SPRING SEMINAR 2016

March 23, 2016

COBB GALLERIA CENTRE

EVENTS WIRELESS\WIRED INTERNET SETUP INSTRUCTIONS

1. Turn on your device and open your web browser. The Events Internet login screen below will appear by default. If you should not get a login page, please verify that your system's network adapter is setup for **DHCP** so that it may access our **EVENTS** network. If your network adapter is setup for a **Static IP** address, please change your adapter to **DHCP** or contact your company's IT Department to do that for you.

Your Username is **dixie** and the Password is **dixie2016.** Both ID and password is in lower caps. The Username and Password will be provided to you either by the Show Manager and/or your CGC Event Coordinator.

COBB GALLERIA CENTRE

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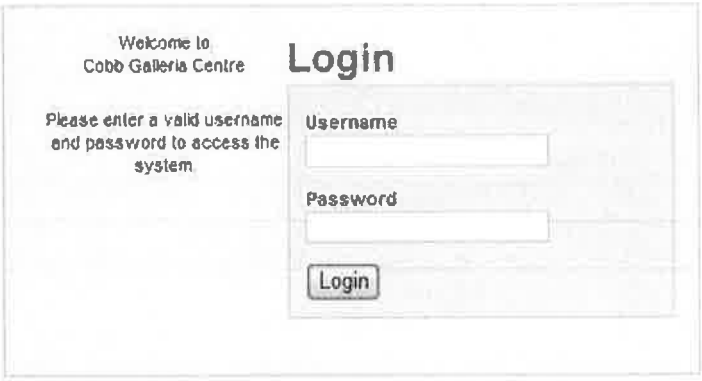

2. As long as you're connected to the **EVENTS** wireless or the wired network, you will not need to login again, but if you leave your device idle\off for an extended period of time then you will be logged off and then you must repeat the previous login step.

3. **Wireless Internet Disclaimer**: Wireless connectivity is part of an emerging technology and is subject to interference and manipulation beyond the Lessor's control. Wireless connectivity is provided on an "as is" and "as available" basis and Lessor does not warrant that this service will be uninterrupted, error free, or free of viruses or other harmful components. Users should be aware that there are security, privacy, and confidentiality risks inherent in wireless communications and technology, and Lessor does not make any assurances or warranties relating to such risks. By using wireless connectivity, users agree that Lessor is not liable for any costs or damages arising from use of this service and Lessor does not control any materials, information, products, or services on the Internet. When connectivity and security are critical, hard-wired connections are available and recommended.

Spring 2016 SEMINAR

Evaluation Form

In order to improve our seminars and maximize their value to you, we would appreciate your feedback.

1. Overall evaluation of the seminar:
   Please circle the number that corresponds with your opinion of each of the following seminar elements:

	Excellent	Very Good	Average	Fair
a. Overall opinion of the seminar	1	2	3	4
b. Organization of the seminar	1	2	3	4
c. Impression of written material	1	2	3	4
d. Quality of Speakers	1	2	3	4
e. Opinion of subject matter	1	2	3	4
f. Overall value of seminar	1	2	3	4
g. Facilities	1	2	3	4

2. What did you like most about this seminar? Any feedback for improvement?

   _____

   _____

3. What did you like least about this seminar? Any feedback for improvement?

   _____

   _____

4. Do you have any topics you would like to see covered in future seminars?

   _____

   _____

5. Other comments or suggestions:

   _____

   _____

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March 23, 2016

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SPRING 2016 AGENDA March 23, 2016

7:45	***Registration Opens***
8:20	***Welcome Remarks: Amanda Calloway, Esq.*** ***Education Committee Chairperson***
8:30-9:30	***New ALTA Survey Standards*** **Mark Chastain** **Chastain & Associates, P.C**
9:30-10:30	***Business Entities and Title To Property*** **Clyde Mize, Esq.** **Morris, Manning & Martin, LLP**
10:30-11:00	***Washington Update*** **Senator Johnny Isakson** **United States Senator**
11:00	***15 Minute Break***
11:15-12:15	***Professionalism*** **Carol V. Clark, Esq.** **Carol Clark Law**
12:15	***Lunch***
1:15-2:15	***Title Claims*** **Tenise A. Cook, Esq.** **Rubin Lublin, LLC**
2:15	***15 Minute Break***
2:30-3:30	***Deed Attestation and Recent Changes Affecting Real Estate Practice*** **Debora Bailey, Esq.** **Gilroy Bailey Trumble LLC**
3:30-4:00	***Alluring Appeals - Current Cases in our Appellate Courts Which Impact your Practice*** **Monica Gilory, Esq.** **Gilroy Bailey Trumble LLC**

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SECTION ONE

New ALTA Survey Standards

Mark Chastain

Chastain and Associates, P.C.

Mark E. Chastain, PLS

Mark is a graduate of Southern Polytechnic State University in Marietta, Georgia and is licensed to practice Land Surveying in Georgia, Tennessee, and North Carolina, and has an application pending in Alabama. He has served on the Georgia Board of Registration for Professional Engineers and Land Surveyors since his first appointment in 2003, and also serves on the Secretary of State's Advisory Committee on Disputed County Boundaries. Mark is President and CEO of Chastain & Associates, P.C. Chastain & Associates, P.C. offers all aspects of Land Surveying, Land Planning, and Consulting in the Southeast.

Licensing and Affiliations:

- AS Civil Engineering Technology 1990 - Southern College of Technology (now SPSU)
- Professional Land Surveyor - **Licensed in Georgia, Tennessee, North Carolina**
- Georgia Board of Registration for Professional Engineers and Land Surveyors (2003-present)
- Georgia Licensed Residential/Light Commercial Contractor
- Georgia Soil & Water Conservation Commission Certified Design Professional
- Gilmer County Surveyor (elected office) 2000-2004
- Gilmer County Board of Commissioners (Chairman 2009-2010, Post 2 2005-2008)
- Northwest Georgia Regional Commission Charter Member (2009-2010)
- Georgia Secretary of State Advisory Panel on Disputed County Lines

CHANGES IN ALTA SURVEY STANDARDS 2011 TO 2016

Specifications for ALTA Land Title Surveys were initially adopted in 1962 and have been revised 8 times since. Previously co-written with the American Congress on Surveying and Mapping (ACSM) which merged with the National Society of Professional Surveyors (NSPS), they are now known as ALTA/NSPS Land Title Surveys as of the 2016 revision. There are also several other changes in the standards. Though none of them are major, some of them will be noticeable and will require mild adapting.

- Previously the fine print required that all public records were to be provided to the surveyor by the insurer, including the adjacent descriptions. While that requirement is still in place, there is now an exception that if they are not provided, the surveyor shall obtain the documents necessary to satisfy statutory requirements (Section 4).
- Utility location requirements have changed. Location of observed utility evidence was formerly Table A item 11(a) but is now a standard requirement (Section 5.E.iii & iv). Table A item 11 is now a hybrid of the 811 "one call", external research, and possibly third party investigation and locate service. The actual scope of service should be discussed if item 11 is specified in the future such that expectations and needs are met, and it may be realized that no item 11 is needed.
- New verbiage is included regarding legal descriptions. Any new description should state that the new description describes the same real estate as the record description or note how it differs. Another new requirement is to identify and include the point of beginning, the remote point of beginning or point of commencement as identified in the record description (and new description if one is prepared). This should resolve the confusion of when a surveyor tries to use a different "tie point" or "point of reference" than the record description uses, by eliminating that option (Section 6.b.ii & iii).
- Distances are now specified to be "ground distances". This does not mean slope distances or distances measured along the surface (such to include ditches, ground profiles, etc.) but to distinguish from "grid distances" as many surveyors use on pre-construction surveys to aid in using GPS equipment. Depending on where a piece of property is located within the respective grid, the use of "grid distances" may distort stated or surveyed distances by much more than accepted tolerances (Section 6.B.iii).
- To aid in clarity, the boundary shall be drawn in a manner that distinguishes it from other lines on the plat. Vacant property is to be noted "no buildings observed". Any negotiated Table A items (#21) shall be explained. The survey shall now be called an "ALTA/NSPS Land Title Survey" (Section 6.D. ii).
- Zoning to be shown on the survey must now come from a zoning report to be provided to the surveyor. The surveyor is no longer required nor responsible to research and certify zoning information. This does not prevent surveyors from preparing zoning reports under separate contract. This is intended to eliminate the option of a cursory look at a county/city GIS website and ordinance, and reporting information that may be incorrect due to variances, zoning conditions, etc. that are only discoverable through proper zoning research (Table A item 6)
- Other less significant Table A changes include: Item 18 no longer includes evidence of a landfill, as ESA Phase 1 reports have become universal in addressing these concerns; Item 18 is now the old Item 19 which is wetlands, which now requires a field delineation by a qualified specialist. It is clarified that Item 20 does not need to state the amount of insurance on the plat. Item 21 is a blank, to be used to specify unique survey requirements to be "negotiated" with the surveyor.

The official 2016 ALTA/NSPS standards, along with a "red line" version that shows all changes from the 2011 standards in standard "strike through and underscore" format are available at our website www.chastainassociates.com on the ALTA Survey page.

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MINIMUM STANDARD DETAIL REQUIREMENTS FOR ALTA/~~ACSM~~NSPS LAND TITLE SURVEYS

(Effective February 23, ~~2011~~2016)

***NOTE** - Attention is directed to the fact that the National Society of Professional Surveyors, Inc. (NSPS) is the legal successor organization to the American Congress on Surveying and Mapping (ACSM) and that these 2016 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys are the next version of the former Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys.*

1. Purpose - Members of the American Land Title Association® (ALTA®) have specific needs, unique to title insurance matters, when asked to insure title to land without exception as to the many matters which might be discoverable from survey and inspection, and which are not evidenced by the public records.

For a survey of real property, and the plat, map or record of such survey, to be acceptable to a title insurance company for the purpose of insuring title to said real property free and clear of survey matters (except those matters disclosed by the survey and indicated on the plat or map), certain specific and pertinent information must be presented for the distinct and clear understanding between the insured, the client (if different from the insured), the title insurance company (insurer), the lender, and the surveyor professionally responsible for the survey.

In order to meet such needs, clients, insurers, insureds, and lenders are entitled to rely on surveyors to conduct surveys and prepare associated plats or maps that are of a professional quality and appropriately uniform, complete and accurate. To that end, and in the interests of the general public, the surveying profession, title insurers and abstracters, the ALTA and the NSPS ~~National Society of Professional Surveyors, Inc. (NSPS)~~ jointly promulgate the within details and criteria setting forth a minimum standard of performance for ALTA/~~ACSM~~NSPS Land Title Surveys. A complete ~~2011~~2016 ALTA/~~ACSM~~NSPS Land Title Survey includes:

(i) the on-site fieldwork required pursuant to ~~under~~ Section 5 ~~herein~~,
(ii) the preparation of a plat or map pursuant to Section 6 showing the results of the fieldwork and its relationship to ~~record~~ documents provided to or obtained by the surveyor pursuant to Section 4 ~~as required under Section 6 herein~~,
(iii) any information from ~~in~~ Table A items ~~herein that may have been requested by negotiated with~~ the client, and
(iv) the certification outlined in Section 7 ~~herein~~.

2. Request for Survey - The client shall request the survey or arrange for the survey to be requested, and shall provide a written authorization to proceed from the person or entity responsible for paying for the survey. Unless specifically authorized in writing by the insurer, the insurer shall not be responsible for any costs associated with the preparation of the survey. The request shall specify that an **"ALTA/~~ACSM~~NSPS LAND TITLE SURVEY"** is required and which of the optional items listed in Table A ~~herein~~, if any, are to be incorporated. Certain properties or interests in real properties, including, but not limited to, marinas, campgrounds, trailer parks, and easements, ~~leased areas~~ leases and other non-fee simple interests ~~areas~~, may present issues outside those normally encountered on an ALTA/~~ACSM~~NSPS Land Title Survey. The scope of work related to surveys of such properties should be discussed with the client, lender and insurer, and agreed upon in writing prior to commencing work on ~~requesting~~ the survey.

The client may need to secure permission for the surveyor to enter upon the property to be surveyed, adjoining properties, or offsite easements.

3. **Surveying Standards and Standards of Care**
   - **A. Effective Date** - The ~~2011~~2016 Minimum Standard Detail Requirements for ALTA/~~ACSM~~NSPS Land Title Surveys are effective February 23, ~~2011~~2016. As of that date, all previous versions of the Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys are superseded by these standards.
   - **B. Other Requirements and Standards of Practice** - ~~Some Federal agencies,~~ Many states and some local jurisdictions have adopted statutes, administrative rules and/or ordinances that set out standards regulating the practice of surveying within their jurisdictions. In addition to the standards set forth herein, surveyors shall also conduct their surveys in accordance with ~~all~~ applicable jurisdictional survey requirements and standards of practice. Where conflicts between the standards set forth herein and any such jurisdictional requirements and standards of practice occur, the more stringent shall apply.
   - **C. The Normal Standard of Care** - Surveyors should recognize that there may be unwritten local, state, and/or regional standards of care defined by the practice of the 'prudent surveyor' in those locales.
   - **D. Boundary Resolution** - The boundary lines and corners of any property being surveyed as part of an ALTA/~~ACSM~~NSPS Land Title Survey shall be established and/or retraced in accordance with appropriate boundary law principles governed by the set of facts and evidence found in the course of performing the research and fieldwork ~~survey~~.
   - **E. Measurement Standards** - The following measurement standards address Relative Positional Precision for the monuments or witnesses marking the corners of the surveyed property.
     - **i.** "Relative Positional Precision" means the length of the semi-major axis, expressed in feet or meters, of the error ellipse representing the uncertainty due to random errors in measurements in the location of the monument, or witness, marking any corner of the surveyed property relative to the monument, or witness, marking any other corner of the surveyed property at the 95 percent confidence level ~~(two standard deviations)~~. Relative Positional Precision is estimated by the results of a correctly weighted least squares adjustment of the survey.
     - **ii.** Any boundary lines and corners established or retraced may have uncertainties in location resulting from (1) the availability, condition, history and integrity of reference or controlling monuments, (2) ambiguities in the record descriptions or plats of the surveyed property or its adjoiners, (3) occupation or possession lines as they may differ from the written title lines, or ~~and~~ (4) Relative Positional Precision. Of these four sources of uncertainty, only Relative Positional Precision is controllable, although due to the inherent errors in any measurement, it cannot be eliminated. The magnitude of the first three uncertainties can be projected based on evidence; Relative Positional Precision is estimated using statistical means (see Section 3.E.i. above and Section 3.E.v. below).
     - **iii.** The first three of these sources of uncertainty must be weighed as part of the evidence in the determination of where, in the surveyor's opinion, the boundary lines and corners of the surveyed property should be located (see Section 3.D. above). Relative Positional Precision is a measure of how precisely the surveyor is able to monument and report those positions; it is not a substitute for the application of proper boundary law principles. A boundary corner or line may have a small Relative Positional Precision because the survey measurements were precise, yet still be in the wrong position (i.e. inaccurate) if it was established or retraced

using faulty or improper application of boundary law principles.

iv. For any measurement technology or procedure used on an ALTA/~~ACSM~~NSPS Land Title Survey, the surveyor shall (1) use appropriately trained personnel, (2) compensate for systematic errors, including those associated with instrument calibration, and (3) use appropriate error propagation and measurement design theory (selecting the proper instruments, geometric layouts, and field and computational procedures) to control random errors such that the maximum allowable Relative Positional Precision outlined in Section 3.E.v. below is not exceeded.

v. The maximum allowable Relative Positional Precision for an ALTA/~~ACSM~~NSPS Land Title Survey is 2 cm (0.07 feet) plus 50 parts per million (based on the direct distance between the two corners being tested). It is recognized that in certain circumstances, the size or configuration of the surveyed property, or the relief, vegetation or improvements on the surveyed property will result in survey measurements for which the maximum allowable Relative Positional Precision may be exceeded. If the maximum allowable Relative Positional Precision is exceeded, the surveyor shall note the reason as explained in Section 6.B.~~i~~x~~x~~. below.

4. Records Research - It is recognized that for the performance of an ALTA/~~ACSM~~NSPS Land Title Survey, the surveyor will be provided with appropriate and, when possible, legible data which can be relied upon in the preparation of the survey. The request for an ALTA/~~ACSM~~NSPS Land Title Survey shall set forth the current record description of the property to be surveyed or, in the case of an original survey prepared for purposes of locating and describing real property that has not been previously separately described in documents conveying an interest in the real property, the current record description of the parent parcel that contains the property to be surveyed. ~~Complete copies of the most recent title commitment, the current record description of the property to be surveyed (or, in the case of an original survey, the parent parcel), the current record descriptions of adjoiners, any record easements benefiting the property, the record easements or servitudes and covenants burdening the property (all hereinafter referred to collectively as "Record Documents"), documents of record referred to in the Record Documents, documents necessary to ascertain, if possible, the junior/senior relationship pursuant to Section 6.B.vii. below, and any other documents containing desired appropriate information affecting the property being surveyed, and to which the ALTA/ACSM Land Title Survey shall make reference, shall be provided to the surveyor for use in conducting the survey. Reference is made to Section 3.B. above.~~

In order to complete an ALTA/NSPS Land Title Survey, the surveyor must be provided with complete copies of the most recent title commitment, or if a title commitment is not available, other title evidence satisfactory to the title insurer. In addition the surveyor must be provided with the following:

(i) The following records established under state statutes for the purpose of imparting constructive notice of matters relating to real property (public records):
  (a) The current record descriptions of any adjoiners to the property to be surveyed, except where such adjoiners are lots in platted, recorded subdivisions;
  (b) Any recorded easements benefitting the property;
  (c) Any recorded easements, servitudes, or covenants burdening the property;

(ii) Any unrecorded documents affecting the property being surveyed and containing information to which the survey shall make reference, if desired by the client.

Except, however, if the documents outlined above in (i) and (ii) of this section are not provided to the surveyor or if non-public or quasi-public documents are required to complete the survey, the surveyor

shall be required to conduct only that research which is required pursuant to the statutory or administrative requirements of the jurisdiction where the property being surveyed is located and that research (if any) which is negotiated and outlined in the terms of the contract between the surveyor and the client.

5. **Fieldwork** ~~**Field Work**~~ - The ~~S~~survey shall be performed on the ground (except as otherwise negotiated pursuant to Table A, Item 15 below, if selected by the client), ~~and~~ The fieldwork ~~field work~~ shall include the following, located to what is, in the surveyor's professional opinion, the appropriate degree of precision based on (a) the planned use of the property, if reported in writing to the surveyor by the client, lender or insurer, or (b) the existing use, if the planned use is not so reported:

A. Monuments

- **i.** The location, size, character and type ~~and description~~ of any monuments found during the fieldwork, ~~or lines that control the boundaries of the surveyed property~~.
- **ii.** The location, size, character and type of any monuments set during the fieldwork, if item 1 of Table A was selected or if otherwise required by applicable jurisdictional requirements and/or standards of practice. ~~found (or set, if Table A, Item 1 is requested by the client, or if otherwise required – see Section 3.B. above) on the boundary of the surveyed property.~~
- **iii.** The location, description and character of any lines that control the boundaries of the surveyed property.

B. Rights of Way and Access

- **i.** The distance from the appropriate corner or corners of the surveyed property to the nearest right of way line, if the surveyed property does not abut a right of way.
- **ii.** The name of any street, highway or other public or private way abutting the surveyed property, together with ~~and~~ the width ~~and location~~ of the travelled way ~~relative to the nearest boundary line of the surveyed property~~ and the location of each edge of the travelled way including on divided streets and highways. If the documents provided to or obtained by the surveyor pursuant to Section 4 indicate no access from the surveyed property to the abutting street or highway, the width and location of the travelled way need not be located.
- **iii.** Visible evidence of physical access (e.g. ~~such as, but not limited to,~~ curb cuts, ~~and~~ driveways) to any abutting streets, highways or other public or private ways.
- **iv.** The location and character of vehicular, pedestrian or other forms of access by other than the apparent occupants of the surveyed property to or across the surveyed property observed in the process of conducting the fieldwork (e.g., ~~including, but not limited to~~ driveways, alleys, private roads, railroads, railroad sidings and spurs, sidewalks, ~~and~~ footpaths~~) observed in the process of conducting the survey.~~
- **v.** Without expressing a legal opinion as to ownership or nature, the location and extent of any potentially encroaching driveways, alleys, and other ways of access from adjoining properties onto the surveyed property observed in the process of conducting the fieldwork ~~survey~~.
- **vi.** Where documentation of the ~~width or~~ location of any ~~abutting~~ street, road or highway right of way abutting, on, or crossing the surveyed property, was not disclosed in ~~Record~~ ~~D~~documents provided to or obtained by the surveyor, or was not otherwise available from the controlling jurisdiction (see Section 6.C.iv. below), the evidence and location of parcel corners on the same side of the street as the surveyed property recovered in the process of conducting the fieldwork which may indicate the location of such right of way lines (e.g., lines of occupation, survey monuments) ~~which might indicate the width or location of such right of way lines.~~
- **vii.** Evidence of access to and from waters adjoining the surveyed property~~, such as paths, boat~~

~~slips, launches, piers and docks~~ observed in the process of conducting the fieldwork ~~survey~~, (e.g., paths, boat slips, launches, piers, docks).

C. Lines of Possession, and Improvements along the Boundaries

i. The character and location of evidence of possession or occupation along the perimeter of the surveyed property, both by the occupants of the surveyed property and by adjoiners, observed in the process of conducting the fieldwork ~~survey~~.

ii. Unless physical access is restricted, ~~T~~the character and location of all walls, buildings, fences, and other improvements within five feet of each side of the boundary lines, observed in the process of conducting the fieldwork ~~survey~~. Trees, bushes, shrubs and other natural vegetation need not be located other than as specified in the contract, unless they are deemed by the surveyor to be evidence of possession pursuant to Section 5.C.i.

iii. Without expressing a legal opinion as to the ownership or nature of the potential encroachment, the evidence, location and extent of potentially encroaching structural appurtenances and projections observed in the process of conducting the fieldwork ~~survey~~, (e.g., ~~such as~~ fire escapes, bay windows, windows and doors that open out, flue pipes, stoops, eaves, cornices, areaways, steps, trim~~, etc.~~) by or onto adjoining property, or onto rights of way, easements or setback lines disclosed in ~~Record D~~documents provided to the surveyor.

D. Buildings

~~Based on the normal standard of care.~~ The location of ~~all~~ buildings on the surveyed property observed in the process of conducting the fieldwork ~~shown perpendicular to perimeter boundary line(s) and expressed to the appropriate degree of precision~~.

E. Easements and Servitudes

i. Evidence of any easements or servitudes burdening the surveyed property, disclosed in the ~~Record D~~documents provided to or obtained by the surveyor pursuant to Section 4 and observed in the process of conducting the fieldwork ~~survey~~.

ii. Evidence of easements, ~~or~~ servitudes or other uses by other than the apparent occupants of the surveyed property not disclosed in the ~~Record D~~documents provided to the surveyor, but observed in the process of conducting the fieldwork ~~survey~~ if they appear to affect the surveyed property (e.g., ~~such as those created by~~ roads; drives, sidewalks, paths and other ways of access; utility service lines; ~~rights of way~~; water courses; ditches; drains; telephone, fiber optic lines, or electric lines; or water, sewer, oil or gas pipelines on or across the surveyed property and on adjoining properties). ~~if they appear to affect the surveyed property.~~

iii. Surface indications of underground easements or servitudes on or across the surveyed property observed in the process of conducting the fieldwork ~~survey~~ (e.g. utility cuts, vent pipes, filler pipes).

iv. ~~Evidence of use of the surveyed property by other than the apparent occupants observed in the process of conducting the survey.~~ Evidence on or above the surface of the surveyed property observed in the process of conducting the fieldwork, which evidence may indicate utilities located on, over or beneath the surveyed property. Examples of such evidence include pipeline markers, manholes, valves, meters, transformers, pedestals, clean-outs, utility poles, overhead lines and guy wires.

F. Cemeteries

As accurately as the evidence permits, the ~~location~~ perimeter of cemeteries~~, gravesites,~~ and burial grounds, and the location of isolated gravesites not within a cemetery or burial ground, (i) disclosed in the ~~Record D~~documents provided to or obtained by the surveyor, or (ii) observed in the process of conducting the fieldwork ~~survey~~.

G. Water Features

i. The location of springs, ~~together with the location of~~ ponds, lakes, streams, ~~and~~ rivers, canals, ditches, marshes and swamps ~~bordering~~ on, ~~or~~ running through, or outside, but within five feet of the perimeter boundary of, the surveyed property, observed during the process of conducting the fieldwork ~~survey~~. ~~See Table A, Item 19 for wetlands locations.~~

ii. The location of any water feature forming a boundary of ~~on~~ the surveyed property. The attribute(s) of the water feature located (e.g. top of bank, edge of water, high water mark~~,~~ ~~etc.~~) should be congruent with the boundary as described in the record description or, in the case of an original survey, in the new description. (See Section 6.B.vi. below).

6. Plat or Map - A plat or map of an ALTA/~~ACSM~~NSPS Land Title Survey shall show the following information. Where dimensioning is appropriate, dimensions shall be ~~in accordance with the appropriate standard of care~~ annotated to what is, in the surveyor's professional opinion, the appropriate degree of precision based on (a) the planned use of the property, if reported in writing to the surveyor by the client, lender or insurer, or (b) existing use, if the planned use is not so reported.

A. The evidence and locations gathered, and the monuments and lines located during the fieldwork pursuant to ~~as outlined in~~ Section 5 above, with accompanying notes if deemed necessary by the surveyor or as otherwise required as specified below.

