserted claims for negligence, trespass, and nuisance against the church and county in connection with water intrusion on her property. At issue in the case was Bailey's decision not to install French drains on her property with funds received from a partial condemnation by the county, which defendants contended would have significantly alleviated the plaintiff's water problems. The trial court admitted the evidence of Bailey's decision not to install French drains, and the jury initially found Bailey 50 percent at fault for the damages to her property. Although the Court of Appeals reversed the jury's first verdict finding Bailey 50 percent at fault (based upon faulty jury charges), the Court of Appeals affirmed the jury's second verdict finding Bailey 49 percent at fault and found no error in the trial court's admission of evidence regarding Bailey's deci-

sion not to install drains.⁵ As the Court of Appeals explained, "evidence showing that the plaintiff 'is to some degree responsible for the injury or damages claimed' is relevant and admissible for reduction and apportionment of damages in cases involving injury to persons or property. . . . 'Closely allied to the doctrine of contributory negligence is the rule of 'avoidable consequences,' which denies recovery for any damages which could have been avoided by reasonable conduct on the part of the plaintiff.' . . . [A] plaintiff injured by the negligence of another 'must mitigate his damages as far as is practicable by the use of ordinary care and diligence.'"⁶

To completely prevail, therefore, a plaintiff must establish that the defendant proximately caused his damages, and that there was no "reasonable conduct" on the part of the plaintiff which could have avoided or lessened his damages.

D. The Role of Non-Expert Testimony

Expert testimony is not always dispositive in surface water invasion cases. Defendants cannot be assured that their experts' testimony will carry the day. In *Ponce de Leon Condominiums et al. v. DiGirolamo et al.*, 238 Ga. 188, 232 S.E.2d 62 (1977), a seminal Georgia Supreme Court surface water case, landowner DiGirolamo brought suit against the developer of adjacent condominiums, alleging that the building of the condominiums had caused his property to receive unnatural quantities of surface waters. The trial court awarded actual and exemplary damages, injunctive relief, and attorneys' fees, and the Georgia Supreme Court affirmed. Among the errors enumerated by *Ponce de Leon Condominiums* was the contention that the award of injunctive relief was contrary to the evidence. In support of this contention, the appellant "pointed out that all of the expert testimony introduced at trial was to the effect that the engineering design utilized by appellants could not in theory have resulted in the accumulation or discharge of surface waters onto appellee's property in excess of that which existed under natural conditions prior to the development."⁷ The Georgia Supreme Court held, however, that the jury "was authorized to conclude otherwise from the nonexpert testimony introduced, the photographic evidence of the conditions existing before and after development, and their own site inspection during trial. The record also provides ample evidence upon which the jury could conclude that the problem would continue unless enjoined by the Court."⁸ In other words, even in the face of uncontroverted expert testimony that an engineering design is sufficient to prevent discharges of unnatural quantities of surface water, a plaintiff can prevail based upon his non-expert testimony and photographic evidence to the contrary. *Ponce de Leon* is and has been the law of Georgia for three decades and has effectively shifted the odds in surface water cases greatly in favor of plaintiffs and against defendants, no matter how unassailable defendants may believe their engineering practices to be.⁹

Newton's Crest Homeowners' Association v. Camp et al., 2010 WL 3719894 (Ga. App. Sept. 24, 2010) further illustrates the role of lay testimony versus expert testimony and demonstrates that, while expert opinion can preclude a grant of summary judgment, it cannot support it. In *Newton's Crest*, Donald and Brenda Camp owned property in Gwinnett County that was downhill from the Hunter's Pond subdivision, which was developed in the 1970s.