B. Boundary, Descriptions, Dimensions and Closures

i. ~~The current record description of the surveyed property, and any new description of the surveyed property that was prepared in conjunction with the survey, including a statement explaining why the new description was prepared. Preparation of a new description should be avoided unless deemed necessary or appropriate by the surveyor and insurer. Preparation of a new description should also generally be avoided when the record description is a lot or block in a platted, recorded subdivision.~~
(a) The current record description of the surveyed property or,
(b) In the case of an original survey, the current record description of the parent tract that contains the surveyed property.

ii. Any new description of the surveyed property that was prepared in conjunction with the survey, including a statement explaining why the new description was prepared. Except in the case of an original survey, preparation of a new description should be avoided unless deemed necessary or appropriate by the surveyor and insurer. Preparation of a new description should also generally be avoided when the record description is a lot or block in a platted, recorded subdivision. Except in the case of an original survey, if a new description is prepared, a note shall be provided stating (a) that the new description describes the same real estate as the record description or, if it does not, (b) how the new description differs from the record description. ~~The location and description of any monuments, lines or other evidence that control the boundaries of the surveyed property or that were otherwise relied upon in establishing or retracing the boundaries of the surveyed property, and the relationship of that evidence to the surveyed boundary. In some cases, this will require notes on the plat or map.~~

iii. The point of beginning, the remote point of beginning or point of commencement (if applicable) and Aall distances and directions identified in the record description of the surveyed property (and in the new description, if one was prepared). Where a measured or calculated dimension differs from the record by an amount deemed significant by the surveyor, such dimension shall be shown in addition to, and differentiated from, the

corresponding record dimension. All dimensions shown on the survey and contained in any new description shall be ground dimensions unless otherwise noted.

iv. The directional, distance and curve data necessary to compute a mathematical closure of the surveyed boundary. A note if the record description does not mathematically close. The basis of bearings and, ~~when~~ where it differs from the record basis, the difference.

v. The remainder of any recorded lot or existing parcel, when the surveyed property is composed of only a portion of such lot or parcel, shall be graphically depicted. Such remainder ~~does not~~ need not ~~to~~ be included as part of the actual survey, except to the extent necessary to locate the lines and corners of the surveyed property, and it need not be fully dimensioned or drawn at the same scale as the surveyed property.

vi. When the surveyed property includes a title line defined by a water boundary, a note on the face of the plat or map noting the date the boundary was measured, which attribute(s) of the water feature was/were located, and the caveat that the boundary is subject to change due to natural causes and that it may or may not represent the actual location of the limit of title. When the surveyor is aware of natural or artificial realignments or changes in such boundaries, the extent of those changes and facts shall be shown or explained.

vii. The relationship of the boundaries of the surveyed property with its adjoiners (~~i.e.~~ e.g., contiguity, gaps, or overlaps) ~~with its adjoiners,~~ where ascertainable from ~~Record~~ ~~D~~documents provided to or obtained by the surveyor pursuant to Section 4 and/or from field evidence gathered during the process of conducting the fieldwork ~~survey~~ ~~of the property being surveyed~~. If the surveyed property is composed of multiple parcels, the extent of any gaps or overlaps between those parcels shall be identified. Where gaps or overlaps are identified, the surveyor shall, prior to or upon delivery ~~preparation~~ of the final plat or map, disclose this to the insurer and client ~~for determination of a course of action concerning junior/senior rights~~.

viii. When, in the opinion of the surveyor, the results of the survey differ significantly from the record, or if a fundamental decision related to the boundary resolution is not clearly reflected on the plat or map, the surveyor shall explain this information with notes on the face of the plat or map.

ix. The location of all buildings on the surveyed property, located pursuant to Section 5.D., dimensioned perpendicular to those perimeter boundary lines that the surveyor deems appropriate (e.g., where potentially impacted by a setback line) and/or as requested by the client, lender or insurer.

x. A note on the face of the plat or map explaining the site conditions that resulted in a Relative Positional Precision that exceeds the maximum allowed ~~under~~ pursuant to Section 3.E.v. ~~of these standards~~.

xi. A note on the face of the plat or map identifying what areas, if any, on the boundaries of the surveyed property, physical access within five feet was restricted (See Section 5.C.ii.).

xii. A note on the face of the plat or map identifying the source of the title commitment~~/policy number~~, or other title evidence provided pursuant to Section 4, and the effective date and the name of the insurer of same ~~for any title work provided to the surveyor~~.

C. Easements, Servitudes, Rights of Way, Access and Documents

i. The location, width and recording information of all plottable rights of way, easements and servitudes burdening and benefitting the property surveyed, as evidenced by ~~Record~~ ~~D~~documents ~~which have been~~ provided to or obtained by the surveyor pursuant to Section 4.

ii. A summary of all ~~note regarding any~~ rights of way, easements ~~or~~ and servitudes burdening the property surveyed and identified in the title evidence provided to or obtained by the

surveyor pursuant to Section 4. Such summary shall include the record information of each such right of way, easement or servitude, a statement indicating whether or not it is shown on the plat or map, ~~evidenced by a Record Document which has been provided to the surveyor~~ and a related note if:

(a) the location ~~of which~~ cannot be determined from the record document; ~~or~~
(b) ~~of which~~ there was no observed evidence at the time of the fieldwork ~~survey~~; ~~or~~
(c) ~~that~~ it is a blanket easement; ~~or~~
(d) ~~that~~ it is not on, or does not touch, the surveyed property; ~~or~~
(e) ~~that~~ it limits access to an otherwise abutting right of way; ~~or in~~
(f) the documents are illegible; or
(g) the surveyor has information indicating that it may have been released or otherwise terminated.

~~i~~In cases where the surveyed property is composed of multiple parcels, indicate which of such parcels the various rights of way, easements~~,~~ and servitudes cross or touch.

iii. A note if no physical access to a public way was observed in the process of conducting the fieldwork ~~survey~~.

iv. The locations and widths ~~of abutting~~ rights of way abutting or crossing the surveyed property, and the source of such information (a) where available from the controlling jurisdiction or (b) where disclosed in ~~Record D~~documents provided to or obtained by the surveyor pursuant to Section 4.

v. The identifying titles of all recorded plats, filed maps, right of way maps, or similar documents which the survey represents, wholly or in part, with their recording or filing data.

vi. For non-platted adjoining land, ~~names and~~ recording data identifying adjoining tracts ~~owners~~ according to current public records. For platted adjoining land, the recording data of the subdivision plat.

vii. Platted setback or building restriction lines which appear on recorded subdivision plats or which were disclosed in ~~Record D~~documents provided to or obtained by the surveyor.

D. Presentation

~~i.~~ The plat or map shall be drawn on a sheet of not less than 8 ½ by 11 inches in size at a legible, standard engineering scale, with that scale clearly indicated in words or numbers and with a graphic scale. ~~When recordation or filing of a plat or map is required by law, such plat or map shall be produced in recordable form. The boundary of the surveyed property drawn in a manner that distinguishes it from other lines on the plat or map. A north arrow (with north to the top of the drawing when practicable), a legend of symbols and abbreviations, and a vicinity map showing the property in reference to nearby highway(s) or major street intersection(s).~~

ii. ~~Supplementary or detail diagrams when necessary~~ The plat or map shall include:

(a) The boundary of the surveyed property drawn in a manner that distinguishes it from other lines on the plat or map.
(b) If no buildings were observed on the surveyed property in the process of conducting the fieldwork, a note stating *"No buildings observed."*
(c) A north arrow (with north to the top of the drawing when practicable).
(d) A legend of symbols and abbreviations.
(e) A vicinity map showing the property in reference to nearby highway(s) or major street intersection(s).
(f) Supplementary or detail diagrams when necessary.
(g) Notes explaining any modifications to Table A items and the nature of any additional

Table A items (*e.g.*, 21(a), 21(b), 21(c)) that were negotiated between the surveyor and client.

(h) The surveyor's project number (if any), and the name, registration or license number, signature, seal, street address, telephone number, company website and email address (if any) of the surveyor who performed the survey.

(i) The date(s) of any revisions made by said surveyor.

(j) Sheet numbers where the plat or map is composed of more than one sheet

(k) The caption "ALTA/NSPS Land Title Survey."

iii. When recordation or filing of a plat or map is required by law, such plat or map shall be produced in recordable form. ~~If there are no visible buildings on the surveyed property, a note stating *"No buildings existing on the surveyed property"* shall appear on the face on the survey.~~

~~iv. The surveyor's project number (if any), and the name, registration or license number, signature, seal, street address, telephone number, and email address of the surveyor who performed the survey. The date(s) of any revisions made by said surveyor.~~

~~v. Sheet numbers where the plat or map is composed of more than one sheet.~~

~~vi. The caption "ALTA/ACSM Land Title Survey."~~

7. **Certification** - The plat or map of an ALTA/~~ACSM~~NSPS Land Title Survey shall bear only the following certification, unaltered, except as may be required pursuant to Section 3.B. above:

To (name of insured, if known), (name of lender, if known), (name of insurer, if known), (names of others as negotiated with the client):

This is to certify that this map or plat and the survey on which it is based were made in accordance with the ~~2011~~2016 Minimum Standard Detail Requirements for ALTA/~~ACSM~~NSPS Land Title Surveys, jointly established and adopted by ALTA and NSPS, and includes Items of Table A thereof. The fieldwork ~~field work~~ was completed on _____ [date].

Date of Plat or Map:_____ (Surveyor's signature, printed name and seal with Registration/License Number)

8. **Deliverables** - The surveyor shall furnish copies of the plat or map of survey to the insurer and client, and as otherwise negotiated with the client. Hard copies shall be on durable and dimensionally stable material of a quality standard acceptable to the insurer. A digital image ~~Digital copies~~ of the plat or map may be provided in addition to, or in lieu of, hard copies pursuant to ~~in accordance with~~ the terms of the contract. When required by law or requested by the client, the plat or map shall be produced in recordable form and recorded or filed in the appropriate office or with the appropriate agency.

TABLE A

OPTIONAL SURVEY RESPONSIBILITIES AND SPECIFICATIONS

NOTE: The twenty (20) items of Table A may ~~must~~ be negotiated between the surveyor and client. Any additional items negotiated between the surveyor and client shall be identified as 21(a), 21(b), etc. and explained pursuant to Section 6.D.ii.(g). Notwithstanding Table A Items 5 and 11~~(b)~~, if an engineering design survey is desired as part of an ALTA/~~ACSM~~NSPS Land Title Survey, such services should be negotiated under Table A, Item ~~22~~ 21.

If checked, the following optional items are to be included in the ALTA/NSPS LAND TITLE SURVEY, except as otherwise qualified (see note above):

1. _____ *Monuments placed (or a reference monument or witness to the corner) at all major corners of the boundary of the property, unless already marked or referenced by existing monuments or witnesses in close proximity to the corner.*

2. _____ *Address(es) of the surveyed property if disclosed in ~~Record D~~documents provided to the surveyor, or observed while conducting the fieldwork ~~survey~~.*

3. _____ *Flood zone classification (with proper annotation based on federal Flood Insurance Rate Maps or the state or local equivalent) depicted by scaled map location and graphic plotting only.*

4. _____ *Gross land area (and other areas if specified by the client).*

5. _____ *Vertical relief with the source of information (e.g. ground survey or aerial map), contour interval, datum, and originating benchmark identified.*

6. _____ *(a) If set forth in a zoning report or letter provided to the surveyor by the client, list the current zoning classification, setback requirements, the height and floor space area restrictions, and parking requirements. Identify the date and source of the report or letter. ~~Current zoning classification, as provided by the insurer;~~*

   _____ *(b) If the zoning setback requirements are set forth in a zoning report or letter provided to the surveyor by the client, and if those requirements do not require an interpretation by the surveyor, graphically depict the building setback requirements. Identify the date and source of the report or letter. ~~Current zoning classification and building setback requirements, height and floor space area restrictions as set forth in that classification, as provided by the insurer. If none, so state.~~*

7. _____ *(a) Exterior dimensions of all buildings at ground level.*

   (b) Square footage of:

   _____ *(1) exterior footprint of all buildings at ground level.*

NSPS

AMERICAN LAND TITLE ASSOCIATION

_____ *(2) other areas as specified by the client.*

_____ *(c) Measured height of all buildings above grade at a location specified by the client. If no location is specified, the point of measurement shall be identified.*

8. _____ *Substantial features observed in the process of conducting the fieldwork ~~survey~~ (in addition to the improvements and features required pursuant to ~~under~~ Section 5 above) (e.g., ~~such as~~ parking lots, billboards, signs, swimming pools, landscaped areas, substantial areas of refuse) ~~etc.~~*

9. _____ *~~Striping, n~~Number and type (e.g. disabled ~~handicapped~~, motorcycle, regular and other marked specialized types ~~etc.~~) of clearly identifiable parking spaces on surface ~~in~~ parking areas, lots and in parking structures. Striping of clearly identifiable parking spaces on surface parking areas and lots.*

10. _____ *(a) As designated by the client, a ~~D~~determination of the relationship and location of certain division or party walls ~~designated by the client~~ with respect to adjoining properties (client to obtain necessary permissions).*

_____ *(b) As designated by the client, a ~~D~~determination of whether certain walls ~~designated by the client~~ are plumb (client to obtain necessary permissions).*

11. *Location of utilities ~~(representative examples of which are listed below)~~ existing on or serving the surveyed property as determined by:*

~~_____ (a) Observed evidence.~~

~~_____~~ ~~(b) O~~

- *observed evidence collected pursuant to Section 5.E.iv. ~~together with~~*
- *evidence from plans requested by the surveyor and obtained from utility companies, or provided by client (with reference as to the sources of information), and*
- *markings requested by the surveyor pursuant to an 811 utility locate or similar request ~~by utility companies and other appropriate sources (with reference as to the source of information).~~*

Representative examples of such utilities include, but are not limited to:

- ~~*Railroad tracks, spurs and sidings;*~~
- *Manholes, catch basins, valve vaults and other surface indications of subterranean uses;*
- *Wires and cables (including their function, if readily identifiable) crossing the surveyed property, and all poles on or within ten feet of the surveyed property. Without expressing a legal opinion as to the ownership or nature of the potential encroachment, the dimensions of all encroaching utility pole crossmembers or overhangs; and*
- *Utility company installations on the surveyed property.*

Note to the client, insurer and lender - With regard to Table A, item 11~~(b)~~, source information from plans and markings will be combined with observed evidence of utilities pursuant to Section 5.E.iv. to develop a view of ~~those~~ the underground utilities. However, lacking excavation, the exact location of underground features cannot be accurately, completely and reliably depicted. In addition, in some jurisdictions, 811 or other similar utility locate requests from surveyors may be ignored or result in an incomplete response, in which case the surveyor shall note on the plat or map how this affected the surveyor's assessment of the location of the utilities. Where additional or more detailed information is required, the client is advised that excavation and/or a private utility locate request may be necessary.

12. _____ *As specified by the client, Governmental Agency survey-related requirements ~~as specified by the client~~, (e.g. ~~such as~~ for HUD surveys, ~~and~~ surveys for leases on Bureau of Land Management managed lands).*

13. _____ *Names of adjoining owners ~~of platted lands~~ according to current ~~public~~ tax records. If more than one owner, identify the first owner's name listed in the tax records followed by "et al."*

14. _____ *As specified by the client, Ddistance to the nearest intersecting street ~~as specified by the client~~.*

15. _____ *Rectified orthophotography, photogrammetric mapping, remote sensing, airborne/mobile laser scanning and other similar products, tools or technologies as the basis for the showing the location of certain features (excluding boundaries) where ground measurements are not otherwise necessary to locate those features to an appropriate and acceptable accuracy relative to a nearby boundary. The surveyor shall (a) discuss the ramifications of such methodologies (e.g. the potential precision and completeness of the data gathered thereby) with the insurer, lender and client prior to the performance of the survey and, (b) place a note on the face of the survey explaining the source, date, precision and other relevant qualifications of any such data.*

16. _____ *~~Observed e~~Evidence of recent ~~current~~ earth moving work, building construction or building additions observed in the process of conducting the fieldwork.*

17. _____ *Proposed changes in street right of way lines, if such information is made available to the surveyor ~~from~~ by the controlling jurisdiction. ~~Observed e~~Evidence of recent street or sidewalk construction or repairs observed in the process of conducting the fieldwork ~~survey~~.*

18. _____ ~~*Observed evidence of site use as a solid waste dump, sump or sanitary landfill.*~~

~~Pursuant to the~~ If there has been a field delineation of wetlands conducted by a qualified specialist hired by the client, the surveyor shall locate any delineation markers observed in the process of conducting the fieldwork and show them on the face of the plat or map. If no markers were observed, the surveyor shall so state.

19. _____ ~~Location of wetland areas as delineated by appropriate authorities.~~

~~20.~~ _____ ~~Locate improvements within~~ Include any plottable offsite (i.e., appurtenant) easements or servitudes ~~benefitting the surveyed property that are~~ disclosed in ~~the Record~~ Ddocuments provided to the surveyor or obtained by the surveyor as a part of the survey pursuant to Sections 5 and 6 (and applicable selected Table A items) ~~and that are observed in the process of conducting the survey~~ (client to obtain necessary permissions).

_____ ~~(b) Monuments placed (or a reference monument or witness to the corner) at all major corners of any offsite easements or servitudes benefitting the surveyed property and disclosed in Record Documents provided to the surveyor (client to obtain necessary permissions).~~

20. _____ Professional Liability Insurance policy obtained by the surveyor in the minimum amount of $_____ to be in effect throughout the contract term. Certificate of Insurance to be furnished upon request, but this item shall not be addressed on the face of the plat or map.

21 _____ _____

Adopted by the Board of Governors, American Land Title Association, on ~~October 13, 2010~~ 8, 2015.
American Land Title Association, 1~~8~~0028 ~~L~~ M St., N.W., Suite ~~705~~300S, Washington, D.C. 20036-5828.

Adopted by the Board of Directors, National Society of Professional Surveyors, on ~~November 15, 2010~~ October 9, 2015.
National Society of Professional Surveyors, Inc., ~~a member organization of the American Congress on Surveying and Mapping, 6 Montgomery Village Avenue, Suite 403, Gaithersburg, MD 20879~~ 5119 Pegasus Court, Suite Q, Frederick, MD 21704.

NOTES:

SECTION TWO

Business Entities and Title to Property

Clyde Mize, Esq.

Morris, Manning & Martin, LLP

MORRIS, MANNING & MARTIN, LLP

Clyde E. Mize, Jr.

Partner - Atlanta

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Join my LinkedIn network
vCard

Clyde Mize is Partner in the firm's Residential Real Estate Practice at the Northside (North Atlanta) Office. Mr. Mize practices in the areas of residential and commercial real estate, finance and government guaranteed lending. He represents clients in all phases of real estate including acquisitions, developments, financing and sales. He is an active member of the Atlanta real estate community and often speaks on a variety of issues of interest concerning the financial and real estate industries. Mr. Mize is currently Chair of the firm's Diversity Committee.

Prior to joining Morris, Manning & Martin, Mr. Mize practiced in Chicago in the areas of real estate and commercial litigation. While in Chicago, Mr. Mize counseled individual and corporate clients regarding commercial and residential real estate, zoning and construction matters.

Representative Experience

- Representation of investor purchasing over $3 billion of loans on distressed residential properties in various

PRACTICES

Eminent Domain & Condemnation
Real Estate
Residential Real Estate

BAR ADMISSIONS

Illinois, 1999
Georgia, 2003

EDUCATION

University of Iowa, 1998
Juris Doctor (J.D.)
Iowa Law Foundation Board
Trial Advocacy Board, Director
National Trial Advocacy Competition Regional

phases of development throughout the Southeast.
- Representation of USDA in auction and sale of portfolio of foreclosed property.
- Representation of one of the Southeast's largest lenders in the sale of their bank-owned residential properties.
- Representation of many of the Southeast's community banks and developers in loan workouts, debt resolution and dispositions.
- Approved closing attorney for almost all banks and mortgage companies in the Southeast.

Finalist

University of Illinois, 1995
Bachelor of Arts (B.A.)

Honors and Affiliations

- Vice Chair, State Bar of Georgia's Diversity Program
- Board of Directors, 100 Black Men of Atlanta
- Board Member, Gate City Bar Foundation
- YWCA of Northwest Georgia
- Georgia Real Estate Closing Attorneys Association
- Gate City Bar Association
- Selected in *Who's Who in Black Atlanta* (2009)

Business Entities and Title to Property

March 23, 2016

Clyde E. Mize, Jr., Partner
Morris, Manning & Martin, LLP
(404) 255-6900
cmize@mmmlaw.com
www.mmmlaw.com

MORRIS, MANNING & MARTIN, LLP

What is a "Business Entity"?

- An organization that is considered separate and distinct for legal purposes

Morris, Manning & Martin, LLP

Types of Business Entities

Professional Corporation

Partnership

Business Corporation

Nonprofit Corporation

Limited Liability Company

Limited Partnership

Real Estate Investment Trust

Morris, Manning & Martin, LLP

Chip N Dale Rescue Rangers, Inc.

Morris, Manning & Martin, LLP

Brady Bunch Land Investments, LLC

Power Rangers Realty, Ltd

Business Entities

- Business Corporations - O.C.G.A. § 14-2-101 through 14-2-1703
- Nonprofit Corporations - O.C.G.A. § 14-3-101 through 14-3-1703
- Professional Corporations - O.C.G.A. § 14-7-1 through 14-7-7
- Partnerships - O.C.G.A. § 14-8-1 through 14-8-61
- Revised Uniform Limited Partnership Act - O.C.G.A. § 14-9-100 through 14-9-1204
- Limited Partnership - O.C.G.A. § 14-9A-1 through 14-9A-130
- Professional Associations - O.C.G.A. § 14-10-1 through 14-10-18
- Limited Liability Companies - O.C.G.A. § 14-11-100 through 14-11-1109
- Real Estate Investment Trusts - O.C.G.A. § 14-2-1501

Good Standing

- To engage in a real estate transaction, an entity must be in "good standing" with the state where it was established.
  - Duly formed in accordance with the laws of a state
    - Foreign – Established under the laws of another state
    - Domestic – Established under Georgia law
  - Rights to conduct business have not been revoked or impaired

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Good Standing

Check Georgia Secretary of State's Website

- http://sos.ga.gov/
- **Select "Business Search"**
- **Create an account; start your search**

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Good Standing Documents to Consider

Limited Liability Company	Business Corporation or Professional Corporation	Partnership	Limited Partnership	Professional Association
Articles of Organization;	Articles of Incorporation;	Partnership Agreement or Statement of Partnership	Certificate of Limited Partnership	Articles of Association with Clerk of Superior Court
Certificate of Organization	Certificate of Incorporation	Filed with Clerk of Superior Court	*Prior to July 1, 1988, filed with Clerk of Superior Court; File "Restated" or "Amended and Restated" Certificate of Limited Partnership	

STATE OF GEORGIA
Secretary of State
Corporations Division
313 West Tower
2 Martin Luther King, Jr. Drive
Atlanta, Georgia 30334-1530

CERTIFICATE
OF
ORGANIZATION

Acme Investments, LLC

a Domestic Limited Liability Company

MORRIS, MANNING & MARTIN, LLP

STATE OF GEORGIA
Secretary of State
Corporations Division
313 West Tower
2 Martin Luther King, Jr. Dr
Atlanta, Georgia 30334-1530

CERTIFICATE OF EXISTENCE

ACME INVESTMENTS, INC

a Domestic Profit Corporation

MORRIS, MANNING & MARTIN, LLP

Authority

- To establish whether an entity may engage in a particular real estate transaction, and to ascertain who may act on behalf of the entity, ***READ, READ, READ***.

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Documents to Consider

- LLCs
  - Articles of Organization
  - Operating Agreement
  - Consent/Action
- Partnerships and Limited Partnerships
  - Partnership Agreement
  - LP Consent(s)
- Corporations
  - Articles of Incorporation
  - Corporate Resolution

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Certificates of Authority

- Foreign corporations, LLCs, and LPs many not transact business in Georgia without a CERTIFICATE OF AUTHORITY from the Secretary of State. However, this DOES NOT include the buying and selling of real property.

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Single Member LLCs

- Operating Agreement not required.
- Speak with title underwriter to determine requirements.
- Consider executing an affidavit acknowledging that there is not operating agreement, and confirming the sole member's authority to engage in the transaction.

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Closing the Deal

- It's time to close the deal. What should you do?

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Closing the Deal

- Review the title commitment
  - Obtain a tax report if not included within the title commitment
- Verify if the entity is in good standing
- Read the contract
- Obtain and review the governing documents
  - Consider if a consent or resolution is required
- Obtain the seller's tax I.D. number
- Obtain valid photo I.D.

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Closing the Deal

- Obtain Affidavits
  - Seller owns the property, no work done in prior 95 days, etc.
  - Officer's affidavit attaching resolution/consent
  - Certificate of Non-Foreign Status
  - GA 3% withholding (if required)
  - Gap Indemnity

- 1099 reporting

http://www.Irs.gov/pub/Irs-pdf/I1099s.pdf

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FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT (FIRPTA)

Section 1445 of the IRS Tax Code – Foreign persons must pay US Income taxes on the gains from selling US real estate. The ***BUYER*** must withhold and report.

Withholding rates: 0%, 10% and 15%

Disregarded Entity – Individual owner must sign the FIRPTA

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Georgia Withholding Tax

Ga. Cmp. R. & Regs. 560-7-8-.35

- Withhold for nonresidents with a principal place of business located outside of Georgia unless exempt under O.C.G.A. Section 48-7-128(a)
- 3% withholding tax on contract price (Complete the G2RP)
- No withholding if purchase price is less than $20,000.00 ***OR*** if the purchase price is greater than $20,000.00 ***AND*** the tax liability is less than $600.00

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Georgia Withholding Tax

- Single-member LLC – If disregarded for federal tax purposes, the LLC is not the seller under OCGA 48-7-128. The owner of the single-member LLC is considered the seller.

*Taxpayer Services Division Policy Statement IT-2000-08-02-01 issued August 2, 2005.

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Closing the Deal: Corporation as Seller

- Corporation's Deed
  - The grantor's name in the deed must read that of the corporation, it must be signed by someone with authority to sign, and, if only one officer signs the deed, the corporation's seal must be affixed to the deed to establish the necessary evidence of authority
  - **Deed missing corporate seal:** The deed must be executed by the president or vice-president and the signature must be attested or countersigned by the secretary, assistant secretary, cashier or assistant cashier of the corporation
  - **Deed missing seal and signed by an officer other than the President or Vice President:** A resolution from the Board of Directors granting the officer the authority to sign on behalf of the corporation must be attached as an exhibit to the deed and referenced on the face of the deed

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Power of Attorney to Convey Property

- ***Corporation*** – A resolution from Board of Directors is required
- ***Partnership*** – Authorization either obtained from all partners or provided within the Partnership Agreement
- ***LLC*** – Authorization either obtained from all members or provided within the Operating Agreement

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Closing the Deal Scenario #1: "Over-zealous General Partner"

The General Partner of Acme, Ltd contracts to sell Green Acre to John Smith. He states that he has **COMPLETE** authority to sign for the partnership. He becomes irate when you question his authority, and he refuses to close with such unreasonable attorneys. He eventually sends you the partnership agreement. ***What should you do***?

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Closing the Deal Scenario #1:
"Over-zealous General Partner"

READ THE PARTNERSHIP AGREEMENT
AND FOLLOW WHAT IT SAYS!

Section 5.01 of the Acme, Ltd. Partnership Agreement reads: "The General Partner shall have the authority to manage all Partnership affairs. However, transactions involving the sale of real estate must be approved by all limited partners."

Closing the Deal Scenario #2:
"Multiple Layers"

Big Builder, LLC is modifying a loan secured four parcels of land located within a subdivision. Through your diligent efforts, you have realized that the signature block for Big Builders, LLC reads as follows:

Closing the Deal Scenario #2:
Multiple Layers

Big Builder, LLC
a Georgia limited liability company
by Medium Builder, LLC
a Georgia limited liability company,
its Manager
By Small Builder, LLC
a Georgia limited liability company
its Manager

By: _____ (Seal)
Bob Builder, Manager

What should you do?

Closing the Deal Scenario #3:
"I promise, we are a REAL company"

Diamond Acres, Inc. was involuntarily dissolved by the Georgia Secretary of State in 2006. However, the "shareholders" have continued to buy and sell real estate using the corporation's name. You receive a contract for the "corporation's" purchase of land in Cherokee County. The "president" tells you: "It's no big deal. We are good to go. Just ask your managing partner who used to work with us years ago."

What should you do?

Closing the Deal Scenario #3:
"I promise, we are a REAL company"

5 Years – If a corporation (for-profit or not-for-profit) or an LLC is administratively dissolved by the secretary of State, the entity has 5 years to apply for reinstatement.

Winding up - An administratively dissolved corporation may not engage in business except that regarding the winding-up of its business affairs A deed of conveyance must be executed by someone with the authority, and it must state that the deed is executed and delivered for the purpose of winding up the business affairs.

Contact me:

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Morris, Manning & Martin, LLP
990 Hammond Drive, Suite 300
Atlanta, GA 30328
(404) 255-6900

cmize@mmmlaw.com

NOTES:

SECTION THREE

Washington Update

Johnny Isakson

United States Senator

Biographical Directory of the United States Congress

1774 - Present

- Biography
- Research Collections
- Bibliography
- New Search
- House History Page
- Senate History Page
- Copyright Information

ISAKSON, Johnny, (1944 -)

Senate Years of Service: 2005-
Party: Republican

Courtesy U.S. Senate Historical Office

ISAKSON, Johnny, a Senator and a Representative from Georgia; born in Atlanta, Fulton County, Ga., December 28, 1944; graduated from the University of Georgia, Athens, Ga., 1966; served in the Georgia Air National Guard 1966-1972; member of the Georgia state general assembly, 1976-1990; unsuccessful candidate for election as Governor of Georgia 1990; member of the Georgia state senate 1993-1996; unsuccessful candidate for election to the United States Senate in 1996; chair of the Georgia board of education 1996; elected as a Republican to the One Hundred Sixth Congress by special election to fill the vacancy created when United States Representative Newt Gingrich did not take his seat in the One Hundred Sixth Congress; reelected to the two succeeding Congresses (February 23, 1999-January 3, 2005); was not a candidate for reelection to the House of Representatives, but was elected to the United States Senate in 2004; reelected in 2010 for the term ending January 3, 2017; chair, Committee on Veterans' Affairs (One Hundred Fourteenth Congress), Select Committee on Ethics (One Hundred Fourteenth Congress).

NOTES:

SECTION FOUR

Professionalism

Carol V. Clark, Esq.

Carol Clark Law

Carol Clark Law

Carol Clark

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Carol is founder of Carol Clark Law, is a trial lawyer with more than thirty years of experience, specializing in mortgage banking, construction and lease contracts, and other real estate related matters. A "Double Dawg" graduate of the Honors Program at the University of Georgia and its law school, Ms. Clark currently serves on the Board of Governors for the State Bar of Georgia and is a Director for the Mortgage Banking Association of Georgia. She is also Past President of the Atlanta Lawyers Club, served as chairperson of the 2000+ member Real Property Section of the State Bar of Georgia, is a member of the American College of Real Estate Lawyers, has presented papers at the Real Property Law Institute, Mortgage Bankers Association Legal Issues Conference, and has made occasional televised appearances, including The Layman's Lawyer.

Her publications include the 4th and 5th Editions of Padrick's RESPA, TILA HOEPA and ECOA in Real Estate Transactions, and the contribution of several chapters in Pindar's Georgia Real Estate Law and Procedure, Civil Procedure and Georgia Procedure, Property. She feels the secret to her many blessings is an old fashioned commitment to provide top service to her clients by a practical approach to dispute resolution with minimal expense. Her faith and philosophy of giving back to the community have been a hallmark of her career, and her awards for leadership and board service are many. She is proud of her AV rating from Martindale Hubbell but is most proud of her clients' continuing confidence. Carol has been named as a Georgia Super Lawyer and repeatedly as one of Georgia's Fifty Top Female Lawyers by Atlanta Magazine, and also as one of Georgia's Top 100.

In May, 2008, Carol was awarded the prestigious George A. Pindar Award for lifetime achievement in real estate law. She was the first woman so honored and also the youngest ever named.

CONNECT WITH US:

THREE FACES OF JUSTICE:
HONESTY, INTEGRITY AND FAIRNESS
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Some cynics claim that professionalism has been reduced to a series of platitudes and clichés not unlike the ubiquitous sound bites from current advertisements. "Do I stay or do I go?" Will eating these chips help me see our son in a boy band? Do I even have a son? Am I actually running for president? Is State Farm really there or am I hallucinating the Sparkle paper towel fairy?

In our time today I hope you move with me beyond the inane, mundane and insane and step up to a higher aspiration for yourself and your practice. The Three Faces of Justice are Honesty, Integrity and Fairness.

I. HONESTY:

It takes any new lawyer only a trial or deposition or two to realize a fundamental hair-raiser: there is no truth. Truth is a concept which reflects on individual's understanding of the world as filtered through the individual's perception, beliefs and cultural underpinnings.

Examples of this surround us. Consider the March, 2015, viral Internet discussions on the color of "the dress". Was it gold or blue?

The world or "other world" or "nether world" which comprises our current election process is filled with examples. A protester carrying a sign says she is behaving peacefully. A campaign handler says she is disruptive. Each of those individuals would likely swear each is telling the truth. Look at this well-known sketch, who is it?

Look at this well-known sketch, who is it?

An old woman
or
A young girl?

With such a built-in distortion, how do we as lawyers comply with the exhortations of the Professional Rules of Conduct to be honest and to exercise candor with our colleagues, clients and courts?

I maintain that this requirement is a skill set that can be developed or enhanced no matter the situation with one caveat: the individual seeking to be honest must daily practice honesty.

There is no Glenda the Good Witch to tap you "up side of the head" to cure the Pinocchio in your soul.

A. Candor Toward the Tribunal: Rule 3.3

1. A lawyer shall not knowingly:
   a. make a false statement of material fact or law to a tribunal;
   b. fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

c. fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

d. offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

2. The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

3. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

4. In an ex parte proceeding, other than grand jury proceedings, a lawyer shall inform the tribunal of all material facts known to the lawyer that the lawyer reasonably believes are necessary to enable the tribunal to make an informed decision, whether or not the facts are adverse.

The maximum penalty for a violation of this Rule is disbarment.
Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(r) for the definition of tribunal. It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(4) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (c) allows that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer may refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit from the witness the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a), (b) and (c) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(i). Thus, although a lawyer should

resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(4) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done - making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or

other evidence or failing to disclose information to the tribunal when required by law to do so.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

B. Candor to the court: How to Comply with Rule 3.3?

To be candid with the court begins with a thorough understanding of the facts of your case. This necessitates establishing a relationship with your clients to foster the ability to get to the facts. This task is often more daunting than it would first appear.

1. Getting the Facts.

Some of the dynamics which go into those initial client discussions: client's desire to sell you on the rightness or principle of his or her case, client's unfamiliarity with process, client's desire for validation of his position or client's desire for acknowledgment of her position as a victim.

A lawyer can inadvertently or intentionally slant the information sought to produce a desired answer. This can come back to haunt both parties and can even result in sanctions. In politics it may be passed on as spin. In a courtroom it can result in contempt, with money damages or jail being the result.

Look at a recent case in which the Georgia Court of Appeals sanctioned a lawyer who continued filing kitchen sink boilerplate complaints alleging wrongful foreclosure and a myriad of other claims inapplicable to his client's facts to try to stop the sale or eviction.

We Care Transp., Inc. et al. v. Branch Banking and Trust Company, No. A15A091, 2015 WL 6742870 (Ga. App. Nov. 5, 2015). We Care provides an excellent example of the limit of appellate court patience with such abuse of the system. *We Care* involved a challenge to a foreclosure by Branch Bank and Trust Company and its attorneys, brought by attorney Grady Roberts. On appeal from the trial court's grant of summary judgment to the lender and its attorneys, We Care and its guarantor filed an untimely appellate brief containing only two arguments: "that summary judgment was improper because discovery 'would have shown' genuine issues of material fact (despite the fact that the discovery period had ended) and that '[a]ccepting the allegations of the complaint as true . . . the trial could court not say definitely that no set of facts establishing a claim . . . could

not be proven[.]'" The Court of Appeals found those arguments to be frivolous and no basis for reversing a grant of summary judgment. The Court went on to say:

> Indeed those arguments reflect a recurring pattern of misconduct on the part of appellant's counsel, Grady Roberts: misuse of notice pleading. From this case and from other appeals filed with this court, it appears that Roberts has adopted a practice of deploying boilerplate claims and arguments with little or no effort to adjust them to the evidence or to the procedural posture of the case and little or no effort to investigate or support them. Efforts by opposing counsel to test or challenge them are met either with a bald assertion that the claim should be allowed to go forward on the basis of the possibility that – at some future time – supporting evidence or analysis might be forthcoming or with substitution of new and difference unsubstantiated boilerplate claims and arguments. These tactics put an undue burden on the courts and on opposing counsel. And they offer no possible benefit to his clients, other than the illicit benefit of delay and harassment. Accordingly, we affirm the trial court's judgment and, pursuant to Court of Appeals Rule 15(b), impose as sanctions the maximum penalty available in this case, a $2,500 penalty, upon Roberts (but not upon his clients, We Care and Hadley).

The Court of Appeals did not stop there. It went on to say, "We note that Roberts currently has 17 cases pending in this court. He would be well advised to diligently and expeditiously examine them to determine whether they are similarly frivolous."

Judicial patience is not, nor should it be, limitless, especially when only boilerplate facts which may not even be germane to the particular case are at hand.

2. Arguing the Facts:

A lawyer certainly has a duty to zealously represent his client, competently (Rule 1.1) and diligently (Rule 1.3). A lawyer can submit good faith arguments in that client's favor even advancing new theories in good faith. But to blatantly misrepresent the facts can end up in malpractice claims and disciplinary proceedings. (See Rule 3.1)

Rule 8.4(a) It shall be a violation of the Georgia Rules of Professional Conduct for a lawyer to:

violate or knowingly attempt to violate the Georgia Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

8.4(1)(4) engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation.

3. A case in point.

Consider the way a Closing Attorney handled an error made in a transaction involving a husband and wife. Closing Attorney is handling a refinance transaction owned by a married couple. At closing, Husband signs the security deed and believes he is a joint borrower with his Wife. However, in October 2005, a quitclaim deed transferring Husband's interest to Wife was prepared in Closing Attorney's office.

Husband did not sign the quitclaim deed, but Closing Attorney witnessed and a paralegal in his office notarized. Quitclaim deed was filed in February 2006. In March Wife took out second mortgage without Husband's knowledge. Husband learned of the forged quitclaim deed in mid-2006.

Closing Attorney represented to State Bar in response to complaint that his office learned of error and that Husband came to the office and executed the quitclaim deed. In another written explanation, Closing Attorney said Husband signed the day after the closing.

In this case the lawyer made an error and then tried to fix it with a forgery and a series of L-I-E-S. That attorney is no longer on the rolls of our Bar. In the matter of Donald O. Nelson, 293 Ga. 578 (2013).

If this is news to you, come home from Mars any way you can but hear this: you are going to make a mistake. Someone in your office under your supervision or on your payroll is going to make a mistake.

C. The ideal of honesty hits the road of reality. How to comply with the Professional Rules without getting hit by the bus?

Here is food for thought.

1. Create an environment so that you can get the facts. No one is happy to learn of negligence, malfeasance or stupidity. Prepare yourself and your colleagues to get the whole story.

2. Get the facts. Go beyond the surface to find the documents or emails. Make sure you have **all** the relevant documents in any form.

3. Interview all those involved. Get the story that goes with the facts. How did this happen? What was going on that made this error, mistake or life seem plausible?

4. Tell the parties who need to know as appropriate and when appropriate.

    a. Your partner who manages risk.

    b. Your errors and omissions carrier.

    c. Your client.

    d. The title company.

    e. Your opposing counsel.

    f. The court.

Let's start with the Nelson case I just shared. You learn that you are missing a signature on the security deed of a spouse. How many of you have experienced this? How can this be solved? Consider contact with the individual, title claim, civil suit.....none

of which include fabrication of a signature or false statement to the client or Bar or anyone else.

As well put by renowned physicist Albert Einstein, "Whoever is careless with truth in small matters cannot be trusted with important matters." Professor Einstein certainly wrote the book on "small matters."

Another common example is new to this century. You are in the middle of a hot and heavy case or maybe it's a contentious closing. You see that you have just been copied with an email that you should not have received. What is your professional duty?

Where does the advantage to your client intersect with the zealous advocate?

Your duty is to immediately notify the sender of its receipt. If you are the receiver by complete accident and the matter is not known to you, notify all the senders it is a message not intended for you and that you are deleting it. If you are the errant sender, immediately request the recipient to delete it as sent in error immediately.

You cannot un-know what you have learned but your duty is to let the parties know that you know.

II. **INTEGRITY**.

Honesty and integrity are often used interchangeably but they have distinctions. Integrity definitions generally describe a moral framework of which honesty is a cornerstone. Think of it this way: any single question may be answered honestly but a life of integrity means that your essential moral framework compels all questions to be answered honestly. It is a hallmark of character.

A. Rules to consider:

1.4 Communication

a. A lawyer shall:

1. promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(h), is required by these Rules;

2. reasonably consult with the client about the means by which the client's objectives are to be accomplished;

3. keep the client reasonably informed about the status of the matter;

4. promptly comply with reasonable requests for information; and

5. consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

b. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The maximum penalty for a violation of this Rule is a public reprimand.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's informed consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations - depending on both the importance of the action under consideration and the feasibility of consulting with the client - this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as

significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged. The timeliness of a lawyer's communication must be judged by all the controlling factors. "Prompt" communication with the client does not equate to "instant" communication with the client and is sufficient if reasonable under the relevant circumstances.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, where there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(h).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests

or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client.

2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. A lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

The maximum penalty for a violation of this Rule is disbarment.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation. Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where

consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4: Communication may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

3.1 Meritorious Claims and Contentions

In the representation of a client, a lawyer shall not:

a. file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another;

b. knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law.

The maximum penalty for a violation of this Rule is a public reprimand.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, or, if the lawyer is unable either to make a

good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] It is not ethically improper for a lawyer to file a lawsuit before complete factual support for the claim has been established provided that the lawyer determines that a reasonable lawyer would conclude that there is a reasonable possibility that facts supporting the cause of action can be established after the filing of the claim; and provided further that the lawyer is not required by rules of procedure or otherwise to represent that the cause of action has an adequate factual basis. If after filing it is discovered that the lawsuit has no merit, the lawyer will dismiss the lawsuit or in the alternative withdraw.

[4] The decision of a court that a claim is not meritorious is not necessarily conclusive of a violation of this Rule.

Whenever someone is accused or arrested of alleged claims or wrongdoing, those accusations did not happen to fall out of the blue one day. Our lives today both professionally and personally are a mosaic of a million little choices we make each minute, each hour, each day.

If you want to consciously self-check your honesty quotient, practice honesty for the next minute, next hour, next day. As you become guided by the intentional and conscious practice of honesty it becomes part of your moral compass of integrity. Virginia Woolf said "If you do not tell the truth about yourself, you cannot tell it about other people."

B. YOUR ESCROW ACCOUNT IS NOT YOURS.

Rule 1.15(I)

a. A lawyer shall hold funds or other property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own funds or other property. Funds shall be kept in a separate account maintained in an approved institution as defined by Rule 1.15(III)(c)(1). Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and

other property shall be kept by the lawyer and shall be preserved for a period of six years after termination of the representation.

b. For the purposes of this Rule, a lawyer may not disregard a third person's interest in funds or other property in the lawyer's possession if:

1. the interest is known to the lawyer, and

2. the interest is based upon one of the following: i.A statutory lien;

ii. A final judgment addressing disposition of those funds or property; or

iii. A written agreement by the client or the lawyer on behalf of the client guaranteeing payment out of those funds or property.

The lawyer may disregard the third person's claimed interest if the lawyer reasonably concludes that there is a valid defense to such lien, judgment, or agreement.

c. Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

d. When in the course of representation a lawyer is in possession of funds or other property in which both the lawyer and a client or a third person claim interest, the property shall be kept separate by the lawyer until there is an accounting and severance

of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or property as to which the interests are not in dispute.

The maximum penalty for a violation of this Rule is disbarment.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[2] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration or interpleader. The undisputed portion of the funds shall be promptly distributed.

[3] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

[3A] In those cases where it is not possible to ascertain who is entitled to disputed funds or other property held by the lawyer, the lawyer may hold such disputed funds for a reasonable period of time while the interested parties attempt to resolve the dispute. If a resolution cannot be reached, it would be appropriate for a lawyer to interplead such disputed funds or property.

[4] A "clients' security fund" provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.

Integrity requires you to "render unto Caesar what is Caesar's." Your escrow account is a sacred trust, not a payday loan funder. Yet year after year we see cases in both the civil context and in the disciplinary matters in which someone took a fateful dip. If you had received $75,000 in May, 2007, to hold in escrow pending a real property sale and did not release the funds upon buyer's default, received $10,000 in escrow for another sale and refused to release per agreement, and refused to pay the judgment the seller won against you for your failure to pay, you **will** be disbarred. See e.g., in the matter of *Leonanous Moore*, 285 Ga. 731 (2009).

One poor decision can trigger a domino. Did you see the pictures from Thailand in December, 2004, of the devastation caused by the tsunami? Over 150,000 people lost their lives.

It is a powerful metaphor. One ripple of greed, one l-i-e, one failure to disclose or cover up can end up affecting so many. The first ripple multiplied became a nightmarish horror.

Compare this metaphor with the phenomenon called The Butterfly Effect in which seemingly insignificant small acts can cause tremendously large consequences in a later state.

From that fascinating source Wikipedia: "The butterfly effect refers to a concept that small causes can have large effects. Initially, it was used with weather prediction but later the term became a metaphor used in and out of science. In chaos theory, the

butterfly effect is the sensitive dependence on initial conditions in which a small change in one state of a deterministic nonlinear system can result in large differences in a later state. The name, coined by Edward Lorenz for the effect which had been known long before, is derived from the metaphorical example of the details of a hurricane (exact time of formation, exact path taken) being influenced by minor perturbations such as the flapping of the wings of a distant butterfly several weeks earlier. Lorenz discovered the effect when he observed that runs of his weather model with initial condition data that was rounded in a seemingly inconsequential manner would fail to reproduce the results of runs with the unrounded initial condition data. A very small change in initial conditions had created a significantly different outcome."

Your act of disclosing an improper email received, of returning an overpayment of change, of correcting a miscalculation of funds due to you is the small act of honesty which, woven with practice, becomes a garment of integrity inseparable from your essence. Honesty becomes integrity becomes character becomes your reputation becomes your good name.

Perhaps you are recalling a situation as we are discussing this in which you either told a lie or withheld the whole truth and nothing but the truth.

Here are some thoughts for dealing with it professionally.

A. If you can fix it, fix it. That's Southern for I'm fixin' to make it right."

B. If you can't fix it or the folks are dead or gone out of your life, acknowledge the error to yourself and pay the reconciliation forward in your own quiet and confidential way. Someone in your circle of contact today can benefit from your personal and confidential act of contrition.

C. After making it right in one of the ways above, forgive yourself. The person who made the error yesterday is not the same person who clearly

recognizes the dishonesty or misrepresentation today. Old person gone, new person would not make those choices.

D. Resolve to give yourself some kind of physical reminder of your ongoing choice to be truthful, forthcoming and to practice honesty with each choice until it is no longer even an issue. A special token, meaningful written saying, framed photograph, or just a one or two word mantra will work. Pick something simple.

E. Recognize the value of this conduct, whether it is something new to you or always been your practice, practicing honesty and integrity will raise your personal standard and in turn make our profession one viewed as one of honor, integrity and respect.

Above all, as Oscar Wilde said, Be yourself; everyone else is taken."

III. **FAIRNESS.** Rule 3.4 is bluntly entitled "Fairness to Opposing Party and Counsel"

A lawyer shall not:

a. unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

b.

1. falsify evidence;
2. counsel or assist a witness to testify falsely; or
3. pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:
    i. expenses reasonably incurred by a witness in preparation, attending or testifying; or
    ii. reasonable compensation to a witness for the loss of time in preparing, attending or testifying; or
    iii. a reasonable fee for the professional services of an expert witness;

c. Reserved.;

d. Reserved.;

e. Reserved.;

f. request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

1. the person is a relative or an employee or other agent of a client; or the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information; and
2. the information is not otherwise subject to the assertion of a privilege by the client; and

g. use methods of obtaining evidence that violate the legal rights of the opposing party or counsel; or

h. present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter.

The maximum penalty for a violation of this Rule is disbarment.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

[3] Reserved.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

[5] As to paragraph (g), the responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of the opposing party or counsel. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence.

It could be said that fairness is in the eye of the beholder, or maybe that of its advocate. From the beginning of time, "It's not fair" has been a recurrent and tiresome human whine.

Fairness is really an abstract concept. It requires some balancing of disparate issues. "If life were fair, Elvis would be alive and all the impersonators would be dead," quipped Johnny Carson.

Justice Potter Stewart of the United States Supreme Court explained that "Fairness is what justice really is." Certainly we think of justice as impartial, blind, fair. Fairness... a synonym of justice.

But justice cannot be fair if we as its advocates are not focused on fairness. Our whole country's climate seems to be reverberating with claims of unfairness. Fairness, like truth, requires perception and interpretation to get it right. Consider what comedian Dick Gregory once observed: "We used to root for the Indians against the cavalry, because we didn't think it was fair in the history books that when the cavalry won it was a great victory, and when the Indians won it was a massacre."

There is no lodestone beyond your conscience to divine what is "fair." Perhaps it is easier to recognize a gnawing uneasiness in your stomach that something is rotten in Denmark as "not fair." Consider the lawyers who "repeatedly and intentionally contacted [an expert witness] at a [...] hospital with the objective of interfering with [his] appearance as ['s] witness," by internal e-mails, pressure and phone calls voicing displeasure. This violated Rule 3.4 and resulted in the disqualification of the hospital's attorneys. *Wellstar Health Systems, Inc. v. Kemp, 324 Ga. App. 629 (2013), cert. denied.*

Maybe the easier way to approach compliance of the Professional Rule requiring fairness is to tie it to the way you would want your own loved ones and children to be treated. "The future which we hold in trust for our own children will be shaped by our fairness to other people's children." Marian Wright Edelman

Summary.

We don't need the Professional Rules of Conduct to behave. Think of your children, as H. Jackson Brown, Jr. said, "Live so that when your children think of fairness, caring and integrity, they think of you".

NOTES:

SECTION FIVE

Title Claims

Tenise A. Cook, Esq.

Rubin Lublin, LLC

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About The Firm

Areas of Service

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In The News

Homeowner Information

Testimonials

Contact Us

Property Listings

Careers

Profile Details: Tenise A Cook

« Return to Profiles

Title: Partner

Phone: 770-246-3300

Email: tcook@rubinlublin.com

Chains of title are like a puzzle. I enjoy the complexity of them and working on something new every day.

LinkedIn profile

Mrs. Cook is a Partner of the firm and oversees the firm's eviction and litigation department. Her primary practice areas include commercial and real estate litigation. She represents companies in a wide variety of complex civil litigation matters, contract disputes, real estate, and quiet title actions. Prior to joining the firm, Mrs. Cook managed the title department of another industry law firm and was involved in their litigation practice.

PRACTICE AREAS

- Bankruptcy and Creditors Rights
- Residential and Commercial Real Estate Transactions
- Commercial and Residential Real Estate Investments
- Foreclosure and Mortgage Default
- Landlord/Tenant
- Real Estate Title

EDUCATION

- J.D., University of Georgia (2006)
- B.A., University of Georgia (2002)

ADMISSIONS

- **Licensed In:** Georgia, Tennessee
- **Admitted to Practice Before:** Georgia Court of Appeals, Georgia Supreme Court, Northern District of Georgia Federal Court

INVOLVEMENT

- Member, Real Property Section, Georgia Bar Association
- Executive Committee Member, Real Property Section, Georgia Bar Association

Title Claims: Beyond the Claim Letter

Tenise Cook
Rubin Lublin, LLC

Most Common Title Issues

- Unrecorded Deeds
- Improper execution
  - Notary Acknowledgments
  - Execution by corporate grantors
- Prior open security interest/lien
- Incorrect/insufficient legal description
- Break in the chain of title/missing interest
- Name discrepancies
- Encroachments
- Mobile Homes

Notice of a claim: initial steps

- 1st: Confirm the issue is really an issue
  - Double check online records or with your examiner to confirm there isn't a document missing from the claimant's exam.
  - A fair number of claims can be attributed to an incomplete or inaccurate title exam

Notice of claim: initial steps

- 2nd: Review your closing or origination file
  - There are often documents within the file that clearly explain the parties intentions,
  - These documents are crucial to obtaining either cooperation from the necessary parties or obtaining judicial relief of the mistake

Notice of claim: initial steps

- 3rd: Contact prior closing attorney to see if there are documents or notes in their file regarding issue if it occurred prior to your closing

Unrecorded Deeds

- Confirm deed was never recorded vs. recorded previously and cancelled by mistake vs. recorded in incorrect county
- Obtain copy of missing deed
- Research grantor- if still alive, they may be willing to issue a replacement
- An Affidavit can be recorded to place record notice of the existing deed, but does not establish the deed of record on its own
  - Does prevent a potential bona fide purchaser from coming in, so advisable to record Affidavit while replacement is sought
- If replacement or original cannot be located, bring action to establish lost or misplaced records

Bad Execution

- Issue: Notary used acknowledgement and no second unofficial witness signed the document (prior to July 1, 2015)
  - If Notary is available and other documents support it, have them execute an Affidavit confirming they actually witnessed the execution and used acknowledgement format by mistake
- Issue: Notary Seal is not visible
  - Contact closing firm to see if they have a cleaner copy of deed that shows seal. If so, record Affidavit re: seal present
  - If seal was never present, corrective deed is preferred method of curative
  - Can also obtain a Notary Affidavit saying seal was omitted and confirming Notary was commissioned at the time of closing and witnessed execution

Bad Execution

- Issue: Notary and/or witness signature is missing from document
  - Review document to confirm if any additional documents recorded at the closing (i.e. Waiver of Borrower's Rights) were properly executed
  - Contact closing firm to see if they can identify who was present at the closing
  - If evidence supports usage, have a Notary Affidavit or Witness Affidavit executed.
- For any of the preceding issues, if cooperation of the Notary or party cannot be obtained, or if the identity of the Notary cannot be ascertained, bring judicial action to reform deeds to reflect they are properly executed and to declare them valid despite execution issues.

Bad Execution

- Corporate execution
  - Contact closing attorney for copy of corporate resolution to confirm signor had authority
  - If closing firm not available, contact corporation directly
  - Title Affidavit or Scrivener's Affidavit from closing attorney to clarify signor was authorized or proper title
  - When necessary, corrective deeds can be obtained (even from dissolved corporations as long as they have been dissolved less than 5 years)

Prior Liens/Security Deeds

- Confirm whether lien/security deed was paid
  - For HELOCs, also confirm kill letter was sent
  - You may have to go back several closings to locate the closing that paid off prior loan
- Use Payoff Assist and/or GSCCCA to try and locate successor entities if holder is no longer around
  - If paid, send Cancellation request
    - If request is ignored, consider demand letter pursuant to O.C.G.A. § 44-14-80
      - Must provide cancellation within 60 days of payment or be liable for $500 damages plus attorneys' fees plus any actual damages incurred.

Prior Liens/Security Deeds

- If prior loan was never paid:
  - Request subordination agreement
    - Some lenders will only agree to subordinate to amounts paid on prior loans at closing
    - Check with confirm there was no prior agreement to subordinate that never materialized
  - Bring action have loan equitably subrogated
    - Considerations:
      - Was the prior loan a "gap filing"?
      - How much was expended to pay prior loans at closing?
      - How much cash did borrower walk away with at closing?
      - Was failing to pay prior loan the result of "inexcusable neglect"?