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Historically excess stormwater from Hunter's Pond drained into a natural creek on the Camps' property. In 2001 developer Kennedy began clearing land on a new subdivision, Newton's Crest, uphill from Hunter's Pond. According to Donald Camp, Kennedy's activities at Newton's Crest caused an increase in the amount and velocity of stormwater, silt, and mud running onto his property and into his creek from Hunter's Pond each time it rained, causing substantial erosion, tree loss, and other damage to his property and reducing its value. Camp testified that he had lived on his property for over thirty years and that he had "never had any problems" with excess stormwater running onto his property until Kennedy cleared the Newton's Crest property and began development of the subdivision. The Camps presented photographs of their property that showed that they alleged to be the widening of their creek caused by erosion and the increase in runoff from Hunter's Pond. The Camps filed suit against Kennedy and others, alleging that Kennedy was negligent when it developed the Newton's Crest subdivision and modified Hunter's Pond, and that the increase in stormwater runoff resulting from Kennedy's actions constituted a nuisance and continual trespass onto their property.

Kennedy moved for summary judgment, which motion the trial court denied. On appeal, Kennedy contended that the denial of his motion for summary judgment was in error, arguing that the Camps failed to present any evidence that any act of omission on the part of Kennedy caused or contributed to their alleged damages. According to Kennedy, the camps' allegations regarding the cause of the excess stormwater runoff and siltation were based upon nothing but their "mere speculation and conjecture," were insufficient to eliminate other possible causes for the increased stormwater runoff, and were insufficient to contradict Kennedy's expert's opinion that Kennedy was not responsible for any increase in the runoff. The Court of Appeals disagreed.¹⁰

The Court of Appeals reiterated that causation is an essential element of nuisance, trespass, and negligence claims, and the rule that lower lots owe a servitude to higher lots provided the owner of the latter has done no act to increase stormwater flow by artificial means. Applying these principles, the Court of Appeals held that "the questions of whether Kennedy's acts or omissions artificially increased the amount or velocity of water discharged onto the Camps' property and whether such acts or omissions caused or contributed to the Camps' damages are ordinarily for the jury to decide; the trial court may only resolve these questions on a motion for summary judgment if the evidence is either plain and undisputed or based purely on speculation or conjecture."¹¹ The Court reiterated Camp's testimony that he had never had any problems with excess stormwater runoff until Kennedy began clearing the Newton's Crest subdivision in 2001, that Kennedy's work on the subdivision property and on Hunter's Pond significantly increased the amount and velocity of stormwater, silt, and mud running onto his property and into his creek each time it rained, that the excess runoff caused substantial erosion, tree loss, and other damage to his property, and that even after Kennedy modified the Hunter's Pond spillway in 2003, the runoff problem became worse. The Court found this testimony to be competent and admissible evidence, not "mere speculation or conjecture."¹² Kennedy presented an expert affidavit in which the expert opined that Kennedy's "development of Newton's Crest did not increase the peak rate of storm water discharge onto [the Camps'] property above and beyond the pre-development peak rate, nor did it artificially concentrate the storm water discharge [onto their] property." The Court held, however, that such expert opinion evidence "did not entitle Kennedy to summary judgment, but simply was additional evidence on the issue of causation for the jury to consider. 'Opinion testimony can preclude (but not support) a grant of summary judgment.'¹³ The Court cited to *Ponce de Leon v. DiGirolamo* for the proposition that notwithstanding a defendant's expert's opinion that a particular engineering design "theoretically could not have caused an increase in the discharge of water onto the plaintiff's property, the jury was authorized to conclude otherwise from the plaintiff's nonexpert testimony and the photographic evidence presented."¹⁴ Expert opinions are not dispositive and cannot be relied upon as such.

End of Part Two -To be continued.

Footnotes for Surface Water Article

¹ See, e.g., *Walls et al. v. Moreland Altobelli Associates, Inc.*, 290 Ga. App. 199, 659 S.E.2d 418 (2008).

² *Walls v. Moreland Altobelli Associates, Inc.*, 290 Ga. App. at 200-01, 659 S.E.2d at 420-21.

³ *Grinold v. Farist*, 284 Ga. App. 120, 122, 643 S.E.2d 253, 255 (2007).

⁴ *Bennett Street Properties, L.P. v. CSX Transportation, Inc.*, 248 Ga. App. 686, 548 S.E.2d 619 (2001).

⁵ *Bailey v. Annistown Road Baptist Church, Inc.*, 301 Ga. App. 677, 689 S.E.2d 62 (2009).