Legal Description

Common Mistakes

- Legal description not recorded with deed
- No verifiable point of beginning
- Wrong or missing plat book/page reference in short legal
- Wrong lot number, land lot, or district
- Wrong Unit
- Misspelling or change in Subdivision name
- Failure to reference declarations if property is a condominium
- Failure to include sell-offs (less and except clauses) in legal
- Omission of easements
- Old descriptions that rely solely on lands of adjoining landowners
- Completely incorrect legal description
  - Often happens if the borrower is purchasing multiple properties in the same office on one day
- Metes and bounds description does not close

Legal Description

- Affidavits- keep in mind that they don't "cure" anything, they just provide notice of the issue
  - Therefore, Affidavits are only appropriate when the legal description is otherwise sufficient and change is minor
  - If issue is major, affidavit can be recorded as a placeholder
- Corrective Deeds
- Boundary Line Agreements
- Reformation Actions
- Quiet Title
  - Typically will need to be a Quiet Title Against All the World

Break in the Chain of Title/Missing Interest

- Most Common
  - Vesting Deed into Borrower or Security Deed from Borrower only grants a ½ interest in the property
  - Spouse on title at the time Security Deed granted, but does not sign Security Deed
    - Most often occurs during refinance transactions
    - Can also occur if deeds are recorded out of order
  - Deed into Corporation, next deed out from individual who is an officer of the corporation or vice versa
  - Deed into Corporation A, next Deed in chain from Corporation AB
    - Typically this is a situation where the name changed, or a merger took place.
  - Death of an owner in the chain of title
  - Assignments and/or Cancellations from Lenders that were never assigned the Security Deed

Break in the Chain of Title/Missing Interest

- Title Affidavits
- Deeds from Missing Interest Holders
- Heirship Affidavits and deeds from heirs/beneficiaries
- Judicial actions for reformation, equitable relief
- Quiet Title Actions
  - Conventional Quiet Title can be used when you know all parties whose interest is missing
  - Use Quiet Title Against All the World if there are any unknown claimants

Encroachments

- Even minor encroachments can be an issue due to lender/HUD requirements
- Check for surveys, and if none available or in claim package, order as-built survey to confirm encroachment
- Minor encroachments
  - Boundary line agreements
  - Removal of encroaching structure if not part of house
- Major encroachments
  - Litigation (Quiet Title)
  - Land swap or outright purchase of additional property

Mobile Homes

- All mobile homes manufactured after 1963 must be titled
- Originally titled using MV-1 form for each side of the Mobile Home (Tag/Title Application and submitting to county tag office with Manufacturer's Statement of origin
  - If mobile home has no current GA title or a duplicate title is needed to be issued, you must submit a T-22B form (Certificate of Inspection by Law Enforcement Officer) with MV-1 at the time of titling
  - If ad valorem tax is due, it must be paid at the time the mobile home is titled

Mobile Homes

- A T-234 Form(Certificate of Permanent Location) must be completed for each side and filed with the County Tax Commissioner(who will then forward to the Department of Revenue).
  - Must be completed by all owners
  - Lien releases (T-4 Form) from any lienholders on Mobile Home title should also be submitted
- Once returned from county, the T-234 is recorded and you request a certified copy of the recorded T-234.
- The recorded T-234, plus the original Title, T22-B form and title fee are then submitted to the County Tax Office requesting the title be cancelled to real property
- The County will provide a letter confirming the title has been cancelled to real property

NOTES:

SECTION SIX

Deed Attestation and Recent Changes Affecting Real Estate Practice

Debora Bailey, Esq.

Gilroy Bailey Trumble LLC

Deborah S. Bailey is originally from English Harbour, Antigua. She earned a Bachelor of Science degree from the State University of New York at Buffalo in 1989 and received her J.D. from the University Of Miami School Of Law in 1998. She was admitted to the State Bar of Florida in 2000 and the State Bar of Georgia in 2001. She practices residential and commercial real estate law in Gilroy Bailey Trumble's Alpharetta office. She was a member of the University of Miami International and Comparative Law Review and American Bar Association. She is an active member of the Legislative Committee of the Real Property Law Section of the State Bar of Georgia, a former member of the board of directors of The Georgia Real Estate Fraud Prevention and Awareness Coalition (GREFPAC) and a member of the Georgia Residential Closing Attorneys Association (GRECAA). She is a frequent lecturer and educational trainer for attorneys and real estate industry professionals. Deborah is the Managing Partner of the Real Estate and Commercial Closing Division of Gilroy Bailey Trumble

Her email address is dxb@gilroyfirm.com

FUNDAMENTALS: 101

Q & A: All You Need to Know in One Place
RE: What Is All the Noise About Deed Attestation?

Kent E. Altom
Johns Creek, GA

Deborah S. Bailey
Gilroy Bailey Trumble LLC

As scholars write the history of the Great Recession of 2007-2009, there will be stories written about how real property law practice and procedures in Georgia were impacted by a relaxation of standards and procedures. The court and legislative dockets offer many clues in a myriad of proposed bills, laws and court decisions that indicate how latent and patent defects in instruments that made it through the recording system and onto public record have become problematic. Georgia House Bill 322 (2015) addresses one such fissure that crept into the practice over time and it is that some practitioners were treating notarization and attestation as if they were referring to the same type of act and this resulted in the deterioration in the execution formalities of instruments presented for recording. Despite the misconception, "attestation," "notarization" and "acknowledgment" are different acts which serve different purposes and failure to recognize the distinction between these acts may result in an instrument recorded and properly indexed on the deed records being voidable or in more extreme cases void.

Q: What is attestation and why is it important?

A: Black's Law Dictionary defines "notarize" (of a notary public), "to attest to the authenticity of (a signature, mark, etc.)." "Attest" is defined as "to bear witness, to affirm to be true or genuine; to authenticate by signing as a witness." Black Law Dictionary further defines "attestation" as "[t]he act of witnessing an instrument in writing, at the request of the party making the same, and subscribing it as a witness," noting that "[e]xecution and attestation are clearly distinct formalities; the former being the act of the party, the latter of the witnesses only." Black's Law Dictionary (10th ed. 2014). Similarly, Pindar's Real Estate Law and Procedure defines "attestation" as "the act of witnessing the actual execution of the paper and subscribing one's name as a witness to the fact." Daniel F. Hinkle, Pindar's Real Estate Law and Procedure with Forms (7th ed., 2012).

In Georgia, before any recordable instrument may be recorded, it "must be attested or acknowledged as provided by law." O.C.G.A. § 44-2-14(a). As one court observed:

> ...Attestation serves to enhance the reliability of a deed—to increase the odds that the grantor in fact executed the deed. It creates a presumption of genuineness, Guthrie v. Gaskins, 171 Ga. 303, 306, 155 S.E. 185 (1930), for the purpose of inducing the public to act on that presumption...A necessary corollary is that "[t]he law for recordation is for the purpose of giving constructive notice to all persons other than the parties to the instrument." Gilliam v. Burgess, 169 Ga. 705,

708, 151 S.E. 652 (1930). Constructive notice is another way of saying that duly filed, recorded, and indexed deeds and mortgages are worthy of a presumption of genuineness, which enhances predictability and thereby encourages commerce in real property. An unattested deed cannot be presumed genuine merely because a clerk erred by recording. In re Codrington, 430 B.R. 287 (2009).

Notwithstanding this, however, clerks routinely record security deeds and other instruments that are arguably unattested or improperly attested. As such, it is critical to have an understanding of the evolving attestation requirements in Georgia.

Q: What are the pertinent Georgia statutes regarding attestation?

A: In Georgia, two statutes govern real estate deed attestation: O.C.G.A. § 44-2-15, "Officers authorized to attest registrable instruments," governs who may notarize instruments, and O.C.G.A. § 44-5-30, "Requisites of deed to lands; inquiry into consideration" governs who may witness the execution of real estate deeds. A third governs the notarization of instruments. O.C.G.A. § 44-2-15 provides:

> Any of the instruments enumerated in Code Section 44-2-14 may be attested by a judge of a court of record, including a judge of a municipal court, or by a magistrate, a notary public, or a clerk or deputy clerk of a superior court or of a city court created by special Act of the General Assembly. With the exception of notaries public and judges of courts of record, such officers may attest such instruments only in the county in which they respectively hold their offices.

Until July 1, 2015, O.C.G.A. § 44-5-30 provided:

> Except for documents electronically filed as provided for in Chapter 12 of Title 10 and Part 1 of Article 1 of Chapter 2 of this title, a deed to lands shall be an original document, in writing, signed by the maker, and attested by at least two witnesses, one an official witness and another an unofficial witness. It shall be delivered to the purchaser or his or her representative and be made on a good or valuable consideration. The consideration of a deed may always be inquired into when the principles of justice require it.

O.C.G.A. § 44-5-30 as stated above stood unchanged for decades. Thus, for years in Georgia, proper attestation of real estate deeds, including security instruments, has required two individuals attesting as witnesses to the grantor's(s') signature(s) one of whom was required to be an authorized officer (*e.g.*, a notary public) who must also attest to the grantor's signing of the document as is required by O.C.G.A. § 44-2-15. In re Blackmon, 509 B.R. 415 (2014).

Now, with the passage of Georgia House Bill 322 (2015), even those real estate deeds, including security instruments, that are acknowledged by a notary public require only one unofficial witness and an authorized officer (*e.g.*, a notary public). In the simplest of terms, where in the past "acknowledged" deeds require a total of three witnesses, one of whom is a

notary public, now such deeds must be signed in front of only two persons, one of whom must be a notary who both acknowledges the deed itself and witnesses its execution.

Here is the amended language of O.C.G.A. § 44-5-30:

> Except for documents electronically filed as provided for in Chapter 12 of Title 10 and Part 1 of Article 1 of Chapter 2 of this title, a deed to lands shall be an original document, in writing, signed by the maker, attested by an officer as provided in Code Section 44-2-15, and attested by one other witness. It shall be delivered to the purchaser or his or her representative and be made on a good or valuable consideration. The consideration of a deed may always be inquired into when the principles of justice require it.

Q: What precipitated this statutory change?

A: This statutory change was brought about by two Georgia Supreme Court cases arising from federal bankruptcy cases in Northern District of Georgia, which are commonly referred to as Gordon I & Gordon II. See U.S Bank National Association v. Gordon, No. S10Q1564 (Ga. March 25, 2011); Wells Fargo Bank, N.A. v. Gordon, No. S12Q2067 (Ga. Feb. 18, 2013) (answering two certified questions from the Eleventh Circuit in In re Codrington, 691 F.3d 1336 (11th Cir. 2012)). "Gordon" refers to a Neil C. Gordon, a Chapter 7 Trustee, who sought to avoid the interest of mortgage lenders whose security deeds were not properly witnessed. It is believed that this statutory change—requiring a security deed that is acknowledged by a notary public now only need one unofficial witness—will prevent a mortgage lender's interest from being deemed unsecured.

Q: What is the practical effect of this statutory change?

A: A mortgage lender is now less likely to see its secured lien avoided in a bankruptcy proceeding due to an alleged defect in the security instrument's execution and attestation because one less witness to its execution is required so long as the notary public is an attesting signatory.

Q: What does this statutory change mean for the Georgia real estate attorney?

A: Beginning July 1, 2015, any document transferring an interest in real property, including assignments must be attested by a witness and attested (not merely acknowledged) by a notary public or other authorized officer. After July 1, 2015, an acknowledgement will not meet new recordability standard. Think of the statutory change brought about by the passage of Georgia House Bill 322 (2015) as a "give and take." The new law reduces the required number of witnesses from two to one but it adds a duty upon the notary public or other authorized officer to both acknowledge the document and witness the document's execution.

Q: Does this statutory change cause a problem for real estate documents executed in states such as California that have more than one type of notary?

A: Yes. Instruments executed in certain other states—most notably, California—which has more than one type of notary can cause unique challenges to practitioners. In California, the first type of notarial act that may be performed is to attest to the fact that the document was executed by the grantor in the presence of the notary, while the second type of notarial act is where the notary acknowledges that the document was signed by the grantor. In the former act the notary is attesting to the fact that the instrument was signed in his/her presence. The passage of Georgia House Bill 322 (2015) requires a renewed focus on the specific verbiage accompanying a notary's signature. In order to avail itself to the "only one additional witness" requirement under Georgia's HB 322 (2015), a title document to be recorded in Georgia, if executed in California for example, would need to include a clear statement or certification of the notary public that he or she witnessed the execution of the deed at issue.

Final Point: Practitioners should closely examine the formalities of instruments that are filed and recorded to make sure they meet the minimum standard of Georgia law and take any necessary curative actions when time would allow for such a cure in order to avoid undesirable consequence. Deeds improperly attested in accordance with Georgia law may cause a failure of title, meaning that such a deed may be ineffective in transferring the real property interest referenced therein. These formalities are of utmost importance for example to mortgage lender who may discover at an inconvenient time that its security instrument which was filed and recorded in the real estate index is not properly attested, and this may result in its secured interest being treated as an unsecured. An interest, which would otherwise be secured, would not attach to what was intended to be its collateral for the repayment of the loan for want of an execution formality.

REFERENCE MATERIALS

15 HB 322/AP

House Bill 322 (AS PASSED HOUSE AND SENATE)

By: Representatives Strickland of the 111th, Ramsey of the 72nd, Mabra of the 63rd, Frye of the 118th, Jones of the 62nd, and others

A BILL TO BE ENTITLED
AN ACT

To amend Title 44 of the Official Code of Georgia Annotated, relating to property, so as to change and clarify provisions relating to the witnessing requisites of deeds, mortgages, and bills of sale; to provide a procedure for claiming certain United States savings bonds; to provide for the filing of deeds under power within a certain time after a foreclosure sale; to provide for the assessment and collection of a late filing fee; to provide for the remittance of sums collected from such late filing fees; to provide for related matters; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Title 44 of the Official Code of Georgia Annotated, relating to property, is amended by revising Code Section 44-5-30, relating to the requisites of deed to land, as follows:

"44-5-30.

Except for documents electronically filed as provided for in Chapter 12 of Title 10 and Part 1 of Article 1 of Chapter 2 of this title, a deed to lands shall be an original document, in writing, signed by the maker, ~~and~~ attested by ~~at least two witnesses~~ an officer as provided in Code Section 44-2-15, and attested by one other witness. It shall be delivered to the purchaser or his or her representative and be made on a good or valuable consideration. The consideration of a deed may always be inquired into when the principles of justice require it."

SECTION 2.

Said title is further amended by inserting two new Code sections, to read as follows:

"44-12-237.

(a) Notwithstanding the provisions of subsection (a) of Code Section 44-12-216, United States savings bonds which are unclaimed property and subject to the provisions of Code Section 44-12-190, et seq., the 'Disposition of Unclaimed Property Act,' shall escheat to the State of Georgia three years after becoming unclaimed property and subject to the

provisions of Code Section 44-12-190, et seq., and all property rights to such United States savings bonds or proceeds from such bonds shall vest solely in the State of Georgia.

(b) If, within 180 days after the passage of three years pursuant to subsection (a) of this Code section, no claim has been filed in accordance with the provisions of Code Section 44-12-190, et seq., for such United States savings bonds, the commissioner shall commence a civil action in the Superior Court of Fulton County for a determination that such United States savings bonds shall escheat to the state. The commissioner may postpone the bringing of such action until sufficient United States savings bonds have accumulated in the commissioner's custody to justify the expense of such proceedings.

(c) If no person shall file a claim or appear at the hearing to substantiate a claim or if the court shall determine that a claimant is not entitled to the property claimed, then the court, if satisfied by evidence that the commissioner has substantially complied with the laws of this state, shall enter a judgment that the subject United States savings bonds have escheated to the state.

(d) The commissioner shall redeem such United States savings bonds, and the proceeds shall be deposited in the state general fund in accordance with the provisions of Code Section 44-12-218.

44-12-238.

Any person making a claim for the United States savings bonds escheated to the state under Code Section 44-12-237, or for the proceeds from such bonds, may file a claim in accordance with the provisions of Code Section 44-12-190, et seq., the 'Disposition of Unclaimed Property Act.' Upon providing sufficient proof of the validity of such person's claim, the commissioner may pay such claim in accordance with the provisions of Code Section 44-12-190, et seq."

SECTION 3.

Said title is further amended by revising Code Section 44-14-33, relating to attestation or acknowledgment of mortgage, as follows:

"44-14-33.

In order to admit a mortgage to record, it ~~must be attested by or acknowledged before an officer as prescribed for the attestation or acknowledgment of deeds of bargain and sale; and, in the case of real property, a mortgage must also be attested or acknowledged by one additional witness~~ shall be signed by the maker, attested by an officer as provided in Code Section 44-2-15, and attested by one other witness. In the absence of fraud, if a mortgage is duly signed, witnessed, filed, recorded, and indexed on the appropriate county land

records, such recordation shall be deemed constructive notice to subsequent bona fide purchasers."

SECTION 4.

Said title is further amended by revising Code Section 44-14-34, relating to attestation and acknowledgment or probation of mortgages executed outside of this state, as follows:

"44-14-34.

When executed outside this state, mortgages ~~may be attested, acknowledged, or probated in the same manner as deeds of bargain and sale~~ shall be signed by the maker, attested by an officer as provided in Code Section 44-2-15, and attested by one other witness."

SECTION 5.

Said title is further amended by revising Code Section 44-14-37, relating to the effect of the failure to record a mortgage, as follows:

"44-14-37.

~~The effect of a failure to record a mortgage shall be the same as the effect of a failure to record a deed of bargain and sale~~ Reserved."

SECTION 6.

Said title is further amended by revising Code Section 44-14-61, relating to attestation of deeds to secure debt and bills of sale, generally, as follows:

"44-14-61.

In order to admit deeds to secure debt or bills of sale to secure debt to record, they shall be ~~attested or proved in the manner prescribed by law for mortgages~~ signed by the maker, attested by an officer as provided in Code Section 44-2-15, and attested by one other witness."

SECTION 7.

Said title is further amended by revising Code Section 44-14-62, relating to attestation of deeds to secure debt and bills of sale executed outside of this state, as follows:

"44-14-62.

When executed ~~out of~~ outside this state, deeds to secure debt and bills of sale ~~may be attested, acknowledged, or probated in the same manner as deeds of bargain and sale~~ to secure debt shall be signed by the maker, attested by an officer as provided in Code Section 44-2-15, and attested by one other witness."

SECTION 8.

Said title is further amended by revising subsection (a) of Code Section 44-14-63, relating to recording of deeds to secure debt and bills of sale to secure debt, as follows:

"(a) Every deed to secure debt shall be recorded in the county where the land conveyed is located. Every bill of sale to secure debt shall be recorded in the county where the maker, if a resident of this state, resided at the time of its execution and, if a nonresident, in the county where the personalty conveyed is located. Deeds to secure debt or bills of sale to secure debt not recorded shall remain valid against the persons executing them. ~~The effect of the failure to record deeds and bills of sale shall be the same as the effect of the failure to record a deed of bargain and sale.~~"

SECTION 9.

Said title is further amended by revising Code Section 44-14-160, relating to recording of foreclosure sales and deeds under power, as follows:

"44-14-160.

(a) Within 90 days of a foreclosure sale, all deeds under power shall be ~~recorded~~ filed by the holder of a deed to secure debt or a mortgage with the clerk of the superior court of the county or counties in which the foreclosed property is located. The clerk shall ~~write in the margin of the page where~~ record and cross reference the deed under power to the deed to secure debt or mortgage foreclosed upon ~~is recorded the word 'foreclosed' and the deed book and page number on which is recorded the deed under power conveying the real property; provided, however, that, in counties where the clerk keeps the records affecting real estate on microfilm, the notation provided for in this Code section shall be made in the same manner in the index or other place where the clerk records transfers and cancellations of deeds to secure debt~~. The deed under power shall be indexed pursuant to standards promulgated by the Georgia Superior Court Clerks' Cooperative Authority.

(b) In the event the deed under power is not filed within 30 days after the time period set forth in subsection (a) of this Code section, the holder shall be required to pay a late filing penalty of $500.00 upon filing in addition to the required filing fees provided for in subsection (f) of Code Section 15-66-77. Such late filing penalty shall be collected by the clerk of the superior court before filing.

(c) The sums collected as a late filing penalty under subsection (b) of this Code section shall be remitted to the governing authority of the county. If the foreclosed property is located within a municipality, the governing authority of the county shall remit the late filing penalty for such property to the governing authority of such municipality within 30 days of its receipt of the penalty. For each late filing penalty for property located within

the corporate limits of a municipality, the governing authority of the county may withhold a 5 percent administrative processing fee from the remittance to such municipality."

SECTION 10.

All laws and parts of laws in conflict with this Act are repealed.

Sample Georgia Notary Block

#1

Signed, sealed and delivered in the presence of:

_____

Unofficial Witness

_____

Notary Public

My Commission Expires:

(NOTARY SEAL)

#2

Signed, sealed and delivered in the presence of:

_____

Witness

_____

Notary Public

My Commission Expires:

(NOTARY SEAL)

Sample Deed Executed in California and recorded in Georgia prior to Georgia House Bill 322 (2015)

Deed Book [redacted] Pg [redacted]

[redacted]

SEE EXHIBIT "A" ATTACHED HERETO AND INCORPORATED HEREIN FOR ALL PURPOSES.

TOGETHER with all rights, members and appurtenances thereto, also all the estate, right, title, interest, claim or demand of Party of the First Part, or said Party's representatives, heirs, successors and assigns, legal, equitable or otherwise whatsoever, in and to the same.

THIS CONVEYANCE IS SUBJECT TO all zoning ordinances; matters which would be disclosed by an accurate survey or by an inspection of the property; any outstanding taxes, including but not limited to ad valorem taxes, which constitute liens upon said property; all restrictive covenants, easements, rights-of-way and any other matters of record superior to said Security Deed.

TO HAVE AND TO HOLD the said property and every part thereof unto the Party of the Second Part and said Party's representatives, heirs, successors and assigns, to said Party's own use, benefit and behoof in FEE SIMPLE, in as full and ample a manner as said Party of the First Part or said Party's representatives, heirs, successors and assigns, did hold and enjoy the same.

IN WITNESS WHEREOF, Lender as Attorney in Fact for Borrower has affixed its' hand and seal this [redacted] day of [redacted], 20[redacted]

[redacted]
as Attorney-in-fact for
[redacted]

Signed, sealed and delivered
in the presence of:

[redacted]
UNOFFICIAL WITNESS

BY: [redacted] (SEAL)
NAME:
TITLE:

[redacted]
UNOFFICIAL WITNESS

BY: [redacted] (SEAL)
NAME:
TITLE:
(CORPORATE SEAL)

[redacted]

[redacted]

ACKNOWLEDGMENT

State of California
County of Ventura)

On [redacted] before me, [redacted], notary public
(insert name and title of the officer)

personally appeared [redacted] and [redacted]
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies) and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

[redacted]
Ventura County
My Comm. Expires [redacted]

Signature [redacted] (Seal)

Deed Under Power [redacted]

California Notary Acknowledgement
(Sample: For Illustration Only)

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT **CIVIL CODE § 1189**

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)
County of _____)

On _____ before me, _____,
Date *Here Insert Name and Title of the Officer*

personally appeared _____
Name(s) of Signer(s)

_____,

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____
Signature of Notary Public

NOTES:

SECTION SEVEN

Alluring Appeals – Current Cases in our Appellate Courts Which Impact your Practice

Monica Gilroy, Esq.

Gilroy Bailey Trumble LLC

Monica K. Gilroy, a founding principal of Gilroy Bailey Trumble, is the firm managing partner and has over 20 years of experience practicing law. She received her Bachelor of Arts in Political Science from the University of Wisconsin and a J.D. from the University of South Carolina School of Law. In addition, Ms. Gilroy attended the Ealing College of Higher Education in a study abroad program. Ms. Gilroy leads the Litigation Department as the focus of her national litigation practice includes all aspects of real estate litigation, including foreclosure and title disputes, broker and agent liability defense, mortgage fraud-related litigation and civil and commercial contract disputes. She also leads the Default Department providing national foreclosure, bankruptcy, loss mitigation and eviction services.

Ms. Gilroy has served as the litigation liaison for leading lending institutions as well as managed their national bankruptcy litigation program. She continues to serve as counsel for many national and local banks, mortgage companies and real estate industry lenders and leaders. She regularly assists closing attorneys, real estate agents, property managers, title companies and brokers when title or other contract issues arise. She practiced for several years in the areas of estate and trust litigation and serves regularly as a Special Master in Fulton County. Ms. Gilroy has extensive lead counsel trial experience and frequently appears in all of the state and federal courts of Georgia, including the state and federal appellate courts.

A long-standing member of the State Bar of Georgia, Ms. Gilroy also enjoys membership with the Lawyers Club of Atlanta, the Georgia Women's Lawyers Association, Georgia Mortgage Bankers Association and the Atlanta Volunteer Lawyers Foundation. Ms. Gilroy is the elected Secretary Treasurer of the Executive Committee of the Real Property Section of the State Bar of Georgia, where she previously served as the Editor of the RPLS Newsletter. She is a contributing writer to Foreclosure Law and Related Remedies: a State-by-State Digest which is published by the American Bar Association. She speaks and teaches on a regular basis at the state and national level to attorneys, real estate professionals, property managers, and real-estate brokers and agents on litigation and real estate related topics. Ms. Gilroy holds an AV-peer review rating with Martindale Hubbell.

Her email address is mkg@gilroyfirm.com

ALLURING APPEALS-CURRENT CASES IN OUR APPELLATE COURTS WHICH IMPACT YOUR PRACTICE

MONICA K. GILROY, ESQUIRE
Gilroy Bailey Trumble LLC
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DLTA SPRING SEMINAR 2016

ALLURING APPEALS-CURRENT CASES IN OUR APPELLATE COURTS WHICH IMPACT YOUR PRACTICE

DLTA SPRING SEMINAR 2016

MATERIALS

O.C.G.A.§ 23-3-40

O.C.G.A.§ 23-3-60

Olvera et al vs. University System of Georgia Board of Regents, et.al

State of Georgia vs. Mapache LLC Appellant Brief

State of Georgia vs. Mapache LLC Appellee Brief

State of Georgia vs. Mapache LLC Proposed Amicus Brief

American Land Title Association Amicus Brief

West's Code of Georgia Annotated
Title 23. Equity
Chapter 3. Equitable Remedies and Proceedings Generally
Article 3. Quia Timet (Refs & Annos)
Part 1. Conventional Quia Timet (Refs & Annos)

Ga. Code Ann., § 23-3-40

§ 23-3-40. Proceeding quia timet

Currentness

The proceeding quia timet is sustained in equity for the purpose of causing to be delivered and canceled any instrument which has answered the object of its creation or any forged or other iniquitous deed or other writing which, though not enforced at the time, either casts a cloud over the complainant's title or otherwise subjects him to future liability or present annoyance, and the cancellation of which is necessary to his perfect protection.

Credits

Formerly Code 1863, § 3153; Code 1868, § 3165; Code 1873, § 3232; Code 1882, § 3232; Civil Code 1895, § 4892; Civil Code 1910, § 5465; Code 1933, § 37-1407.

Notes of Decisions (41)

Ga. Code Ann., § 23-3-40, GA ST § 23-3-40
The Constitution and Statutes are current through the 2015 Legislative year. The Statutes are subject to changes provided by the Georgia Code Commission.

End of Document

West's Code of Georgia Annotated
Title 23. Equity
Chapter 3. Equitable Remedies and Proceedings Generally
Article 3. Quia Timet (Refs & Annos)
Part 2. Quia Time Against All the World (Refs & Annos)

Ga. Code Ann., § 23-3-60

§ 23-3-60. Purpose of part

Currentness

The purpose of this part is to create a procedure for removing any cloud upon the title to land, including the equity of redemption by owners of land sold at tax sales, and for readily and conclusively establishing that certain named persons are the owners of all the interests in land defined by a decree entered in such proceeding, so that there shall be no occasion for land in this state to be unmarketable because of any uncertainty as to the owner of every interest therein.

Credits

Laws 1966, p. 443, § 11.