⁶ *Id.*, 301 Ga. App. at 682, 689 S.E.2d at 69 (citations omitted). See also *Goode v. Mountain Lake Investments, LLC*, 271 Ga. 722, 524 S.E.2d 229 (1999), further discussed in Section E below, in which the Georgia Supreme Court affirmed the trial court's requirement that the uphill defendant contribute 50 percent of the cost to construct a ditch across the downhill plaintiff's property, where the plaintiffs were 50 percent responsible because they had allowed the ditch to become clogged.

⁷ *Ponce de Leon Condominiums et al. v. DiGirolamo et al.*, 238 Ga. at 190-91, 232 S.E.2d at 65 (1977).

⁸ *Ponce de Leon v. DiGirolamo*, 238 Ga. at 191, 232 S.E.2d at 65.

⁹ See also, *Green v. Eastland Homes, Inc. et al.*, 284 Ga. App. 643, 647, 644 S.E.2d 479, 482 (2007)(citing to *Ponce de Leon v. DiGirolamo* for the proposition that the jury could rely on nonexpert testimony and photographs regarding runoff to reject expert testimony to the contrary).

¹⁰ *Newton's Crest Homeowners' Association v. Camp et al.*, 2010 WL 3719894.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*, citing to *Ponce de Leon v. DiGirolamo*, 238 Ga. 188, 232 S.E.2d 62 (1977).

UPCOMING CALENDAR DATES REAL PROPERTY LAW SECTION

— 2011 —

April 19th, 2011
RPLS monthly meeting
(State Bar Headquarters)

May 5th - 7th, 2011
Real Property Law Institute
(Sandestin Hilton)

May 20th, 2011
Spring Materialmen's Liens Seminar
(State Bar Headquarters)

Don't forget to vote in
the upcoming State Bar Elections.

Deadline to vote is May 2nd.

REAL PROPERTY LAW SECTION SURVEY RESULTS

Anisa I. Abdullahi

Arnall Golden, Gregory LLP, Atlanta

In an effort to investigate how the Real Property Law Section can provide better services to its members, the Executive Committee recently undertook to question the membership on a variety of matters via an online survey which was distributed on December 8, 2010. The survey questions were designed to assess the current state of the membership by asking respondents, among other things, to indicate (1) their primary areas of practice, (2) the location of their practice (by County) and (3) which seminars sponsored by the Real Property Law Section they had attended. The survey was also designed to obtain specific input from the respondents on existing programs and benefits offered by the Real Property Law Section for the Executive Committee's future planning purposes by asking respondents, among other things, (1) to give their reasons for attending or not attending various seminars sponsored by the Real Property Law Section and (2) to offer alternative locations for the annual Real Property Law Institute. In the end, over 230 members representing nearly 10% of the membership of the Real Property Law Section responded to the call by submitting their answers to the questions posed in the survey. A summary of the results follows.

Who are our members?

The largest group of responses came from those who identified themselves as residential closing attorneys, with a total of 92 responses (or 41.1% of those responding). Respondents who identified themselves as commercial closings attorneys were the second largest group with 50 responses (or 22.3% of those responding). The next largest groups of responses came from those members who identified themselves as real estate finance and development attorneys, with 27 responses (or 12.1% of those responding), and real estate litigation attorneys, with 24 responses (or 10.7% of those responding). The remaining results came from attorneys whose primary practice involved title examinations and insurance, land use and zoning, property tax and landlord/tenant law.

Where are our members?

A total of 88 (or 38.6%) of the respondents indicated that they were located in Fulton County, followed by Cobb County with 27 (or 11.8%) of the respondents. DeKalb, Chatham, Gwinnett, Richmond and Oconee Counties also had a number of respondents. Overall, a total of 53 counties in Georgia were represented in the results of the survey, plus one submission that came from outside of the state.

In what size law firms do our members work?

The largest average firm size came from those attorneys who identified their practice area as falling within the category of "title examiners and insurance", with an average size of approximately 200 attorneys. The second largest average firm size was tied to the commercial closings practice area, with an average size of approximately 115 attorneys. Overall, the firm sizes ranged from 1 to 1000 attorneys.

Which seminars do our members attend and why?

Of those who answered this particular set of questions, 130 (or 56.5%) of the respondents had previously attended the Title Standards Seminar, 54 (or 26.0%) of the respondents had previously attended the Fall Commercial Seminar, 78 (or 37.9%) of the respondents had previously attended the Spring Residential Practice &

Procedures Seminar, 40 (or 20.2%) of the respondents had previously attended the Mechanics and Materialmen's Liens Seminar, and 105 (or 56.8%) of the respondents had previously attended the Annual Real Property Law Institute held in May of each year. Most respondents had previously attended at least one of the regular seminars.

In general, the primary reason for choosing to attend a particular seminar was that the topic was relevant to the attorney's area of practice. In most cases, the primary reasons for not attending a particular seminar were that the topic was not relevant to the attorney's practice area or the attorney did not need the Continuing Legal Education hours. The only exception was the Annual Real Property Law Institute, in which case the primary reasons for not attending were the location and price of the seminar. Respondents were asked to indicate their preference for a location for the Annual Real Property Law Institute and, of those who answered this question, most respondents preferred a primary location for the seminar rather than alternating locations. The top choices for this particular seminar were Atlanta, Georgia, if the seminar was always held in a primary location, and Amelia Island and Destin, Florida, if the seminar was held in alternating locations.

Which programs and services do our members see as a benefit?

Respondents were also asked to rate the various programs and benefits offered in connection with their membership in the Real Property Law Section. These programs and benefits included the listserv, the website, opportunities to participate in pro bono cases and volunteer projects, the forms library, the fundamentals seminars, the newsletter, legislative monitoring and networking events. Although no particular program or benefit garnered a clear top ranking, the listserv and pro bono programs received the highest marks. At the bottom of the list were legislative monitoring and the website. Further review of the survey results, however, revealed that although the listserv and pro bono programs received the highest rankings, they also received nearly the same number of low rankings. In other words, what some respondents considered to be the most valuable, others found to be the least valuable.

The results also indicated that the Real Property Law Section's website and newsletter are highly supported. A large majority of respondents had visited the website and an overwhelming majority of respondents receive the newsletter. Most respondents indicated that they would prefer to receive the newsletter by email, which is an option the Executive Committee will consider offering in the future. Additional comments provided by the respondents revealed that improvements to the website and newsletter could be made in terms of better organization and increasing the discussion of recent cases and case law trends.

Final comments and thank you!

The survey results indicated much of what we have known all along. Our membership is located throughout every part of Georgia and practices in a variety of real estate matters. In addition, while there are many things the Real Property Law Section is doing right in terms of offering programs and other benefits to its membership, there is always room for improvement.

The Executive Committee would like to sincerely thank everyone who took the time to complete the survey. The results of the survey will be tremendously helpful in planning future Real Property Law Section events and Continuing Legal Education sessions. This summary will be posted on our website for future reference. Look for more on this in the future!

REAL PROPERTY LAW SECTION

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RPLS HAS OVER 300 ATTEND SPRING RESIDENTIAL SEMINAR

The RPLS, in conjunction with the Georgia ICLE, presented the annual Spring Residential Practice Real Estate Seminar on February 11, 2011. This program, aimed at helping closing practitioners fine tune their day to day activities and challenges, was presented live at the Georgia Public Broadcasting Studios and broadcasted throughout the State. Over 300 attendees participated in the program, both in person, through satellite and on replay. Topics ranged from updates on RESPA, Frank-Dodd and foreclosures to helpful tips on HOA trends, Probate and Estate basics and tips for maintaining your practice. Co-chairs Jeff Rubnitz of Savannah and Monica Gilroy of Atlanta gathered practitioner and industry leaders as presenters. The program received high marks by the attendees and is an annual event.

WAYS TO CONTRIBUTE

For more information about the RPLS , please visit our webiste: garealpropertylaw.com. For more information on submission and editorial guidelines for the newsletter, please contact Newsletter Editor, Monica Gilroy, at: mkg@dickensongilroy.com