NOTES OF DECISIONS

In general

Property owner's petition to remove 20-year leasehold interest as cloud on title of his property was proper use of Quiet Title Act. O.C.G.A. §§ 23-3-60 to 23-3-72. Cowron & Co. v. Shehadeh, 1997, 268 Ga. 383, 490 S.E.2d 82. Quieting Title 21

Purpose

Quiet Title Act of 1966 was designed to broaden relief available by supplementing and not supplanting quia timet procedure. O.C.G.A. § 23-3-60 et seq. Smith v. Georgia Kaolin Co., Inc., 1998, 269 Ga. 475, 498 S.E.2d 266, reconsideration denied. Quieting Title 19

Quiet Title Act provides efficient, speedy, and effective way to adjudicate disputed title claims. O.C.G.A. §§ 23-3-60 to 23-3-72. Cowron & Co. v. Shehadeh, 1997, 268 Ga. 383, 490 S.E.2d 82. Quieting Title 19

Declaratory judgments distinguished

Action under Quiet Title Act, rather than declaratory judgment action, was course that should have been pursued by plaintiff husband, who sought to establish that defendants, his wife's siblings, had no interest in lands allegedly owned by wife at her death. O.C.G.A. § 23-3-60. Porter v. Houghton, 2001, 273 Ga. 407, 542 S.E.2d 491. Declaratory Judgment 44; Quieting Title 1

Current possession of property required

Even under relaxed standard of Quiet Title Act of 1966, plaintiff must assert that he holds some current record title or current prescriptive title, in order to maintain his suit. O.C.G.A. § 23-3-60 et seq. Smith v. Georgia Kaolin Co., Inc., 1998, 269 Ga. 475, 498 S.E.2d 266, reconsideration denied. Quieting Title ⚷ 22

Right to trial by jury

Action to quiet title is an equitable action; however, either party may demand a trial by jury. O.C.G.A. §§ 23-3-60 et seq., 23-3-66. Martin v. Patton, 1997, 225 Ga.App. 157, 483 S.E.2d 614, reconsideration denied. Jury ⚷ 14(9); Quieting Title ⚷ 27

Voluntary dismissal

Alleged dominant tenement owner was not entitled to move for voluntary dismissal of action to establish easement by implication, since court had entered oral judgment in case. O.C.G.A. § 23-3-60 et seq. Woelper v. Piedmont Cotton Mills, Inc., 1996, 266 Ga. 472, 467 S.E.2d 517, reconsideration denied. Pretrial Procedure ⚷ 509

Res judicata

Denial of landowners' request for easement by implication to underground system of water pipes in their prior quiet title action because their petition did not include required description of the land was not res judicata in landowners' subsequent action seeking declaratory and injunctive relief with regard to the water pipes; relief was denied in earlier action on technical grounds, and no court of competent jurisdiction had reached merits of case. O.C.G.A. §§ 9-11-9.1, 9-12-42, 23-3-60 et seq. Woelper v. Piedmont Cotton Mills, Inc., 1997, 226 Ga.App. 337, 487 S.E.2d 5, reconsideration denied, certiorari granted, reversed 269 Ga. 109, 498 S.E.2d 255, vacated 231 Ga.App. 510, 498 S.E.2d 372. Judgment ⚷ 562

Questions of fact

Summary judgment will rarely be appropriate in action under Quiet Title Act. O.C.G.A. §§ 9-11-56, 23-3-60 to 23-3-72. Smith v. Georgia Kaolin Co., Inc., 1994, 264 Ga. 755, 449 S.E.2d 85. Judgment ⚷ 181(15.1)

Attorney fees

Complainant who had brought quiet title and partition proceeding was not entitled to attorney fees, if case was considered one at law; statutes governing those proceedings did not provide for award of attorney fees. O.C.G.A. §§ 23-3-60 et seq., 44-6-160 et seq. Walker v. Walker, 1996, 266 Ga. 414, 467 S.E.2d 583. Partition ⚷ 114(4); Quieting Title ⚷ 54

Review

In action to quiet title, findings of special master and adopted by trial court will be upheld unless clearly erroneous. O.C.G.A.

§ 23-3-60 et seq. Seignious v. Metropolitan Atlanta Rapid Transit Authority, 1984, 252 Ga. 69, 311 S.E.2d 808. Appeal And Error ⚙ 1022(1)

Ga. Code Ann., § 23-3-60, GA ST § 23-3-60
The Constitution and Statutes are current through the 2015 Legislative year. The Statutes are subject to changes provided by the Georgia Code Commission.

End of Document

2016 WL 369382
Only the Westlaw citation is currently available.
Supreme Court of Georgia.

OLVERA et al.
v.
UNIVERSITY SYSTEM OF GEORGIA'S BOARD OF REGENTS et al.

No. S15G1130.
|
Feb. 1, 2016.

Synopsis
Background: Non-citizen students who were beneficiaries of federal Deferred Action for Childhood Arrivals program brought action against University System's Board of Regents seeking a declaration that they were entitled to in-state tuition. The Superior Court, Fulton County, Goger, J., granted Board's motion to dismiss. Students appealed. The Court of Appeals, 331 Ga.App. 392, 771 S.E.2d 91, affirmed. Students appealed.

[Holding:] The Supreme Court, Melton, J., held that Board's sovereign immunity was not waived under Administrative Procedure Act (APA).

Affirmed.

West Headnotes (3)

[1] **States**⇨Eminent Domain

The State has no sovereign immunity that would allow it to take private property without just compensation. U.S.C.A. Const.Amend. 5; Const. Art. 1, sec. 2, par. 9(e).

Cases that cite this headnote

[2] **Education**⇨Liabilities

The University System's Board of Regents is an agency of the state to which sovereign immunity applies. Const. Art. 1, sec. 2, par. 9(e).

Cases that cite this headnote

[3] **Education**⊶Liabilities
States⊶Declaratory Judgment

Even if University System's Board of Regents were subject to Administrative Procedure Act (APA), in declaratory judgment action in which non-citizens sought declaration that they were entitled to in-state tuition, Board's sovereign immunity was not waived under provision of APA allowing the validity of any rule to be determined in an action for declaratory judgment; Board did not issue residency requirements pursuant to APA, and residency requirement was merely the Board's interpretation of an internal manual and not a "rule" within the purview of that provision. Const. Art. 1, sec. 2, par. 9(e); West's Ga.Code Ann. § 50–13–10(a).

Cases that cite this headnote

Attorneys and Law Firms

Charles Herman Kuck, Kuck Immigration Partners, Atlanta, GA, for Olvera et al.

Russell David Willard, Samuel S. Olens, A.G., Department of Law, Atlanta, GA, for University System of Georgia's Board of Regents et al.

Opinion

MELTON, Justice.

*1 In this case, a group of college students, including Miguel Angel Martinez Olvera, who are not United States citizens and who are grant beneficiaries of the Deferred Action for Childhood Arrivals program (DACA) filed a declaratory judgment action against the University System of Georgia's Board of Regents and its members in their official capacities (collectively, the Board) seeking a declaration that they are entitled to in-state tuition at schools in the University System of Georgia. The trial court granted the Board's motion to dismiss on the ground that sovereign immunity bars the action, and the Court of Appeals affirmed the trial court. *Olvera v. Univ. Sys. of Georgia's Bd. of Regents*, 331 Ga.App. 392, 771 S.E.2d 91 (2015). We affirm.

As set forth by the Court of Appeals,

> in their declaratory judgment petition, the students alleged that their status as DACA beneficiaries rendered them lawfully present in the United States. They further alleged that the Board's policy manual required students to provide verification of their lawful presence in the United States before being classified as in-state students for tuition purposes. And they alleged that the Board had not defined "lawful presence" for the purpose of its policy manual. The students alleged that the Board has "refused to confer in-state tuition benefits to Georgia college students who have obtained lawful presence in the United States through DACA." They sought a declaration that they "and other similarly situated DACA approved students who would otherwise qualify for in-state tuition benefits are entitled to those benefits."
>
> Arguing that sovereign immunity barred the declaratory judgment action, the Board moved for the trial court to dismiss it. The trial court agreed and granted the motion to dismiss, reasoning among other things that sovereign immunity extends to declaratory judgment actions and that the provision in the Administrative Procedures Act authorizing declaratory judgment actions against state agencies to determine the validity of agency rules ... did not waive sovereign immunity in actions concerning "interpretive rules."

(Punctuation omitted.) Id. at 392–93, 771 S.E.2d 91. The Court of Appeals agreed with the trial court.

[1] [2] The sweep of sovereign immunity under the Georgia Constitution is broad. It provides:

> Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.

Ga. Const. Art. I, Sec. II, Par. IX (e). In *Georgia Dept. Of Natural Resources v. Center for a Sustainable Coast,* 294 Ga. 593, 755 S.E.2d 184 (2014), we recently explained the extensive nature of sovereign immunity.

> The plain and unambiguous text of the 1991 constitutional amendment shows that only the General Assembly has the authority to waive the State's sovereign immunity. [*Gilbert v. Richardson,* 264 Ga. 744, 748(3), 452 S.E.2d 476 (1994)](subsection (e) of the amendment "confers upon the legislature the authority to waive sovereign immunity"); see also *Woodard v. Laurens County,* 265 Ga. 404(1), 456 S.E.2d 581 (1995) ("A waiver of sovereign immunity is a mere privilege, not a right, and the extension of that privilege is solely a matter of legislative grace.").

*2 *Sustainable Coast,* supra, 294 Ga. at 599(2), 755 S.E.2d 184.[1] It is settled that the Board is an agency of the State to which sovereign immunity applies.

> The Board of Regents is the state agency vested with the governance, control, and management of the University System of Georgia. Ga. Const. Art. VIII, Sec. IV, Par. I(b). Therefore, ... the board is an agency of the state to which sovereign immunity applies. *Pollard v. Board of Regents [of the University System] of Ga.,* 260 Ga. 885, 401 S.E.2d 272 (1991).

Wilson v. Board of Regents of the University System of Georgia, 262 Ga. 413, 414(3), 419 S.E.2d 916 (1992). Therefore, absent some exception, the Board is immune from the declaratory judgment action brought by the students.

[3] The students argue that the Board's sovereign immunity is waived under OCGA § 50–13–10(a) of the Georgia Administrative Procedure Act, which provides:

> The validity of any rule, waiver, or variance may be determined in an action for declaratory judgment when it is alleged that the rule, waiver, or variance or its threatened application interferes with or impairs the legal rights of the petitioner. A declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule, waiver, or variance in question.

This contention is misplaced. Even if we assume without deciding that the Board is subject to the APA,[2] the Board did not issue the residency requirements pursuant to the APA, and, in fact, the Board has never issued any rule pursuant to the APA. In addition, the Board's "policy [regarding residency requirements] was merely the agency's interpretation of [an internal manual], not an independently promulgated agency rule, and did not bring plaintiff within the scope of OCGA § 50–13–10." (Citation and punctuation omitted.) *Georgia Oilmen's Ass'n v. Dept. of Revenue,* 261 Ga.App. 393, 400, 582 S.E.2d 549 (2003). As such, the residency requirements challenged by the students is

> not a "rule" within the purview of § 50–13–10 .... [The residency requirements have] never been enacted as a [Board] rule pursuant to the APA. Therefore, the [residency requirements constitute] an "interpretive rule" [that falls within an exception to the procedural requirements of the APA pursuant to OCGA §§ 50–13–3 and 50–13–4,] not a

> "rule" [subject to the APA] within the meaning of § 50–13–10."

Roy E. Davis & Co. v. Dept. of Revenue, 256 Ga. 709, 711, 353 S.E.2d 195 (1987). See also, *Georgia Oilmen's Ass'n,* supra. Therefore, the students' contention that their declaratory judgment action is authorized by OCGA § 50–13–10 fails, and the students have pointed to no other source of law containing an explicit waiver of the Board's sovereign immunity in this matter.[3] Accordingly, the trial court correctly dismissed the students' declaratory judgment action, as found by the Court of Appeals.[4]

As we did in *Sustainable Coast,* supra, we note that

> *3 [o]ur decision today does not mean that citizens aggrieved by the unlawful conduct of public officers are without recourse. It means only that they must seek relief against such officers in their individual capacities. In some cases, qualified official immunity may limit the availability of such relief, but sovereign immunity generally will pose no bar. See *IBM v. Evans,* 265 Ga. [215, 220–222, 453 S.E.2d 706 (1995)] (Benham, P.J., concurring in part and dissenting in part).

Sustainable Coast, supra, 294 Ga. At 603(2). At this point in time, however, the students have not attempted to follow this route.

Judgment affirmed. All the Justices concur.

All Citations

--- S.E.2d ----, 2016 WL 369382

Footnotes

1 We note that sovereign immunity may also, in certain circumstances, be waived by our Constitution, itself. For example, the State has no sovereign immunity that would allow it to take private property without just compensation. See, e.g., *Thomasville v. Shank,* 263 Ga. 624(1), 437 S.E.2d 306 (1993).

2 We have employed this assumption without the necessity for actually making any such determination in a prior case. See *Tompkins v. Board of Regents of the University System of Georgia,* 262 Ga. 208, 417 S.E.2d 153 (1992).

3 We note that the students' action regards only the proper interpretation of terminology in a policy manual, not its very constitutionality.

4 In past cases, where the question of whether this sort of declaratory judgment action against the State is barred by the doctrine of sovereign immunity under our current Constitution has actually been raised as an issue, we have pretermitted the question. See, e.g., *Southern LNG, Inc. v. MacGinnitie,* 294 Ga. 657, 659 n. 5, 755 S.E.2d 683 (2014) (290 Ga. 204, 719 S.E.2d 473) (2011); *Jenkins v. Walker,* 287 Ga. 783, 700 S.E.2d 362 (2010); *Georgia Council of Professional Archeologists v. Board of Regents,* 271 Ga. 757, 523 S.E.2d 879 (1999). In this opinion, we squarely address that question and find that declaratory judgment actions of this type are, in fact, barred by the doctrine of sovereign immunity.

End of Document

IN THE SUPREME COURT
STATE OF GEORGIA

STATE OF GEORGIA	*	
	*	
Appellant,	*	
	*	
vs.	*	Case No. S16A0472
	*	
MAPACHE, LLC	*	
	*	
Appellee.	*	
	*	

BRIEF OF APPELLANT STATE OF GEORGIA

SAMUEL S. OLENS 551540
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MARGARET K. ECKROTE 238709
Senior Assistant Attorney General

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I. INTRODUCTION

This is an appeal from the Camden County Superior Court's denial of the State of Georgia's *Motion to Dismiss*, as to the State, in response to the *Amended Petition Quia Timet Against All the World* ("*Amended Petition*") filed by the Appellee, Mapache, LLC ("Mapache"). Mapache seeks a decree establishing its title in fee simple to an island known as Raccoon Key allegedly consisting of approximately 1720 acres (1563 acres of which is coastal marshland, tidewater, and tidewater bottoms) as fully described in the *Amended Petition*. [R: 107-108]. The Protection of Tidewaters Act provides the State is the presumed owner of all tidewaters[1] within the jurisdiction of the State "as successor to the Crown of England except where title in a private party can be traced to a valid Crown or state grant which explicitly conveyed the beds of such tidewaters." O.C.G.A. § 52-1-2.

The State seeks dismissal on the basis of sovereign immunity and shows the Camden County Superior Court erred in denying its *Motion to Dismiss* because sovereign immunity in a quiet title action involving coastal marshland is not waived in the Georgia Constitution and has not been

[1] The term "tidewaters" includes coastal marshland and is defined as, "the sea and all rivers and arms of the sea that are affected by the tide, where the tide rises and falls, which are capable of use for fishing, passage, navigation, commerce, or transportation and which are located within the jurisdiction of the State of Georgia." O.C.G.A. §52-1-3(4).

specifically waived by the General Assembly and Mapache failed to meet its burden of demonstrating a waiver of sovereign immunity.[2] In denying the State's *Motion to Dismiss* the Superior Court erred because: (1) it misapplied the waiver of sovereign immunity provision of the Georgia Constitution; (2) it ignored the fact that the State is not bound by a statute unless the State is named therein or the language in the statute is, "so plain, clear, and unmistakable as to leave no doubt as to the intention of the General Assembly," O.C.G.A §1-3-8; (3) it misconstrued relevant case law including *Georgia Dep't of Natural Res. v. Ctr. for a Sustainable Coast*, 294 Ga. 593 (2014) in which this Court rejected judicially created exceptions to sovereign immunity and established the bright line rule that **only the Georgia Constitution or a specific waiver by the General Assembly can abrogate sovereign immunity**, *Id.* at 602; and (4) it wrongly characterized this action as merely an *in rem* proceeding to establish title which does not compel the General Assembly or the Governor to do anything and, "does not implicate any of the modern day considerations that would justify the State's invocation

[2] The burden of demonstrating a waiver of sovereign immunity rests with the person filing the suit who must bring his or her case within the authority upon which he or she relies, *DOT v. Dupree*, 202 Ga. App. 668, 671 (2002) cited in the Camden County Superior Court's Order. [R: 367].

of sovereign immunity," the primary purpose of which is protection of the public purse. [R: 368].

In holding "the words 'all the world' can only be afforded their plain meaning to include the State," [R: 370], the Superior Court directly contradicted the statutory construction rule, the Georgia Constitution, and judicial precedent. Instead of applying Georgia law, under which sovereign immunity is only abrogated where it is specifically waived, the Superior Court incorrectly concluded that the *in rem* procedural provisions of O.C.G.A. §§23-3-60 through 23-3-72, ("the Quiet Title Act"[3]) and a legislative finding in the Protection of Tidewaters Act at O.C.G.A.§52-1-2 (which provides that the State owns all tidelands except where title in a private party can be traced to a valid Crown or state grant), "created a process to establish title against 'all the world' which waives sovereign immunity in these regards." [R: 370]. In other words, the Superior Court relied upon what it wrongly inferred were **implied** waivers in the Quiet Title Act and the Protection of Tidewaters Act to deny the State's *Motion to Dismiss*. The Superior Court's rationale is flawed because its inference is not based on

[3] Although the Quia Timet Against All the World statutes are not formally titled "the Quiet Title Act" for ease of reference in this brief, those statutes, O.C.G.A. §§23-3-60 through 23-3-72, are referred to in this brief as "the Quiet Title Act."

relevant law. The plain language of the procedural provisions of the Quiet Title Act and the legislative finding provision in the Protection of Tidewaters Act do not address sovereign immunity at all and do not provide the extent of any alleged waiver of sovereign immunity. If the Superior Court had correctly applied the fundamental rules of statutory construction and properly interpreted the Georgia Constitution and the relevant case law, it would have recognized that a waiver of sovereign immunity simply does not exist in this case.

Although Mapache and the Superior Court consider this action as purely an *in rem* action against the property, that view is not accurate. In reality, this action is a hybrid – it is an *in rem* proceeding against the property, but it is also an *in personam* action against the State which is named as a party-Respondent. In light of the State's presumed ownership of the property at issue, as articulated in O.C. G.A. § 52-1-2, the State has a responsibility to incur expenses to respond to this lawsuit. Even if the State was not expressly named as a party, Mapache's *in rem* action against marshlands, tidewaters and/or tidewater bottoms is also an *in personam,* action against the State because the State is the presumed owner of the beds of all tidewaters in the State and is charged with protecting those tidewaters for use by the State and its citizens. *See* O.C. G.A. § 52-1-2.

II. STATEMENT OF THE CASE

A. Relevant Law.

This case was initiated under the Quia Timet Against All the World statutes, O.C.G.A. §§23-3-60 through 23-3-72, but it also involves the Protection of Tidewaters Act, O.C.G.A. §§ 52-1-1 through 52-1-39, the rule for statutory construction at O.C.G.A. §1-3-8, the 1991 amendment which added Paragraph IX(e) to to Article I, Section II of the Georgia Constitution, and this Court's decision in *Georgia Dep't of Natural Res. v. Ctr. for a Sustainable Coast*, 294 Ga. 593 (2014) wherein judicially created exceptions to sovereign immunity were rejected.

1. Ga. Const. Art. I, Sec. II, Par. IX(e).

The 1991 amendment which added Paragraph IX (e) to Article I, Section II of the Georgia Constitution makes clear that only the Georgia Constitution or the General Assembly may abrogate sovereign immunity. It provides:

> Except as specifically provided in this paragraph sovereign immunity extends to the State and all of its departments and agencies. **The sovereign immunity of the State and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.**
>
> Ga. Const. Art. I, Sec. II, Par. IX(e).

2. O.C.G.A. § 1-3-8, Binding Effect of Legislation Upon State.

This rule for statutory construction specifies when a statute may be interpreted as applicable to the State. It provides:

> The state is not bound by the passage of a law unless it is named therein or unless the words of the law are so plain, clear, and unmistakable as to leave no doubt as to the intention of the General Assembly.

O.C.G.A. §1-3-8.

3. Quiet Title Act Provisions.

a. O.C.G.A. § 23-3-60, Purpose of Part.

The plain, clear, and unmistakable language of the Quiet Title Act does not include an explicit waiver of sovereign immunity. Code section 23-3-60 states:

> The purpose of this part is to create a procedure for removing any cloud upon the title to land, including the equity of redemption by owners of land sold at tax sales, and for readily and conclusively establishing that certain named persons are the owners of all the interests in land defined by a decree entered in such proceeding, so that there shall be no occasion for land in this state to be unmarketable because of any uncertainty as to the owner of every interest therein.

O.C.G.A. § 23-3-60

b. O.C.G.A. § 23-3-61, Who May Bring Proceeding.

Nor does the Quiet Title Act include a waiver of sovereign immunity. Code section 23-3-61 provides:

> Any person, which term shall include a corporation, partnership, or other association, who claims an estate of freehold present or future or any estate for years of which at least five years are unexpired, including persons holding lands under tax deeds, in any land in this state, whether in the actual and peaceable possession thereof or not and whether the land is vacant or not, may bring a proceeding *in rem* against all the world to establish his title to the land and to determine all adverse claims thereto or to remove any particular cloud or clouds upon his title to the land, including an equity of redemption, which proceeding may be against all persons known or unknown who claim or might claim adversely to him, whether or not the petition discloses any known or possible claimants.

O.C.G.A. § 23-3-61

c. O.C.G.A. § 23-3-67, Decree, Effect of Recordation.

This code section demonstrates the *in personam* nature of a decision to quiet title against the State. It provides in relevant part, "...a decree...shall operate to bind the land affected according to the tenor thereof and shall be conclusive upon and against all *persons* named therein..." O.C.G.A. §23-3-67. (Emphasis added).

4. The Protection of Tidewaters Act.

The Protection of Tidewaters Act does not include a specific waiver of sovereign immunity. It provides in relevant part at O.C.G.A § 52-1-2:

> The General Assembly finds and declares that the State of Georgia became the owner of the beds of all tidewaters within the jurisdiction of the State of Georgia as successor to the Crown of England and by the common law. **The State of Georgia continues to hold title to the beds of all tidewaters within the state, except where title in a private party can be traced to a valid Crown or state grant which explicitly conveyed the beds of such tidewaters.** The General Assembly further finds that the State of Georgia, as sovereign, is trustee of the rights of the people of the state to use and enjoy all tidewaters which are capable of use for fishing, passage, navigation, commerce, and transportation, pursuant to the common law public trust doctrine. Therefore, the General Assembly declares that the protection of tidewaters for use by the state and its citizens has more than local significance, is of equal importance to all citizens of the state, is of state-wide concern, and, consequently, is properly a matter for regulation under the police powers of the state.
>
> O.C.G.A § 52-1-2.

B. Procedural History

This case was initiated with Mapache's *Petition Quia Timet Against All the World* filed on March 2, 2015 in which Mapache specifically named the State as a party-Respondent. [R: 5-101]. Mapache filed an *Amended Petition Quia Timet Against All the World* ("*Amended Petition*") on May 8, 2015. [R: 107-193]. On May 26, 2015 Camden County Superior Court issued a Consent Order setting July 10, 2015 as the deadline for the State to file its answer to the *Amended Petition* after which the case would proceed in accordance with the Georgia Civil Practice Act, O.C.G.A. §§ 9-11-1 through

9-11-133.[4] [R: 196-198]. The State filed both its *Special Appearance Answer and Defenses of Respondent State of Georgia to Petitioner's Amended Petition Quia Timet Against All the World* and *Respondent State of Georgia's Motion to Dismiss* on July 10, 2015. [R: 204-244].

Mapache filed *Petitioner's Response to Georgia's Motion to Dismiss Asserting Sovereign Immunity* on August 10, 2015. [R: 254-270]. The State filed *State of Georgia's Reply to Petitioner's Response to State of Georgia Motion to Dismiss* on August 18, 2015. [R: 277-290]. Oral argument on the State's Motion to Dismiss was heard by the Camden County Superior Court on August 18, 2015 [T: 1-31], after which Mapache filed a *Rebuttal Brief* [R: 291-347], and the State filed a *Motion to File Surrebutal* with *Respondent State of Georgia's Surrebuttal* attached as Exhibit A. [R: 348-360]. On September 10, 2015 Camden County Superior Court denied the State's *Motion to Dismiss* without addressing the applicability of O.C.G.A. § 1-3-8 to the Quiet Title Act or the Protection of Tidewaters Act. [R: 363-370].

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[4] The State answered only the Amended Petition having acknowledged service of the Amended Petition on May 11, 2015. The State was not required to answer the Petition with which it was never served. Although the Acknowledgment of Service is not included in the record, it is referenced in the Consent Order.

C. The Camden County Superior Court Decision.

The Camden County Superior Court denied the State's Motion to Dismiss erroneously holding that, "the Legislature has waived sovereign immunity by enacting the *in rem* procedure outlined in O.C.G.A. § 23-3-60 *et seq.*, and anticipated in the findings that support the Tidewater Protection Act.***Construing these two code sections the Legislature created a process to establish title against 'all the world' which waives sovereign immunity in these regards." [R: 370].

On September 18, 2015 the State filed a Notice of Appeal. [R: 1-4]. An extension of time was granted until January 19, 2016 to file this brief. Pursuant to Supreme Court of Georgia Rule 12 and this Court's Order, a copy of the Order granting the extension is attached as Exhibit A.

III. ENUMERATION OF ERROR, STATEMENT OF JURISDICTION, AND STANDARD OF REVIEW.

A. Enumeration of Error

> The Camden County Superior Court erred in finding a waiver of sovereign immunity in this case and denying the State's *Motion to Dismiss* because there is no such waiver; neither the Georgia Constitution nor any applicable statute includes a specific waiver of sovereign immunity for an action against the State under the Quiet Title Act involving coastal marshland, tidewater, and tidewater bottoms of which the State is the presumed owner.

B. Statement of Jurisdiction and Standard of Review.

This Court rather than the Court of Appeals has jurisdiction over this appeal pursuant to (1) the collateral order rule as defined in *Bd. of Regents v. Canas*, 295 Ga. App. 505 (2009) and more fully explained in *Appellant State of Georgia's Response to Appellee Mapache LLC's Motion to Dismiss Appeal for Lack of Jurisdiction* filed simultaneously with this brief, (2) O.C.G.A. § 5-6-34, and (3) Ga. Const. Art. VI, Sec. 6, Par. 3(1) which provides for Supreme Court jurisdiction of all cases involving title to land. The standard of review is *de novo* because the issue presented is a question of law and does not involve disputed facts. *See Luangkhot v. State*, 292 Ga. 423, 424 (2013).

IV. ARGUMENT AND CITATION OF AUTHORITY

Mapache's claims, as they pertain to the State and the real property which is presumed to be owned by the State, are barred in their entirety by the sovereign immunity of the State. In the absence of a specific waiver of sovereign immunity, no action may proceed against the State. Here, neither the Quiet Title Act nor the Protection of Tidewaters Act includes a specific waiver of sovereign immunity, as is required under Georgia law. That being the case, the Superior Court erred in finding a waiver and denying the State's *Motion to Dismiss*.

A. Neither the Georgia Constitution nor the General Assembly Has Specifically Waived Sovereign Immunity in a Quiet Title Action Involving Coastal Marshland.

Neither the Georgia Constitution, the Quiet Title Act, nor the Protection of Tidewaters Act specifically waives sovereign immunity. The Superior Court erred in its two key holdings that were the basis of its denial of the State's *Motion to Dismiss*. It ignored the rule for statutory construction specifying when the State is covered by a statute and the bright line rule laid out in *Georgia Dep't of Natural Res. v. Ctr. for a Sustainable Coast*, 294 Ga. 593 (2014), which require a specific waiver of sovereign immunity and the extent of any such waiver. In *Ctr. for a Sustainable Coast,* this Court held that only the Georgia Constitution or a specific waiver by the General Assembly can abrogate sovereign immunity. *Id.* at 602.

The Camden County Superior Court erred in holding that in the Quiet Title Act, "the words 'all the world' can only be afforded their plain meaning to include the State," [R: 370] although the plain language of the statute

mentions neither the state nor sovereign immunity.[5] The Superior Court also erred when it held that *in rem* procedural provisions of the Quiet Title Act and a legislative finding in the Protection of Tidewaters Act at O.C.G.A.§ 52-1-2 (which provides that the State owns all tidelands except where title in a private party can be traced to a valid Crown or state grant), "created a process to establish title against 'all the world' which waives sovereign immunity in these regards." [R: 370]. Since the language of the procedural provisions of the Quiet Title Act and O.C.G.A. §52-1-2 do not even mention sovereign immunity and do not provide the extent of any alleged waiver of sovereign immunity, a waiver simply does not exist and the Superior Court's ruling denying the State's motion is erroneous.

In making its decision, the Superior Court ignored the relevant provision of the Georgia Constitution, O.C.G.A. §1-3-8, and this Court's guidance on statutory construction. It also misconstrued the holding in *Colon v. Fulton County,* 294 Ga. 93 (2013).

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[5] In a similar case involving conventional quiet title cited by the State below, *TDGA, LLC v. 6030 Bethel View Road Unit 404 et al*, Civil Action File No. 14CV-0974-1, Forsyth County Superior Court found no waiver of sovereign immunity in a conventional quiet title action filed pursuant to O.C.G.A. §§ 23-3-40 through 23-3-42 and granted the Georgia Department of Revenue's Motion to Dismiss on the basis of sovereign immunity. That case is now on appeal in this Court, *TDGA, LLC v. Georgia Department of Revenue, Georgia Department of Labor et al.*, Case No. S15A1638.

The Georgia Constitution provides that, "the sovereign immunity of the State and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver." Ga. Const. Art. I, Sec. II, Par. IX(e). Under the pertinent rule for statutory construction, the State is not bound by a statute unless the State is named therein or the language in the statute is, "so plain, clear, and unmistakable as to leave no doubt as to the intention of the General Assembly," O.C.G.A §1-3-8. This Court's guidance on statutory construction as articulated in *Currid v. DeKalb State Court Probation Dept.*, 258 Ga. 184 (2009) provides, "[I]n construing a statute we apply the fundamental rules of statutory construction that require us to construe the statute according to its terms, to give their words their plain meaning and to avoid a construction that makes some language mere surplusage. At the same time, we must effectuate the intent of the legislature." *Id.* at 187. Effectuating the General Assembly's intent also requires application of O.C.G.A. §1-3-8.

The Superior Court misapplied *Colon v. Fulton County, et al.*, 294 Ga. 93 (2013) in holding that the Quiet Title Act and the Protection of Tidewaters Act waive sovereign immunity. *Colon* is easily distinguished from the case at bar because it is a Georgia whistleblower case involving a statute that

encompasses a specific waiver of sovereign immunity. In *Colon,* whistleblowers alleged retaliation by their employer, Fulton County. *Id.* at 93. The County moved to dismiss for sovereign immunity and this Court held that sovereign immunity was specifically waived. *Id.* at 95-96. The Court held that while "magic words" such as, "sovereign immunity is hereby waived" are not required to create a specific statutory waiver of sovereign immunity, sovereign immunity is waived absent those words only where the Legislature has made its intent to waive sovereign immunity clear. *Id.* at 95. In *Colon*, the statute "specifically created a right of action against the government that would otherwise be barred by sovereign immunity and has further expressly stated that an aggrieved party is entitled to collect money damages from the government in connection with a successful claim under the statute, there can be no doubt that the Legislature intended for sovereign immunity to be waived with respect to the specific claim authorized under the statute." *Id.* at 95-96. This Court pointed to the fact that the whistleblower statute created a cause of action for money damages which indicated the Legislature's specific waiver of sovereign immunity stating, "in order for the statute to have any meaning at all here, it can only be interpreted as creating a waiver of sovereign immunity." *Id.* at 96. *See also Williamson v. Dept. of Human Resources,* 258 Ga. App. 113 (2002), *Sawnee Elec. Membership*

Corp. v. Georgia Dept. of Revenue, 279 Ga. 22 *(2005)*, and *City of Atlanta v. Barnes*, 276 Ga. 449, 452 (2003) ("When a statute provides the right to bring an action for a tax refund against a governmental body, that statute provides an express waiver of immunity and establishes the extent of the waiver (the amount of the refund).")

Unlike *Colon*, the Quiet Title Act and the Protection of Tidewaters Act do not provide a right of action against the State, do not include an express waiver of sovereign immunity, and, contrary to the Superior Court's holding, have meaning absent a waiver of sovereign immunity. The Superior Court concluded incorrectly that in the Quiet Title Act, "[T]he words 'all of the world' can only be afforded their plain meaning to include the State," [R: 370], when those words can and should be afforded their plain meaning not to include the State. Nothing in the Quiet Title Act specifically indicated that the state is bound by the terms thereof.

Likewise, contrary to the Superior Court's holding, the findings in the Protection of Tidewaters Act do not anticipate an action against the State and O.C.G.A. § 52-1-2 is not rendered meaningless in the absence of a waiver of sovereign immunity. Among other things, that Act provides, "[T]he State of Georgia continues to hold title to the beds of all tidewaters within the state, except where title in a private party can be traced to a valid Crown or state

grant which explicitly conveyed the beds of such tidewaters." O.C.G.A.§ 52-1-2. Nothing in O.C.G.A. § 52-1-2 creates a cause of action against the State or waives the State's sovereign immunity. The fact that the statute recognizes the possibility that a private party can own marshland does not create a right of action against the State. The statute reinforces claims of ownership by the State against a private party by expressly requiring any claim adverse to State ownership to be shown by a chain of custody back to a valid Crown or state grant. Rather than waiving sovereign immunity, the statute provides that the State may initiate an action against a private party and provides a defense (showing a chain of custody back to a valid Crown or state grant) that private party could assert in such a case.

If the General Assembly had intended to create a specific waiver of sovereign immunity in quiet title actions or in actions under the Protection of Tidewaters Act, it would have expressly said so. It has created specific waivers in other contexts. For example, O.C.G.A. § 50-21-1 contains an express waiver of sovereign immunity for actions against agencies of the State for breach of a written contract. *See* O.C.G.A. § 50-21-1(a) ("[t]he defense of sovereign immunity is waived as to any action ex contractu for the breach of any written contract existing on April 12, 1982, or thereafter entered into by the state, departments and agencies of the state, and state

authorities.") In contrast, neither the Quia Timet Against All the World statutes (O.C.G.A. §§ 23-3-60 through 23-3-72) nor the Tidewaters Protection Act even mention sovereign immunity much less provide a specific waiver of sovereign immunity. Nor do they authorize an action against the State. Accordingly, the Superior Court's decision should be reversed because neither the Georgia Constitution nor any Act of the General Assembly waives sovereign immunity for the relief sought by Mapache against the State.

B. This action is both *in rem* and *in personam*.

Mapache contends that the doctrine of sovereign immunity has no applicability to this action because it is solely an *in rem* action against real property. The Camden County Superior Court held that the proceedings are *in rem* against all the world to establish title. [R: 368]. However, the State shows this is in substance both an *in rem* action to quiet title to the tract of land known as Raccoon Key and an *in personam* action against the State. While the *Amended Petition* asserts an *in rem* action under O.C.G.A. § 23-3-60 through §23-3-72 to quiet title, Mapache names the State as a party-Respondent and seeks to establish its private ownership in certain coastal marshland, tidewaters and tidewater bottoms contained within Raccoon Key. Under O.C.G.A. §23-3-67 a decree quieting title in Raccoon Key against the State would operate to "bind the land affected according to the tenor thereof

and shall be conclusive upon and against all persons named therein." Thus this is an *in personam* action because it will bind the State's rights regarding property of which the State is the presumed owner. Mapache acknowledges that under the Protection of Tidewaters Act the State is the presumed owner of those coastal marshland, tidewaters and tidewater bottoms which it seeks to have declared as its own. [R: 108]. Mapache admits that more than 91% of the tract (1,563 acres) consists of coastal marshland, which is a tidewater, while less than 9% of the tract (157 acres) consists of land "lying above the mean high tide elevation," or upland [R: 108].[6] Since the State has an obligation under the public trust doctrine and the Protection of Tidewaters Act to protect the interest of the citizens of Georgia in the state's tidewaters, and since Mapache is seeking a ruling against those specific State interests and has named the State as a party, this is also an *in personam* action.

C. The State has a Responsibility to Expend the Public Purse in Defending this Lawsuit.

The Camden County Superior Court is wrong when it states, "[T]his action to quiet title is not asking the Court to compel the Legislature or the Governor to do anything. The present case does not implicate any of the

[6] The State is not concurring with the Mapache's representations regarding the amount of coastal marshland and upland in the Raccoon Key tract but merely pointing out what Mapache admits in its *Amended Petition*.

modern day considerations that would justify the State's invocation of sovereign immunity," the primary purpose of which is protection of the public purse. [R: 368]. The General Assembly has found that "the State of Georgia, as sovereign, is trustee of the rights of the people of the state to use and enjoy all tidewaters which are capable of use for fishing, passage, navigation, commerce, and transportation pursuant to the common law public trust doctrine." O.C.G.A. § 52-1-1. It is undisputed that under the Protection of Tidewaters Act, the State of Georgia is the presumptive owner of the beds of all tidewaters in the state unless title in a private party can be traced to a valid Crown or state grant which specifically conveyed the beds of such tidewaters. O.C.G.A. § 52-1-1. That being the case, the State cannot sit idly by and allow Mapache to seek relief in this action which is aimed at binding and controlling the legal rights of the State and its citizens with respect to coastal marshland, tidewaters and tidewater bottoms presumptively owned by the State and held for the benefit of its citizens. Instead, the State has a responsibility to expend the public purse to respond to this suit in which it is a named party. The State has appropriately sought dismissal in the absence of a Constitutional waiver of sovereign immunity or a specific waiver of sovereign immunity by the General Assembly. If the Superior Court's denial of the

Motion to Dismiss is not reversed, the State will expend funds to defend this lawsuit.

D. In Asserting Sovereign Immunity the State is Not Depriving Mapache of Property in Violation of the Georgia Constitution

The State has not taken any action to deprive Mapache of property and if the State's *Motion to Dismiss* is granted it will mean only that Mapache cannot quiet its title to Raccoon Key against the State thereby leaving the issue unresolved with respect to the State. A ruling in the State's favor will not constitute an unconstitutional taking. While dismissal of the State may raise concerns as to Mapache's title to the property, those concerns are a natural outgrowth of the long-standing doctrine of sovereign immunity which predates Mapache's acquisition of any purported title to the property. Rather than flying "in the face of the constitutional protections and property rights of the people set out in Georgia Constitution Art. I, Sec. 1," as asserted by the Superior Court [R: 368], a ruling in favor of the State would uphold the provisions of Art. I, Sec. II, Par. IX(e) of the Georgia Constitution.

While this issue has never been addressed in Georgia, *Block v. North Dakota*, 461 U.S. 273(1983)[7], a U.S. Supreme Court case involving a quiet

[7] This case is no longer good law because the statute of limitations at issue has been changed but the rationale is still logical and relevant.

title action by North Dakota against the federal government provides some guidance in a very similar situation. In *Block* the Supreme Court refused to quiet title against the United States because North Dakota's claim was time barred. The Court stated that, "a claimant has title to a disputed tract of land, he retains title even if his suit to quiet his title is deemed time-barred under *§ 2409a(f)*. A dismissal pursuant to *§ 2409a(f)* does not quiet title to the property in the United States. The title dispute remains unresolved. Nothing prevents the claimant from continuing to assert his title, in hope of inducing the United States to file its own quiet title suit, in which the matter would finally be put to rest on the merits." *Id.* at 291-292. This rationale holds in the case at bar. Mapache cannot quiet title to the State but retains possession of the property.

CONCLUSION

For the foregoing reasons, this Court should reverse Camden County Superior Court and dismiss the *Amended Petition* as to the State.

Respectfully submitted, this 19th day of January, 2016.

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SUPREME COURT OF GEORGIA
Case No. S16A0472

Atlanta, December 14, 2015

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

STATE OF GEORGIA v. MAPACHE, LLC et al.

Your request for an extension of time to file the brief of appellant in the above case is granted. You are given an extension until January 19, 2016.

Appellee's brief shall be filed within 20 days after the filing of appellant's brief.

A request for oral argument must be independently timely filed, except in direct appeals from judgments imposing the death penalty, granted writs of certiorari, and granted applications for interim appellate review, where oral argument is mandatory. No extensions of time for requesting oral argument will be granted. Rule 50 (3).

A copy of this order **MUST** be attached as an exhibit to the document for which you received this extension.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk

EXHIBIT
A

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing **BRIEF OF APPELLANT STATE OF GEORGIA**, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed, upon:

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William T. Ligon, Jr.
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This 19th day of January, 2016.

S:\Margaret Kemmerly Eckrote
Senior Assistant Attorney General

IN THE SUPREME COURT
STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
Appellant	)	
	)	
vs.	)	Case No. S16A0472
	)	
MAPACHE, LLC,	)	
	)	
Appellee.	)	
	)	

BRIEF OF APPELLEE MAPACHE, LLC

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I. Introduction

The State filed this direct appeal of the Trial Court's denial of its motion to dismiss asserting sovereign immunity. This Court has affirmatively recognized that a petition to quiet title pursuant to O.C.G.A. §23-3-60, *et seq.* is subject to dismissal only when, on the face of the pleadings, it appears that it is in noncompliance with O.C.G.A. §23-3-62 and no evidence which might be introduced within the framework of the complaint could sustain a grant of the relief sought. *G.H.G., Inc. v. Bryan*, 275 Ga. 336, 566 S.E.2d 662 (2002). Such is certainly not the case here, where Petitioner's claim of title originates in part from valid Crown grants issued in 1763 by the State of South Carolina and acknowledged and recorded by the State of Georgia that same year.

Through this appeal the State seeks a ruling regarding sovereign immunity that would place in question the marketability and certainty of title to virtually all real estate within its boundaries. To achieve this remarkable threat to every owner, lender and insurer of title to land in Georgia, the State asks this Court to find that the legislative scheme created under the Quiet Title Act (O.C.G.A. §23-3-60 *et seq*)[1],

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[1] O.C.G.A. §23-3-60 *et seq*, (the 1966 Quiet Title Act) by which the legislature established a proceeding *in rem* to establish title as to all the world is referred to herein as the Quiet Title Act. This act is distinguished from § 23-3-40 *et seq*. which provides for proceedings *quia timet*
instruments and are not strictly actions *in rem*. The 1966 Quiet Title Act was designed to broaden the relief available by supplementing and not supplanting the earlier *quia timet* procedures . . . so that there shall be no occasion for land in this

by which one claiming title to real property is empowered to "bring a proceeding *in rem*" against "*all* the world" to "*establish* title" and to "determine *all* adverse claims thereto," does not apply to the State and does not effect a waiver of sovereign immunity.

Remarkably, the State admits that in order to sustain its position, this Court must find that when the Legislature used the words "*in rem,*" it meant "*in personam*"; when it used the words "all claims," it meant "all claims *except those that might be asserted by the State*"; and, when it used the words "all the world," it meant "all the world *except for the State*." This Court should respect the plain and clear language of the Quiet Title Act and affirm the ruling of the Trial Court denying the State's Motion to Dismiss in this matter.

Pretermitting the question of waiver, is the fact that the doctrine of sovereign immunity does not apply in an action *in rem* where the State is not in possession of the *res* at issue. This legal proposition, not relied on by the Trial Court in light of the clear and unambiguous waiver of sovereign immunity stated in the Quiet Title Act itself, provides a separate basis for affirming the order on appeal herein.

State to be unmarketable because of any uncertainty as to the owner of *every* interest therein. *In re Rivermist Homeowner Association, Inc.* 244 Ga. 515, 517, 260 S.E.2d 897 (1979) (emphasis added).

Finally, the application of the doctrine of sovereign immunity in this action to preclude Petitioner, without hearing or due process, from establishing *in rem* its title to real property in this action would constitute and effect a taking in violation of Art. I, Sec. III, Par. I(a) of the Georgia Constitution. The apparent inspiration for the State's argument, the holding in *DNR v. Center for a Sustainable Coast*, 294 Ga. 593, 755 S.E.2d 184 (2014), wherein this Court dispensed with an exception to the doctrine of sovereign immunity of its own creation, does not support the application of sovereign immunity in the instant matter. This Court, in discussing *Sustainable Coast* and the sweep of sovereign immunity, emphasized that in addition to express legislative waivers of sovereign immunity, "sovereign immunity may also, in certain circumstances, be waived by our Constitution, itself. For example, the State has no sovereign immunity that would allow it to take private property without just compensation." *Olvera, et al. v. University System of Georgia's Board of Regents, et al.* S15G1130 (February 1, 2016) (note 1). Upholding denial of the State's motion to dismiss asserting sovereign immunity is the only means available to prevent a taking of private property without just compensation from occurring in the instant case.

II. The Court Does Not Have Jurisdiction over this Appeal

It is without dispute that there is no statutory basis for a direct appeal of denial of a motion to dismiss in this matter. Further, there is no promulgated rule of this Court that would permit the appeal.

Instead, while relying on the decision in *Center for a Sustainable Coast* wherein this Court rejected a judicially created exception to the doctrine of sovereign immunity, the State simultaneously asks this Court to expand the judicially created "collateral order" doctrine concerning direct appeals in order to assert jurisdiction. Because that rule has never been applied by this Court to permit an appeal of a plea of sovereign immunity in an *in rem* proceeding, the Appellee moved to dismiss this Appeal. Appellee relies upon the arguments and citations provided in that motion and brief and denies that this Court has jurisdiction over this appeal without complying with the procedures expressly provided by the Legislature in O.C.G.A. §5-6-34(b)

III. Statement of the Case

The Appellant accurately states most of the history of this action in its brief.[2] The State however, mischaracterizes its status in the case and fails to identify the statutory requirement for giving notice to the State of the action.

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[2] The State omits reference to a prior quiet title action filed by predecessor counsel to Mapache. The State responded to that action not by asserting sovereign immunity but by filing a Motion for Summary Judgment contending that the chain of title

The State correctly asserts that it was specifically named as a Respondent and acknowledged service by consent in this matter. Appellee provided notice of the action to the State consistent with both the requirements of the Quiet Title Act and the fundamental rules of due process.

O.C.G.A. § 23-3-62 prescribes who may file an action to quiet title against all the world and sets out the requirements of the petition, including:

> [A] description of all adverse claims of which petitioner has actual or constructive notice, the names and addresses, so far as known to the petitioner, of any possible adverse claimant . . .

Aware of the State's claims, both generally under the Protection of Tidewaters Act (O.C.G.A. § 52-1-1 *et seq.)* and specifically as the result of the action commenced by prior counsel, Appellee gave informal and formal notice via delivery of the petition to the State which acknowledged service.

The foregoing process anticipated the notice that would have been ordered by the Special Master appointed by the Trial Court pursuant to O.C.G.A. § 23-3-65 which provides, in part:

> (a) Upon the filing of all evidence with him, the master shall:
> (1) ***Determine who is entitled to notice, including, but not limited to, all adjacent landowners*** and ***all adverse claimants*** as to whose adverse claims petitioner has actual or constructive notice;

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identified by prior counsel identified State grants of property other than the property at issue in this matter. Because current counsel agreed with the State's position, that case was dismissed and, after further historical title research, the current action was commenced.

(2) ***Cause process to issue, directed to all persons who are entitled to notice*** and to all other persons whom it may concern.
(b) ***Process shall be served upon known persons*** whose residence is ascertainable by the sheriff or his deputy as provided by law.

O.C.G.A. § 23-3-65 (emphasis supplied). Providing the State with notice and service of the Petition as contemplated by the Quiet Title Act did not in any manner convert this action, specifically stated by the Legislature to be an action *in rem*, to an *in personam* law suit. Instead, notice given by Appellee was consistent with the "efficient and effective way to adjudicate disputed title claims" established by the Quiet Title Act. *Resseau v. Bland*, 268 Ga. 634, 636, 491 S.E.2d 809, 811 (1997) (noting in the decision that parties were named as "Defendants" in the quiet title action at issue).

IV. Argument and Citation of Authority

A. The Doctrine of Sovereign Immunity Does Not Bar This *In Rem* Action

Although the Trial Court correctly held that the Legislature waived the defense of sovereign immunity when it created an *in rem* proceeding to quiet title as to every claim of all parties against all the world, the threshold legal inquiry is whether and under what circumstances the doctrine of sovereign immunity applies in any action *in rem*. Appellees argued below and restate here that sovereign immunity does not bar an inquiry into title and that this rule provides an independent basis to uphold the Trial Court's order.

1. The History and Nature of Actions *In Rem*

In *Tanner v. Brasher*, 254 Ga. 41, 326 S.E.2d 218 (1985), this Court acknowledged that the concept of sovereign immunity is so similar at the state and federal level that federal precedent can provide guidance to the Court regarding application of the doctrine. As demonstrated below, the 11th Circuit Court of Appeals, in a case involving an assertion of sovereign immunity by the State in an *in rem* action involving title to personalty, has recently provided an analysis that should also be applied herein.

The "defense" of sovereign immunity is a defense to jurisdiction of the courts and, although decided prior to the 1991 amendment to the Georgia Constitution, the *Tanner* decision still provides an historical starting point for the analysis. Citing *United States v. Lee,* 106 U.S. (16 Otto) 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882), a case involving title to Arlington National Cemetery brought by the heirs of Robert E. Lee, this Court quoted a summary of the United States Supreme Court's review of the history of the doctrine of sovereign immunity as applied to an inquiry of title to real property:

> The court, after analyzing the differences between the British and American concepts of sovereign immunity, cited *United States v. Peters,* 5 Cranch. 115, 3 L.Ed. 53 (1809), in which Chief Justice Marshall stated, "[I]t can certainly never be alleged that a mere suggestion of title in a State ... must arrest the proceedings of the court, and prevent their looking into the suggestion and examining the validity of the title." *Lee,* supra, 106 U.S. at 210, 1 S.Ct. at 252.

Tanner, *supra*, 254 Ga. 41, 43, 326 S.E.2d 218, 220 (1985).

More recently, in *Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977), the United States Supreme Court explained the essential difference between *in rem* and *in personam* jurisdiction:

> [B]ased on the jurisdiction's power over either persons or property. This fundamental concept is embodied in the very vocabulary which we use to describe judgments. If a court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated "in personam" and can impose a personal obligation on the defendant in favor of the plaintiff. If jurisdiction is based on the court's power over property within its territory, the action is called "in rem" or "quasi in rem." The effect of a judgment in such a case *is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court.*

(emphasis supplied). *Shaffer, supra*, 433 U.S. 186, 199.

The Eleventh Circuit, in a case arising in the Southern and Middle Districts of Georgia involving disputes over ownership of logs at the bottom of the Altamaha and Flint Rivers, recently applied that distinction and found that the State of Georgia's plea of sovereign immunity would not bar an action *in rem* to determine ownership of the logs salvaged from the bottom of the Altamaha River when the State was not in actual, possession of the *res*. *Aqua Log, Inc. v. State of Georgia*, 594 F.3d 1330 (11th Cir. 2010). This decision is doubly instructive because in that case, like the present action, the State's alleged interest in the "deadheaded" logs

was created by a statutory scheme whereby the State claimed ownership of submerged cultural resources. See, O.C.G.A. §12-3-80 *et seq.*

Beginning its analysis, the 11th Circuit found that Georgia had not waived sovereign immunity and had a colorable claim of ownership to the logs. The Court then cited *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 118 S. Ct. 1464, 140 L. Ed. 2d 626 (1998) and summarized the law as follows:

> In *Deep Sea Research,* the Supreme Court reaffirmed the vitality of a series of cases dating back to the nineteenth century that hold a government can assert sovereign immunity in an *in rem* admiralty proceeding only when it is in possession of the res. *Deep Sea Research,* 523 U.S. at 506–07, 118 S.Ct. at 1472–73.

Aqua Log, Inc., supra, 594 F.3d 1330, 1334 (11th Cir. 2010). The Court continued its analysis and held that mere constructive possession would not satisfy the "possession" requirement and that the doctrine of sovereign immunity was an inappropriate defense to jurisdiction in the *in rem* dispute regarding ownership.

In this case, Appellees assert actual, notorious and uninterrupted possession of the real property *res* for over two hundred and fifty years. This assertion, at the stage of a motion to dismiss, must be accepted as true for purposes of this appeal. *Ikomoni v. Bank of Am., N.A.*, 330 Ga. App. 776, 769 S.E.2d 527 (2015) and *G.H.G, Inc., supra.*

As noted in decisions cited in the *Aqua Log* case, the question of "possession" is not merely academic from a jurisdictional standpoint. Should a State agent be in

undisputed, actual possession of the *res* at issue, *in personam* jurisdiction might be required to obtain release or possession of the thing. When, on the other hand, it is the *res* itself that is sued upon, the question shifts to an analysis of whether the Court has jurisdiction over the *res*. Here, the Georgia Constitution answers that question:

> The superior courts shall have jurisdiction in all cases, except as otherwise provided in this Constitution. They shall have exclusive jurisdiction over trials in felony cases, except in the case of juvenile offenders as provided by law; in *cases respecting title to land*; in divorce cases; and in equity cases. The superior courts shall have such appellate jurisdiction, either alone or by circuit or district, as may be provided by law.

Ga. Const. Art. VI, § 4, ¶ I. This Superior Court has jurisdiction over the *res* in this case under the Georgia Constitution and the process for managing that jurisdiction is the unique statutory procedure created by the Legislature to quiet title "as to *all the world*."

This Court has yet to directly address the question of whether the State will be bound by an *in rem* action commenced "against all the world" under the Quiet Title Act. That fact alone is telling since the State has undoubtedly been provided notice of and participated in tens of thousands of cases initiated under the Quiet Title Act.[3] Other States, however, have taken the issue directly, and the reasoning of those decisions is compelling. For example, the Supreme Court of Maine addressed

[3] See, e.g., *Seignious v. MARTA*, 252 Ga. 69, 311 S.E.2d 808 (1984).

the question of whether the doctrine of sovereign immunity is a defense to an *in rem* quiet title action where private parties claimed an ownership interest in land being used as a state park. *Robert Welch, et al. v. State of Maine,* 2004 ME 84, 853 A.2d 214 (2004). The Court held that an *in rem* quiet title action, where no monetary relief is sought against the State, does not threaten the treasury of the State[4] and that a defense of sovereign immunity would not preclude a determination of ownership interest in the *res* at issue. As argued above, that Court found:

> As we have said in the past, invoking the doctrine of sovereign immunity in a quiet title action 'is illogical because ***it assumes the merits – the existence of the State's interest – in order to avoid litigating the merits . . . [and] would represent a radical assault on the stability of title to real property within this State*** and the availability of legal remedies to defend it.'

Welch v. State of Maine, *supra.* (emphasis supplied) Although distinguishable in that it deals with common-law rather than constitutionally created sovereign immunity, the Massachusetts Supreme Judicial Court recently addressed the interplay between sovereign immunity and property rights protected by quiet title proceedings and citing *Welch v. State of Maine*, noted, "constitutional protections of property and due process 'would lose considerable meaning if the doctrine of

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[4] Under Georgia authority, a primary purpose of the doctrine of sovereign immunity is the protection of the public purse. *Liberty County School District v. Halliburton*, 328 Ga. App. 422, 762 S.E.2d 138 (July 2014), citing, *DeKalb County School Dist. v. Gold*, 318 Ga. App. 633, 734 S.E.2d 466 (2012).

sovereign immunity prohibited the people from bringing quiet title actions to settle ownership disputes with the State.'"[5] See also, *GAR Associates III, L.P ,v. State of Texas,* 224 S.W.3d 395, 401 (Tex. App. 2006 (Although sovereign immunity generally protects the State from lawsuits for monetary damages, it offers no shield against an inverse condemnation claim brought under article I, section 17 of the Texas Constitution, which waives immunity for the taking, damaging or destruction of property for public use and authorizes compensation for such destruction); *Cass County Joint Water District v. 1.43 Acres,* 2002 ND 83, 643 N.W.2d 685, 689 (N.D. 2002) (tribal immunity is not implicated when courts exercise *in rem* jurisdiction); and, *Smale v. Noretep*, 150 Wn. App. 476, 208 P.3d 1180 (2009) (motion to dismiss in quiet title action denied because sovereign immunity is a defense to a claim of personal jurisdiction).

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[5] See, *Walter E. Fernald Corporation v The Governor & Others*, 471 Mass 520, 31 N.E.3d 47, 2015 Mass LEXIS 315, page 4 (2015) (where the Supreme Court transferred case from Appeals Court on its own initiative and while acknowledging that the Legislature did not waive common-law sovereign immunity for the universe of actions brought under its declaratory judgment act, recognized that sovereign immunity 'strains against constitutionally protected values such as the right of acquiring, possessing and protecting property' and refused to apply the doctrine to actions by which a plaintiff seeks to vindicate its ownership of specified parcels of land given that such actions do not implicate the concerns that support the continued application of sovereign immunity)

2. The Quiet Title Act Creates an Action *In Rem*

The State contends that the Quiet Title Act creates an action that is both *in rem* and *in personam*. That assertion, made without citation, is in error as demonstrated in both the title and text stating the purpose of the Act:

> **§ 23-3-61. Proceedings in rem against all the world to establish title; removal of clouds upon title; who may bring action**
>
> Any person . . . may bring ***a proceeding in rem against all the world*** to establish his title to the land and to determine all adverse claims thereto . .

The Court of Appeals has, in recent months, reaffirmed that the Legislature achieved what it intended: the nature, purpose and procedure applicable to this action:

> Actions against "all the world" to quiet title to real property are governed by the Quiet Title Act of 1966. OCGA § 23–3–60 *et seq*. The purpose of the Act "is to create a procedure for removing any cloud upon the title to land"; the Act is to be liberally construed; and the remedy provided "is intended to be cumulative and not exclusive." OCGA §§ 23–3–60; 23–3–71; 23–3–72. The Act "is a special statutory proceeding designed for a specific purpose." *James v. Gainey*, 231 Ga. 543, 545, 203 S.E.2d 163 (1974). The Act "creates an efficient, speedy and effective means of adjudicating disputed title claims and ***sets out specific rules of practice and procedure with respect to an in rem quiet title action against all the world that take precedence over the Civil Practice Act when there is a conflict.***" *Nelson v. Ga. Sheriffs Youth Homes*, 286 Ga. 192, 686 S.E.2d 663 (2009) (citation and punctuation omitted).

Johnson v. Bank of Am., N.A., 333 Ga. App. 539, 540-41, 773 S.E.2d 810, 812 (2015), *reconsideration denied* (July 29, 2015) (emphasis supplied). See also *Georgia Kaolin Co, Inc.* 264 Ga. 755, 449 S.E.2d 85 (1994) (Unlike an equitable quiet title action, the statutory proceeding is taken directly against the property and

all the world, thus, creating a unique legislatively authorized proceeding, *in rem.* Recognizing the sometimes impossible task of determining the identity or residence of all possible adverse claimants, the Legislature made the proceeding *in rem* against all the world.); and *Heath v. Stinson,* 238 Ga. 364, 233 S.E.2d 178 (1977).

3. The Decision in *Sustainable Coast* Did Not Involve an Action *In Rem*

The holding in *DNR v. Center for a Sustainable Coast*, 294 Ga. 593, 755 S.E.2d 184 (2014) does not run counter to the rule recognized in *Aqua Log* and other decisions. In *Sustainable Coast*, Plaintiffs sought *in personam* jurisdiction over the State in the form of a common law injunction prohibiting the State from taking regulatory action in what was alleged to be an *ultra vires* manner. Holding that the doctrine of sovereign immunity would bar an action for a common law injunction, the Court reversed its holding in *IBM v. Evans*, 256 Ga. 215, 453 SE,2d 706 (1995) where it recognized a judicially created exception for such *in personam* relief.

The Court was careful, however, to distinguish actions that are not exceptions to the doctrine of sovereign immunity but to which the doctrine has never applied. The Court cited, for example, the maintenance of a nuisance that would constitute an unconstitutional taking, in upholding its ruling that sovereign immunity would not bar a claim even for damages. *Sustainable Coast*, 294 Ga. at 600, 755 S.E.2d at 190, citing *City of Thomasville v. Shank*, 263 Ga. 624, 437 S.E.2d 306 (1993). The

Court specifically declined to address the issue of declaratory judgment and other constitutional claims. 263 Ga. note 1.[6]

Unlike *Sustainable Coast*, this Petitioner does not require that the Court exercise *in personam* jurisdiction over the sovereign. Petitioner does not seek a judgment against the State nor does it seek to compel or restrain the State in any manner. Instead Petitioner has brought an action against real property pursuant to the *in rem* procedure created by the Legislature and put the State and the world on notice of its claims so that any party claiming an interest in the same *res* may come forward and assert its own claims. As in *City of Thomasville v. Shank*, and under the reasoning of *Aqua Log, Inc. v. State of Georgia*, the doctrine of sovereign immunity does not apply in an action *in rem* where the State is not in possession of

[6] The Court did not even accept certiorari to consider the appellate court's decision to remand constitutional claims against DNR to the trial court for further consideration in the same case. *Sustainable Coast*, note 1. Upon remand from the Supreme Court, the Court of Appeals noted, "In Division 3 of our earlier decision, we vacated the trial court's judgment insofar as it dismissed the Center's due process and equal protection claims, and we remanded the case for further consideration [citations omitted] The Supreme Court declined to grant certiorari as to our disposition of the Center's claims pursuant to the U.S. Constitution [citations omitted]. We have reviewed Division 3 of our decision and conclude that it is consistent with the Supreme Court's ruling." Thus, the Court allowed CSC to proceed with its constitutional claims despite DNR's assertions of sovereign immunity. *Center for a Sustainable Coast, Inc. v. Georgia DNR*, 326 Ga. App. 288, 756 S.E.2d 554 (2014).

the *res* at issue and therefore the matter before the Court requires application of no specific exception.

B. The Legislature Has Waived Sovereign Immunity in this Action

Should the Court find that a legislatively created exception to the doctrine of sovereign immunity is necessary to sustain the current *in rem* proceeding and affirm the order of the Trial Court, it need look no further than the text of both the Quiet Title Act of 1966 and the Protection of Tidewaters Act and apply the standard rules of statutory construction and guidance for determining a waiver previously established by the Court.

1. The Standard for Determining a Legislative Waiver of Sovereign Immunity

Three months before announcing the withdrawal of prior judicially created exceptions to the doctrine of sovereign immunity, this Court provided guidance on how it would determine whether such an exception had been created by the Legislature. In *Colon v. Fulton County, et al,* 294 Ga. 93, 751 S.E.2d 307 (2013) the Court clearly articulated that:

> Specifically, we apply the fundamental rules of statutory construction that require us to construe [the] statute according to its terms, to give words their plain and ordinary meaning, and to avoid a construction that makes some language mere surplusage. At the same time, we must seek to effectuate the intent of the legislature. (Citations omitted.)

Colon, 294 Ga. at 310. See also, *SNJ Properties, LLC v. Fulton County Board of Assessors, et al.,* 296 Ga. 793, 770 S.E.2d 832 (March 27, 2015) (decided after

Sustainable Coast, finding a waiver of sovereign immunity where the failure to do so would render provisions of a statute surplusage or categorically render a remedy meaningless). The Court in *Colon* further held that "magic words" such as "sovereign immunity is hereby waived" are not required to create a specific statutory waiver of immunity. Thus the Court stated that it must examine the manner in which various statutes passed by the General Assembly interact in order to determine whether a waiver of sovereign immunity is effected thereby.

2. Waiver under The Quiet Title Act

Almost fifty years before the *Colon* decision, the Legislature enacted the Quiet Title Act using language that satisfies every criteria set forth in *Colon*. Without using "magic words", the intent of Legislature in 1966 could not have been stated more clearly:

> **§ 23-3-60. Purpose of part**
> The purpose of this part is to create a procedure for *removing **any** cloud* upon the title to land, including the equity of redemption by owners of land sold at tax sales, and for readily and conclusively establishing that certain named persons *are the owners of **all** the interests in land* defined by a decree entered in such proceeding, so that there shall be *no occasion for land in this state to be unmarketable because of **any** uncertainty* as to *the owner of every interest therein.*
>
> **§ 23-3-61. Proceedings in rem against all the world to establish title; removal of clouds upon title; who may bring action**
> Any person, which term shall include a corporation, partnership, or other association, who claims an estate of freehold present or future or any estate for years of which at least five years are unexpired, including persons holding lands under tax deeds, in any land in this state, whether in the actual and peaceable possession thereof or not and whether the

> land is vacant or not, may bring *a proceeding in rem against **all the world*** to establish his title to the land and to determine all adverse claims thereto or to remove any particular cloud or clouds upon his title to the land, including an equity of redemption, *which proceeding may be against **all** persons* known or unknown who claim or might claim adversely to him, whether or not the petition discloses any known or possible claimants.

(emphasis supplied).

The words "any," "all," "every," and "all of the world" must be afforded their plain meaning. The State is the ultimate source of all title to all real estate within its boundaries. O.C.G.A. § 44-5-1. To read the "any," "all," "every," and "all of the world" to exclude the State would render not only those words but, from a practical standpoint, the entire Quiet Title Act and the remedy it establishes as mere surplusage. Such a construction would run contrary to this Court's acknowledgment that the purpose underlying an action *quia timet* against all the world is to "remove any cloud of title to land . . . *so that there shall be no occasion for land in this state to be unmarketable because of any uncertainty as to the owner of **every** interest therein.*") (emphasis added). *Gurley v. East Atlanta Land Company, Inc.*, 276 Ga. 749, 583 S.E.2d 866 (2003) and *In re Rivermist Homeowners Association, Inc* 244 Ga. 515, 260 S.E.2d 897 (1979).

The Trial Court correctly found that it was the intent of the Legislature in 1966 to permit a party to bring an *in rem* action to establish title to real estate against

"every claim" of "all parties" and "all the world" and that the State is included in the "world". That finding of the Trial Court should be affirmed herein.

3. Waiver under the Protection of Tidewaters Act

At the same time it asserts sovereign immunity to prevent the quiet title mechanism to function as the Legislature intended, the State makes its claim to ownership of a portion of the *res* at issue[7] herein based on the Protection of Tidewaters Act. In the legislative findings of that act the Legislature found that the State holds ownership of the "beds of all tidewaters within the jurisdiction of the State of Georgia as successor to the Crown of England and by common law. . ." O.C.G.A. § 52-1-2. The same sentence upon which the State makes its claim, however, continues with the express condition that a private party may establish title against the State, ". . . ***except where title in a private party can be traced to a valid Crown or state grant*** . . ." O.C.G.A. § 52-1-2 (emphasis added).[8]

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[7] As further discussed below and conceded by the State, almost one hundred and fifty acres of the Raccoon Key Tract are uplands and not tidal marshlands. Appellant has alleged, and there will be no evidence to the contrary, that buildings have been erected and maintained and a marine farming operation have been conducted on the property for almost a hundred years. Less conclusive evidence points to structures and improvements that are much older.

[8] It is important to note that while the Protection of Tidewaters Act recognizes the supremacy of a private landowner able to trace title to a valid Crown or state grant, it contains no specific provision for validating such a Crown or state grant. Further, there are apparently no provisions for obtaining such a finding through any department of the State. Thus, without the availability of the quiet title proceeding, a land owner must act at his peril and face repercussions in the form of exorbitant

In asserting ownership and regulatory rights over coastal tidewaters, the Legislature clearly expressed the intent to afford a private citizen to establish a claim superior to that of the State. Having left the door open via this waiver of sovereign immunity, the Legislature did not need to create a separate procedure for establishing such a claim. That process already existed in the Quiet Title Act which, as directed by the *Colon* decision, should be read consistently with the Protection of Tidewaters Act.

C. The Application of the Doctrine of Sovereign Immunity in This Action Would Result in an Unconstitutional Taking of Property

The application of the doctrine of sovereign immunity to preclude Appellee, without hearing or due process, from establishing *in* rem its title to real property in this action would constitute and effect a taking in violation of the Georgia and United States Constitutions.

As this Court is well aware, the constitution of this State provides that "private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid." Ga. Const. Art. I, Sec. III, Par. I (a). The Fifth Amendment to the United States Constitution provides a similar protection against taking without due process and adequate compensation. The application of the doctrine of sovereign immunity in this case will render Appellee's title completely

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fines and possible criminal penalties to be placed in a position before the courts to determine the validity of his Crown grant.

unmarketable. The rule urged by the State would have that effect based solely on a claim of ownership by the State -- with no hearing or due process afforded to one in possession of land under color of title to allow an owner to establish an ownership claim. Such a rule would require the same result in all actions commenced under O.C.G.A. § 23-3-60, *et seq.* as to real property in which the State has any remotely potential interest, real or imagined.

The United States Supreme Court has held that takings of property by regulation violate the constitutional prohibition on taking property without payment of compensation after providing due process of law. *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (U.S.S.C. 1992). The rule is applicable categorically to regulation that denies all economically beneficial or productive use of land. *Lucas*, *supra* at p. 1015. The Court went on to hold that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking. *Lucas*, *supra* at p. 1019.[9]

[9] In *Sustainable Coast* the Court specifically acknowledged that the doctrine of sovereign immunity will not bar a claim of unconstitutional taking explaining that its holding in *Thomasville v. Shank* was "a proper recognition that the Constitution itself requires just compensation for takings and cannot, therefore, be understood to afford immunity in such cases." *See also, Jones v. Grady County, et al.*, 1:13-CV-156-WLS Document 36 (M.D. Ga. August 2014) applying *Sustainable Coast* to disallow an attempt to enjoin an *ultra vires* act but allowing claims under the Georgia Constitution to remain since, "sovereign immunity is not a bar to an action alleging a violation of a constitutional right."

In this case the State asserts an interest in Petitioner's property based on a statute enacted over two hundred years after the first Crown grant that anchors Petitioner's claim of title. That statute contemplates, however, the ability to prove title and O.C.G.A. § 23-3-60, *et seq.* provides the *in rem* due process necessary to do so. Denial of due process through application of the doctrine of sovereign immunity would so cloud Petitioner's title that it would constitute a sacrifice of all beneficial uses of the Petitioner's property and, for the first time in the jurisprudence of this State, give rise to the takings claim recognized in *Lucas*.

V. Summary

This appeal presents a rare instance in which the ruling of the Trial Court is not only correct for *any* reason but is right for *every* reason. Viewed in context, the doctrine of sovereign immunity has no application in an action *in rem* where the petitioner does not seek injunctive relief to obtain possession but only seeks to quiet title. Even if a legislative waiver of the doctrine were required, no reasonable reading of the Quiet Title Act can fail to find such a waiver in its use of the broadest possible words – "any claim," "all claims," "every claim," and "all the world" – and the Trial Court's finding of legislative waiver should be upheld. Any question as to a general waiver is answered specifically in this action, where the Protection of Tidewaters Act acknowledges the right of a citizen to establish title against a claim

of the State where a valid Crown grant or grants, such as those at issue here, exist. The failure to affirm the Trial Court's denial of the State's motion to dismiss this action *in rem* would render this express exception in the Tidewaters Act a nullity and would convert this petition from a simple *in rem* action to determine title to a takings case under the Georgia and United States constitutions.

For the foregoing reasons, Appellee prays that this Court affirm the holding of the Trial Court.

Respectfully submitted this, the 4th day of February, 2016.

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IN THE SUPREME COURT
STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
Appellant,	)	
	)	
v.	)	**SUPREME COURT DOCKET NO. S16A0472**
	)	
MAPACHE, LLC, et al.	)	
	)	
Appellees.	)	

CERTIFICATE OF SERVICE

I certify that I have served a true and accurate copy of the within and foregoing **BRIEF OF APPELLEE** upon the following:

Mr. James G. Williams
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Ms. Peggy Eckrote
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Office of the Attorney General
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by placing a copy of same in the United States Mail, postage prepaid on this the 4th day of February, 2016.

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IN THE SUPERIOR COURT OF CAMDEN COUNTY
STATE OF GEORGIA

MAPACHE, LLC,	*	
	*	
Petitioner	*	**Civil Action No. 15-V-174 RLN**
	*	
vs.	*	
	*	
STATE OF GEORGIA, adjoining landowner, the heirs of THOMAS CARR, and all other persons or entities known or unknown who might claim adversely to Petitioner's title to the hereinafter described real property,	*	
	*	
Respondents	*	

STATE OF GEORGIA
CAMDEN SUPERIOR COURT
FILED 9/10/2015 AT 9:30 AM PM
DEPUTY CLERK

ORDER

The Petitioner filed this action, a "Petition Quia Timet" against all the world on March 2, 2015 seeking to conclusively establish petitioner's title to property in Camden County, Georgia, identified and described as "Raccoon Key". This matter came before the Court on August 18th, 2015 for a hearing on Respondents' Motion to Dismiss and the Court having heard argument of counsel and having considered the pleadings filed in this case finds and orders as follows:

I. BACKGROUND

Respondent has filed its Motion to Dismiss Petitioner's claims against them on the basis of sovereign immunity alleging that the petition fails to state a claim and should be dismissed under O.C.G.A. § 9-11-12(1). The Court must take as true and accurate all well pled allegations of fact in the Petitioner's petition and all doubts are to be resolved in Petitioner's favor. Ikomoni v. Bank of Am., N.A., 330 Ga. App. 776, 779 (2015). This includes the Petitioner's allegations of actual possession of the real

property at issue. Viewing the allegations thusly, the following are the facts pled by Petitioner.

The Petitioner is the owner of fee simple title to the following described real property:

> All that certain lot, tract or parcel of land situate, lying and being in Camden County, Georgia, identified and described as "Raccoon Key" bounded as follows, to-wit: To the North by Umbrella Creek; to the West by Dover Creek; and to the East and South by Saint Andrews Sound. Said property is generally identified as Camden County Tax Parcel 163-001. Said property is an Island currently consisting of approximately 157 acres lying above the mean high tide elevation which includes improvements, structures, fresh and salt water lakes, and approximately 1,563 acres of salt marsh, all bounded by the salt water courses set out in the description of the property, which salt water courses are claimed or owned by the State of Georgia or subject to rights-of-way granted to the United States.

The interest of the Petitioner is based upon: (a) Grants from the State of Georgia to Thomas Carr dated August 16th, 1793. The property is an Island bound by the salt water courses set out above. The State of Georgia is an adjoining landowner to the property and the State of Georgia has, pursuant to statute enacted subsequent to the Grant referenced above, made claims to marshlands below the mean high tide elevation except where a valid crown or state grants exist or are presumed to exist pursuant to statute.

The Petitioner requested the appointment of a Special Master and the parties stipulated to the appointment of James Williams as Special Master. The State's Motion to Dismiss is ripe for consideration and the Court will therefore consider the State Respondent's Motion to Dismiss.

II. RESPONDENT'S MOTION TO DISMISS

Respondents allege that (1) Petitioner has failed to state a claim upon which the relief sought against them could be granted, and (2) this action is barred by sovereign immunity from suit under the Georgia Constitution, and therefore the Court lacks subject matter jurisdiction to consider the petition.

After careful consideration of the issues raised by the parties' brief and arguments at a hearing on August 18, 2015, and after careful consideration of the entire record, Respondents' Motion to Dismiss is hereby DENIED.

III. SOVEREIGN IMMUNITY

State Respondent's move to dismiss the Petitioner's claims against them on the basis of sovereign immunity. The issue presented is one of first impression; that is, whether the Doctrine of Sovereign Immunity applies in a "Quia Timet" against all the world action.

Sovereign Immunity is a threshold issue because if an action is barred by sovereign immunity, the Court lacks subject matter jurisdiction. Jurisdiction of the Court to afford the relief sought should be decided at the outset of the case. DOT v. Dupree, 256 Ga. App. 668, 671 (2002).

In this case the State contends that Petitioner's claims, as they pertain to the State and certain real property which is presumed to be owned by the State, are barred in their entirety by the sovereign immunity of the State. The Georgia Constitution extends sovereign immunity to the State and all of its departments and agencies except as specifically provided in Paragraph IX of Art. I, Sec. II. Paragraph IX(e), as amended

in 1991, provides:

> Except as specifically provided in this paragraph sovereign immunity extends to the State and all of its departments and agencies. The sovereign immunity of the State and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver. Georgia Constitution Art. I, Sec. II, Paragraph IX(e).

The State is immune from suit except as provided by an Act of the General Assembly specifically providing that sovereign immunity has been waived and the extent thereof. Woodard v. Laurens County, 265 Ga. 404, 405 (1995).

The 1991 Amendment to the Georgia Constitution granted the General Assembly the exclusive power to waive sovereign immunity. In Georgia Department of Natural Resources v. Center for a Sustainable Coast, Inc., 294 Ga. 593 (2014), the Georgia Supreme Court, in an unanimous decision, rejected judicially created exceptions to sovereign immunity. The Court created a bright line rule holding that only the Georgia Constitution or a specific waiver by the General Assembly can abrogate sovereign immunity.

The Court further held that if the plain language of a statute "does not provide for a specific waiver of governmental immunity nor the extent of such a waiver, ... no waiver can be implied or shown." Id. at 603. "The plain and unambiguous text of the 1991 Constitutional Amendment shows that only the General Assembly has the authority to waive the State's sovereign immunity." Id. at 599. Further, the Court noted that a "bright line rule that only the Constitution itself or a specific waiver by the General Assembly can abrogate sovereign immunity is more workable than a scheme allowing judicially created exceptions." Id. at 602.

The burden of demonstrating a waiver of sovereign immunity rests with the person filing the suit who must bring his or her case within the authority upon which he or she relies. DOT v. Dupree, 256 Ga. App. 668, 671 (2002). In this case, the State's sovereign immunity has been waived to permit the relief sought by the Petitioner and the Petitioner has cited sufficient bases for a waiver of the State's sovereign immunity. Petitioner has met his burden of bringing the claims and its amended petition within the specific provisions of an applicable waiver of sovereign immunity as required under settled law.

IV. SOVEREIGN IMMUNITY AND QUIET TITLE ACTIONS

O.C.G.A. §23-3-60 provides:

> "The purpose of this part is to create a procedure for removing any cloud upon the title to land, including the equity of redemption by owners of land sold at tax sales, and for readily and conclusively establishing that certain named persons are the owners of all of the interest in land defined by a decree entered in such proceeding, so that there shall be no occasion for land in this state to be unmarketable because of any uncertainty as to the owner of every interest therein."

O.C.G.A. §23-3-61 provides:

> "Any person, which term shall include a corporation, partnership, or other association, who claims an estate of freehold present or future or any estate for years of which at least five years are unexpired, including persons holding lands under tax deeds, in any land in this state, whether in the actual and peaceable possession thereof or not and whether the land is vacant or not, may bring a proceeding in rem against all the world to establish his title to the land and to determine all adverse claims thereto or to remove any particular cloud or clouds upon his title to the land, including an equity of redemption, which proceeding may be against all persons known or unknown who claim or might claim adversely to him, whether or not the petition discloses any known or possible claimants."

The proceedings pursuant to the above-quoted code sections are proceedings in rem against all the world to establish title. Unlike an equitable quiet title action or a conventional quia timet, the action in this case is brought against the property and all the world creating a legislatively authorized proceeding. Heath v. Stinson, 238 Ga. 364.

This action to quiet title is not asking the Court to compel the Legislature or the Governor to do anything. Likewise, it is not a claim seeking monetary damages to be paid out from the State's Treasury and only asks that the Court decide the relative rights of the private claimant and the State regarding ownership of the property involved. The present case does not implicate any of the modern day considerations that would justify the State's invocation of sovereign immunity. Under Georgia authority a primary purpose of the doctrine of sovereign immunity is the protection of the public purse. Liberty County School District v. Halliburton, 328 Ga. App. 462 (2014), citing Dekalb County School District v. Gold, 318 Ga. App. 633 (2012).

Additionally, the State is bound by the obligations and restraints imposed by the Georgia Constitution. To allow the State to assert sovereign immunity as a bar to this quiet title action brought in its own Court by private citizens would fly in the face of the constitutional protections and property rights of the people as set out in Georgia Constitution Art. I, Sec. 1, Paragraph 1, which states:

> No person shall be deprived of life, liberty, or property except by due process of law.

The Georgia Supreme Court has yet to directly address the question of whether the State will be bound by an in rem action commenced "against all the world" under O.C.G.A. §23-3-60. However, the State has undoubtedly been provided notice of and

participated in many cases initiated under the Quiet Title Statute.

Other states have addressed the issue directly and their reasoning is compelling. The Supreme Court of Maine addressed the question of whether the doctrine of sovereign immunity is a defense to an in rem quiet title action where private parties claimed an ownership interest in land being used as a state park. Robert Welch, et al v. State of Maine, 853 A.2d 214 (2004). The Court held that an in rem quiet title action, where no monetary relief is sought against the State, does not threaten the Treasury of the State and that a defense of sovereign immunity would not preclude a determination of ownership interest in rem at issue. The Court found:

> As we have said in the past, invoking the doctrine of sovereign immunity in a Quiet Title Action "is illogical because it assumes the merits - the existence of the State's interest - in order to avoid litigating the merits ... (and) would represent a radical assault on the stability of title to real property, within this State and the availability of legal remedies to defend it.

See also, Cass County Joint Water District v. 1.43 acres, 643 NW 2d 685, 689 (N.D. 2003) "Tribal immunity is not implicated when courts exercise in rem jurisdiction."

The Supreme Court has established guidelines for determining whether the provision of a remedy by the legislature creates a waiver of sovereign immunity. In Colon v. Fulton County, et al., 294 Ga. 93 (2013) the Court held that "magic words" such as sovereign immunity is hereby waived are not required to create a specific statutory waiver of immunity. Thus the Court stated that it must examine the manner in which various statutes passed by the General Assembly interact in order to determine whether a waiver of sovereign immunity is affected thereby. The present case presents a scenario that meets all of the criteria announced in Colon for a finding of

waiver of sovereign immunity. The words "all of the world" can only be afforded their plain meaning to include the State. The Georgia Supreme Court recognized that the legislative purpose underlying an action quia timet against all the world is to "remove any cloud of title to land ... so that there shall be no occasion for land in this State to be unmarketable because of any uncertainty as to the owner of every interest therein". Gurley v. East Atlanta Land Co., 276 Ga. 749 (2003). Therefore, the Legislature has waived sovereign immunity by enacting the in rem procedure outlined in O.C.G.A. § 23-3-60, et seq. and anticipated in the findings that support the Tidewater Protection Act.

As noted above, O.C.G.A. §23-3-60, et. seq., establishes an in rem procedure regarding claims to real property in order to establish title against "all the world." The phrase "all the world" cannot be fairly read to mean "all the world except for the State from which title to all real property is derived." Further, in the legislative findings enumerated in the Tidelands Protection Act, the Legislature stated that "the State of Georgia became owner of the beds of all tidewaters within the jurisdiction of the State of Georgia as successor to the Crown of England and by common law ... except where title in a private party can be traced to a valid Crown or State Grant ..." O.C.G.A. § 52-1-2. Construing these two code sections the Legislature created a process to establish title against "all the world" which waives sovereign immunity in these regards.

The Respondent's Motion to Dismiss this action is hereby DENIED.

SO ORDERED, this 8 day of September, 2015.

Roger B Lane

ROGER B. LANE
Judge of Superior Courts
Brunswick Judicial Circuit

I. ARGUMENT AND CITATION OF AUTHORITIES

A. Summary of Argument

Fifty years after enactment of the 1966 Quiet Title Act, O.C.G.A § 23-3-60, et seq., Appellant State of Georgia ("the State") now asserts for the first time that sovereign immunity exempts it from that Act. The State offers no analysis of the shattering effects that its novel position, if adopted by this Court, would have on property owners, the real estate industry, lenders, title insurers, investors and others in this state for whom establishing clean title to land is of paramount importance.

The undersigned Amici Parties submit this brief in support of Appellee to address two matters not already addressed in the briefs. First, the Amici Parties urge the Court to follow its own precedent holding that sovereign immunity does not bar an action to resolve a disputed title because such immunity would violate the constitutional separation of powers by enabling the executive branch to usurp the exclusive judicial function of deciding title to land. *See Tanner* v. *Brasher,* 254 Ga. 41, 42-

44 (1985); 3 *Pindar's Ga. Real Est. L. and Proc.*, §25:11 n.4, p. 486 (7th ed. 2013) (hereinafter cited as "*Pindar*"). Second, the Amici Parties urge the Court to avoid the irreparable and unnecessary damage to real property interests throughout the state, including the broad civic, business and property interests represented by the Amici Parties, that would result from the State's position.

The Amici Parties urge the Court to reject the State's position, follow the rule in *Tanner* v. *Brasher* and hold that land claimed by the State is subject to the Quiet Title Act on the same basis as any other land within the state.

B. The State's Position Violates the Constitutional Separation of Powers

At the heart of the State's sovereign immunity argument lies an unmistakable threat to the constitutional separation of executive and judicial powers. Ga. Const. Art. 1, §2, ¶3. The state constitution vests the judicial branch with the exclusive power to decide title to land. *Id.* at Art. 6 , §4, ¶1 (superior courts given exclusive jurisdiction over title to land); *Id.* at Art.6, §6, ¶3(1) (Supreme Court given exclusive jurisdiction over

appeals involving title to land) The State, however, asserts that sovereign immunity bars a judicial determination of title to land claimed by the State. In other words, the State takes the position that if the executive branch claims land for the State, the judiciary is barred from entertaining an action to test that claim against competing claims. The State's position would render the judicial branch helpless to perform its function as trier of title issues. All persons having competing interests would simply have to accept the factual representations of the executive branch as true and its legal conclusions regarding title as dispositive.

This is not the first time the State has advanced this position. In 1985, this Court unanimously rejected a substantially identical argument in *Tanner v. Brasher*, 254 Ga. 41, 42-44 (1985). In *Tanner*, a group of Sapelo Island landowners challenged the State's assertion of title by adverse possession to land known as "Raccoon Bluff"[1]. The State contended that the landowners were precluded by sovereign immunity from questioning the State's claims to the land. *Id.* at 42. Citing *United States v. Lee*, 106

[1] Notwithstanding their similar names, "Raccoon Bluff" in that case and "Raccoon Key" in this case appear to be different tracts of land.

U.S. 196, 1 S. Ct. 240 (1882), the Court resoundingly rejected the notion that sovereign immunity could "enable State officials to prove the State's ownership of land simply by saying that the State owns the land." *Id.* at 43. The Court explained that "[t]o hold otherwise would throw the constitutional doctrine of sovereign immunity in conflict with the constitutional provision for separation of powers." *Id.* Just as the legislature cannot legislate the truth of facts, the executive branch cannot "conclusively establish facts by pleading them." *Id.* at 44. The Court particularly noted Chief Justice Marshall's observation in *United States v. Peters*, 5 Cranch 115 (1809), that "[I]t certainly can never be alleged that a mere suggestion of title in a State...must arrest the proceedings of the Court, and prevent their looking into the suggestion and examining the validity of the title." *Id.* at 43 (*citing Lee* at 210).

While Appellee cites *Tanner* in support of its position, Appellee appears to be concerned that the 1991 amendments to the state constitution and the different procedural basis for the title dispute in *Tanner* may make *Tanner* distinguishable. *See* Br. Of Appellee at 7, 10. The Amici Parties,

however, do not believe the 1991 amendments effected any change in the separation of powers doctrine, nor is there any indication in *Tanner* that its holding was dependent on whether title was disputed via a quiet title action, a declaratory judgment, or otherwise. Tanner focused solely on whether the executive branch could displace the judiciary in deciding title to land claimed by the State. *Tanner* has never been disturbed, distinguished or criticized on that point, and the United States Supreme Court precedents on which it relies remain good law. Thus, while State has not previously claimed exemption from the Quiet Title Act *per se*, *Tanner* is controlling precedent on that issue.

Moreover, while the title challenge in *Tanner* was not brought under the Quiet Title Act, *Pindar's Georgia Real Estate Law and Procedure*, the leading treatise on Georgia real property law, expressly notes that the rule in *Tanner* would bar any sovereign immunity defense to an action under that Act:

> Where it appears that some claim of title in the State of Georgia may be involved, it should be named and served. **Under the ruling in *Tanner* v. *Brasher*, 254 Ga. 41, 326 S.E.2d 218 (1985), the doctrine of**

> **sovereign immunity could not be raised.** In any event the language of the Act creates a proceeding "against the whole world" (thus including the State), and State highways often constitute boundaries or encroachments of the areas in question.

Pindar at §25:11 n.4, p.486 (emphasis added).

These excerpts from *Tanner* and *Pindar* capture exactly the essential unfairness, not to mention unconstitutionality, of the State's position. As *Pindar* suggests, state roads, lands and other property interests affect huge volumes of the Georgia real property held by others. The executive branch administers those State property interests, but it does not have the power to usurp the judicial function of deciding whether the State's claim to such land is valid. Immunizing the State's land claims from judicial quiet title processes would subordinate the judiciary to the executive branch and thereby deprive Georgia's citizens of any recourse for unlawful claims to their lands. That deprivation would certainly deny landowners due process as Appellee points out (Br. Of Appellee at 20-22), but perhaps more fundamentally it would violate the separation of powers.

As *Tanner*, *Pindar*, *Lee* and *Peters* all make clear, *no* legal theory could enable the executive branch to do what it is trying to do in this case. Regardless of whatever sovereign immunity may exist to protect the State from claims, that doctrine can never be used to deprive the judiciary of its power to decide whether the State's claim to a parcel of land is a good one. Any other result would undermine the most basic constitutional foundations on which the three branches of government co-exist.

One point the State seems to overlook is that the State's claim to Raccoon Key is a claim *by* the State, just as Appellee's claim to Raccoon Key is a claim *by* Appellee. The claims are opposing, but they are against the land, not the opposing claimant. That is, neither claimant seeks to take the land from the other, but only to keep what it believes it already owns. That is why a quiet title action does not implicate sovereign immunity: sovereign immunity only protects the State from claims, not from opposition to the State's own claims. Opposing Appellee's claim to title is not the same as defending title that has already been judicially confirmed. *See Tanner*, 254 Ga. at 43 n.3. By conflating Appellee's mere opposition

to the State's claim with an actual claim against the State, the State is squeezing the judiciary out of its appointed role to decide title disputes.

C. Immunizing State Claims To Land From Quiet Title Actions Would Wreak Economic Havoc

As Appellee notes, the State is the source of virtually all title to land within the State (Br. Of Appellee at 18); and as *Pindar* observes, the State's roads and other real property interests border a huge volume of other real property[2]. The State's assertion that lands claimed by the State are immune from judicial scrutiny would deprive a staggering number of property owners of any judicial recourse in the event of a title dispute. Indeed the State's position would restrict quiet title actions to only those tracts that are not bordered, crossed, or claimed by the State. And if the

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[2] While the exact amount of land interests claimed by the State is unclear, as of 2007 the state Department of Transportation reportedly administered 18,095 miles of state highway. *See* http://www.georgiaencyclopedia.org/articles/government-politics/georgia-department-transportation. A 1995 table produced by the National Wilderness Institute , http://www.nwi.org/maps/land/chart.html, reported that public access areas, not including easements or land used for public buildings, totaled 349,700 acres, or nearly 1% of the state's area. *See* http://www.nrcm.org/documents/publiclandownership.pdf .

State's position is extended to cover claims of persons whose claims arise through the State, the availability of quiet title actions would be reduced even further.

The State never explains how diminishing to near-worthlessness a judicial process designed by the General Assembly to offer protection against "all the world" can possibly be reconciled with legislative intent. It cannot. For more than 50 years, real property buyers, sellers, title insurers, closing attorneys, lenders and others have relied on the conclusiveness of quiet title proceedings. The Amici Parties cannot state definitely the exact number of quiet title proceedings conducted to date, but estimate it to exceed ten thousand. Title to the billions of dollars worth of real estate involved in these proceedings has now been called into question. The resulting financial risk caused by potentially bad land titles is incalculable, and the cost to the public caused by uncertainty and market disruption is, if anything, still higher.

The Amici Parties respectfully submit that the State's position is misguided and highly dangerous to Georgia's real estate industry and to

the public interest. This Court properly rejected such a position in its 1985 *Tanner* decision. The Court should do so again.

For the foregoing reasons, the Amici Parties respectfully request that the decision of the trial court be AFFIRMED.

Respectfully submitted this ___ day of ___, 2016.

Robert P. Williams
Georgia Bar No. 531150

IN THE COURT OF APPEALS
STATE OF GEORGIA

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY,	*	
Appellant,	*	
v.	*	CASE NO. A16A0257
RM KIDS, LLC,	*	
Appellees.	*	

BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION, AMICUS CURIAE, FILED IN SUPPORT OF THE APPELLANT

Monica K. Gilroy
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Tania T. Trumble
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TABLE OF AUTHORITIES

Cases

Other

Pursuant to Court of Appeals Rule 26, the American Land Title Association ("ALTA") files this Amicus Curiae Brief in support of the Brief of the Appellant.

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

Since 1907, ALTA has been the national voice for the title insurance industry. More than 4,600 title agents, abstractors and title insurance companies are active members, ranging from small, one-county operations, to large national title insurers such as Appellant. Associate members of ALTA include attorneys, builders, developers, lenders, real estate brokers, surveyors, consultants, and educational institutions. ALTA members advocate safe and efficient transfer of real estate. Members search, review, and insure land titles to protect home buyers and mortgage lenders who invest in real estate. The title insurance industry has grown in large part because of the confidence it provides to both homeowners and their lenders.

What is title insurance? In Georgia, title insurance policies are indemnity contracts and, therefore, are subject to the same rules of construction as other insurance policies. Chicago Title Ins. Co. v. Citizens and Southern Nat'l Bank, 821 F. Supp. 1492 (N.D. Ga. 1993), *aff'd* 20 F.3d 1175 (11th Cir. 1994). The liability

of an insurer under a title insurance policy is for loss or damage by reason of defects in the title to the property or by reason of liens or encumbrances thereon; the coverage of title insurance extends to reasonably anticipated implications of ownership that attach to the insured by reason of the record, but does not extend beyond that point. Security Union Title Ins. Co. v. RC Acres, Inc., 269 Ga. App. 359, 604 S.E.2d 547 (2004), *cert. denied* (Nov. 22, 2004).

The objective of title insurance, as an indemnity product, is to insure against loss which parties to a real estate transaction may suffer if an aspect of their title (i.e. priority of lien, full ownership of title to property) is ultimately deemed not to be true and accurate. Title insurance is substantially different than other types of insurance. Title insurance emphasizes ***risk prevention*** rather than ***risk assumption***. This emphasis on risk prevention is a labor intensive and costly component of doing business in a real estate transaction.[1]

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[1] While title insurance insures against defects in title, it does not insure value. "Title insurance does not insure the value of the subject property; it insures only that the title to such property is unencumbered by unknown liens, easements, and the like which might affect the property's value". Blackhawk Prod. Credit Ass'n v. Chicago Title Ins. Co., 423 N.W.2d 521, 524 (Wis. 1988). In other words, a title insurance policy is not analogous to a warranty of title found in a deed which is

There are two distinct types of title insurance. An Owner's title policy is a policy of insurance which protects the purchaser/owner of real property and insures fee simple title to that property. A Lender's title policy insures that the lender holds a lien position in real property, wholly encumbering the property. In a typical residential real estate sales transaction, the Lender's title policy often required by the mortgage lender will not safeguard the rights and interest of the homebuyer; therefore, a separate Owner's title policy is issued, usually in the amount of the real estate purchase price. The Owner's title policy remains in effect for as long as the owner retains an interest in the property. In addition to identifying risk before a transaction is completed, the Owner's title policy will pay valid claims. A Lender's title policy insures against loss suffered by the lender regarding the validity, priority, and enforceability of its mortgage. Lender's title policies are issued in the amount of the loan, and liability decreases as the mortgage debt is reduced.

In 1929, lenders persuaded ALTA to develop a standard Lender's title policy to serve across the country as the template for title insurance coverage. These forms are still in use today, with minor revisions being made to ALTA policy

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breached, if at all, at the time it is made. First Fed. Sav. and Loan Ass'n of Fargo, N.D. v. Transamerica Title Ins. Co., 19 F.3d 528, (10th Cir.1994)

forms every few years. There are standard ALTA policies for Lenders and Owners title insurance. The title policy at issue in this case is the 1992 version of the ALTA Lender's title policy as endorsed by Appellant. (T:1591-1602).

The ruling of the Trial Court, if permitted to stand, threatens the title insurance industry, and the consumers served by the same, as it guts the purpose and intent of a Lender's title policy and compromise the future affordability of title insurance. Almost universally, the buyer/borrower in a financed real estate transaction pays the premium for the Lender's title insurance. By its departure from the generally recognized interpretation of title insurance, the Trial Court has created an unanticipated risk and detriment to the consumer by promulgating a result which will translate into higher title insurance premiums, which will directly affect the buyer/borrower. The Trial Court erred in ruling the Appellee's loss under the title policy should be measured based on the date the loan at issue was made and the title policy issued, and not at the time of foreclosure of the loan. If the ruling of the Trial Court stands, Georgia will be an anomaly among the states as the standard ALTA title policies will face a completely separate review and analysis than identical ALTA title policies in other states. Furthermore, the title insurance industry in Georgia will be facing a much greater liability than what was

anticipated when the industry negotiated the tens of thousands of Lender's title policies issued in Georgia each year. Lenders will demand their policy limits in every case of loss, whether realized or not, due to the financial windfalls available under this new calculation. Sustaining the Trial Court's ruling will raise the costs of doing business for insurers in the title industry in Georgia, and correlatively raise the price of title insurance policies for the everyday Georgia consumer. That price increase will frustrate, and potentially prevent, the smooth acquisition of homeownership across Georgia. The Trial Court's ruling of July 11, 2014 should be reversed, along with the verdict based upon the same.

STATEMENT OF FACTS

ALTA agrees with and adopts the Appellant's recitation of the facts as set forth in its brief. *See* Brief of the Appellant at pp. 1-11. Additionally, ALTA respectfully requests the Court review the 1992 ALTA title policy at issue in the case, in particular Section 7 "Determination and Extent of Liability," which states in pertinent part:

> "This contract is ***a policy of indemnity*** against ***actual monetary loss or damage*** sustained or incurred by the insured claimant who has suffered loss or damages by reason of matters insured against by this policy and only to the extent herein described [...]" (Emphasis added).

a. The liability of the Company under this policy shall not exceed the least of:

i. The Amount of Insurance stated in Schedule A, or if applicable, the amount of insurance as defined in Section 2 (c)[2] of these Conditions and Stipulations;

ii. ***The amount of the unpaid principal indebtedness secured by the insured mortgage*** as limited or provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, ***at the time the loss or the damage insured against by this policy occurs***, together with interest thereon or; [...]" (Emphasis added).

ARGUMENT AND CITATION OF AUTHORITY

A. The Date of Loss for a Lender's Title Insurance Policy is Measured by the Date of Foreclosure, Not the Date of Loan Origination

The Trial Court erred in the selection of the date of loss under the title policy in the case *sub juris* as the date the loan was made. A Lender's title insurance

[2] 2c "Amount of Insurance. The amount of insurance after the acquisition or after the conveyance shall in neither event exceed the least of: i. The Amount of the Insurance stated in Schedule A; ii. the amount of the principal of the indebtedness secured by the insured mortgage as of the Date of Policy, interest thereon, expense of foreclosure, amounts advanced pursuant to the insured mortgage to assure compliance with the laws or to protect the lien of the insured mortgage prior to the time of acquisition of the state or interest in the land and secured thereby and reasonable amount expended to prevent deterioration of improvements, ***but reduced by the amount of all payments made***; or [...]" (Emphasis added).

policy has a triggering event for coverage and date of loss; there is no such event with an Owner's title policy. The majority rule measures a lender's loss at the time the loan falls into default and is not paid, and a title defect (such as a missing half interest) is discovered. When the lender forecloses the insured mortgage and takes title (or the loan defaults and is ripe for foreclosure), the majority of courts value the property as of the date of the insured's foreclosure sale. *See* First American Bank v. First American Transp. Title Ins. Co., 759 F.3d 427 (5th Cir. 2014); Associated Bank, N.A. v. Stewart Title Guar. Co., 881 F.Supp.2d 1058 (D.Minn. 2012); Blackhawk Prod. Credit Ass'n v. Chicago Title Ins. Co., *supra*; Trico Manufacturing Co., Inc. v. Penn Title Ins. Co., 657 A.2d 890 (N.J. Super. 1995); First Commerce Realty Investors v. Peninsular Title Ins. Co., 355 So.2d 510 (Fla. App. 1978); Palliser v. Title Ins. Co. of New York, 61 Misc. 490, 115 N.Y.S. 545 (Sup. Ct. 1908); Emigrant Mortg. Co., Inc. v. Washington Title Ins. Co., 78 A.D.3d 1112, 913 N.Y.S.2d 251 (N.Y.A.D. 2d Dept. 2010); Grunberger v. Iseson, 75 App.Div.2d 329, 429 N.Y.S.2d 209 (1980); Stewart Title Ins. Co. v. Credit Suisse, No. 1:11-cv-227-BLW, 2013 WL 4710264 (D. Idaho Aug. 29, 2013) (unpublished); Karl v. Commonwealth Land Title Ins. Co., 20 Cal.App. 4th 972, 24 Cal. Rptr. 2d 912 (Cal. App. 1993); Marble Bank v. Commonwealth Land Title

Ins. Co., 914 F.Supp. 1252 (E.D.N.C. 1996) (*citing* Karl and adopting date of foreclosure because "[o]nly the completion of foreclosure signifies that a lender will not collect on its note").

The facts of this matter show that Appellee presented an opening foreclosure bid of $750,000.00, establishing that Appellee affixed its loss at the time of foreclosure at that sum. A third party could have theoretically purchased the Property with a bid of $750,001.00. Case law regularly provides examples of why this standard is proper. In Commonwealth Land Title Ins. Co. v. Sun Valley Credit, LLC, No. 1:13-cv-00113-EJL, 2015 WL 807055, at *8 (D. Idaho Feb. 26, 2015), the Court stated:

> Having reviewed the arguments of the parties and the relevant case law, and construing those in favor of the insured, the Court finds that the loss to a lender under a title insurance policy is determined at the date of foreclosure. This is the majority approach to valuing the lender's loss. *See* Joyce D. Palomar, *1 Title Insurance Law* § 10:16, Paying the insured's loss—Date value is to be measured (2014–2015 ed.). The risk allocation discussion supporting this view is applicable in this case because the Policy provides indemnity only to the extent a loss suffered by Credit resulting from a title defect thereby compromising its security interest in the Property. The title insurance policy does not place the risk of a decreasing real estate market upon the insurer. The Policy does not guarantee that the Property was worth the amount of the loan used to purchase it nor that the loan will be repaid. Based on the reasoning in these cases, the Court concludes that the proper valuation date is as of the

> date the of the loss is realized by the insured—the date of the foreclosure sale.

First Tennessee Bank, Nat'l Ass'n v. Lawyers Title Ins., Corp., 282 F.R.D. 423 (N.D. Ill. 2012) speaks to the First Midwest case relied upon by Appellant indicating that [First Midwest] "explains that title insurance compensates for losses caused by unknown risks in the chain of title, not for losses arising from a default on the loan. Losses caused by a surprise, more-senior lien can be measured only after the foreclosure sale of the secured property." Id. at 426. The case at footnote 6 goes on to state:

> A few other cases in other jurisdictions have also held that losses insured by title insurance are not compensable until the foreclosure sale. E.g., First Internet Bank of Indiana v. Lawyers Title Ins. Co., No. 1:07–cv–0869, 2009 WL 2092782, at *6 (S.D.Ind. July 13, 2009). "Since the uninsured lender suffers loss only if the note is not repaid, the discovery of an insured-against lien does not trigger recognition of loss ... an anticipated loss cannot be measured until completion of foreclosure because only then is there certainty the lender will not be paid in full." Karl v. Commonwealth Land Title Ins. Co., 20 Cal.App.4th 972, 983–84, 24 Cal.Rptr.2d 912 (Cal.App.Ct.1993)

The court in Karl, 20 Cal. App. 4th at 983-84, goes on to state:

> Since the insured lender suffers loss only if the note is not repaid, the discovery of an insured-against lien does not trigger recognition of loss. Further, even though the lender's note is in default, an anticipated loss cannot be measured until completion of foreclosure because only then is there certainty the lender will not be paid in full. Consequently, it is clear

> that in the typical case the earliest a loss can be claimed on a lender's policy is at the time of completion of foreclosure.

Finally, First Am. Bank v. First Am. Transp. Title Ins. Co., 759 F.3d 427echoes that:

> [a] majority of courts from other jurisdictions have held that, in the absence of specific policy language, a title insurer's liability to a mortgagee should be measured using the foreclosure date. These courts have reasoned that this date is appropriate because the foreclosure is when the insured actually incurs a covered loss. While a handful of courts have opted to use other dates in calculating the amount due a mortgagee, none has used the date of discovery. Rather, they have generally used the date the loan was made and have involved fact patterns in which there was a total failure of title.

Id. at 432-33.

In the case *sub juris*, the Appellee's security interest was clearly not "valueless" or was there a complete failure of title. The Trial Court's determination of use of the loan date was simply error and should be reversed.

B. Owner's and Loan Policy Loss Dates are Different

Modern decisions acknowledge that the date of loss is different under the Owner's title policy and the Lender's title policy, and that the date of discovery is not appropriate for a Lender's title policy because the lender does not suffer a loss on that date. Date of discovery is also not necessarily the operative date of loss

under an Owner's title policy either; rather, date of valuation of a loss is more appropriate, since an owner may suffer actual loss at varying times. In First Internet Bank of Ind. v. Lawyers Title Ins. Corp., No. 1:07-cv-0869-DFH-DML, 2009 WL 2092782 (S.D. Ind. July 13, 2009) (unpublished), the insured lender argued that loss should be measured on the date of discovery. The court in First Internet Bank held that loss under a loan policy is measured on the date on which the insured loses its security, stating: "[t]his rule to use the date of foreclosure does not systematically favor the insurer or the lender. Market conditions determine which party benefits from the date-of-foreclosure rule." Id. at *6. The court in Associated Bank, N.A. v. Stewart Title Guar. Co., 881 F.Supp.2d 1058 (D. Minn. 2012) stated that "the majority of courts considering the issue have held that such loss cannot be measured until the note has not been repaid and the security for the mortgage is shown to be inadequate," and cited Falmouth Nat'l Bank v. Ticor Title Ins. Co., 920 F.2d 1058 (1st Cir. 1990). The courts reached the same conclusion in Marble Bank v. Commonwealth Land Title Ins. Co., *supra*; Blackhawk Prod. Credit Ass'n v. Chicago Title Ins. Co., *supra*; and Demopoulos v. Title Ins. Co., 61 N.M. 254, 298 P.2d 938 (1956). *See also* Wedgewood Square Center Ltd. Ptnshp.

v. Lincoln Land Title Co., Inc., 347 S.W.3d 582 (Mo. App. S.D. 2011) (acknowledging that loss is measured differently under the two types of policies).

The court below has mistakenly construed "loss" to be measured at the time of origination, before an actual loss has been incurred. An "actual loss" means a monetary loss has been suffered by the insured Lender under the clear and unambiguous policy terms. A title defect does not result in a monetary loss at the time of the loan origination. It is not until a lender is unable to convey marketable title that its loss is actualized. While a title problem affects an owner at any time he/she holds an interest in the property, a title issue does not affect a lender's rights under the security deed if, or until, the loan goes into default. Therefore, the Trial Court's July 14, 2014 ruling on the Motion in Limine to determine the date of loss, and the verdict based upon the same, must be reversed.

1. The Appellee's Deed to Secure Does Not Permit Appellee to Rely on the Law Discussing the Measure of Damages for an Owner's Title Policy

The Trial Court based its July 14, 2014 ruling on the measure of the loss upon caselaw which dealt not with Lenders' title policies, but with Owners' title policies. Rampant in the Appellee Brief are citations to cases which base their holdings on facts which review an Owner's title policy. Authorities which revolve

around the date of loss for an Owner's title policy should be disregarded by this Court. They are not compelling and are, in fact, simply inapplicable since, as discussed herein, an Owner's title policy and a Lender's title policy have distinctly different dates for loss. This distinction arises from the basic concept that an Owner's title policy insures fee simple title to the property, free of challenge, while at its heart, a Lender's title policy insures the Lender's right to an enforceable lien.

In a misguided effort to overcome the lack of case law to support the Trial Court's rulings, the Appellee has argued that in Georgia it is acceptable to rely upon legal authorities which factually involved an Owner's title policy as Georgia is a "Deed to Secure Debt" state, not a mortgage state, and therefore the Appellee's deed to secure debt established an "ownership of title" in the property such that the Appellee was indeed an "owner." This is simply not the long standing Georgia law. "The law in Georgia is well established that a security deed, although conveying legal title, does so for the purpose of security only[...]." Trail v. Saunders, 296 Ga. App. 594, 675 S.E.2d 514 (2009). *See also* Biggers vs. Crook, 283 Ga. 50, 656 S.E.2d 835 (2008); Coleman Road Associates v. Culpepper, 214 Ga. App. 475, 483 S.E.2d. 83 (1994); Hennessy v.

Woodruff, 201 Ga. 742, 82 S.E.2d 859 (1954); Northwest Carpets, Inc., v. First Nat'l Bank of Chatsworth, 280 Ga. 535, 630 S.E.2d 407 (2006); Stearns Bank, N.A. v. Doxetos, 382 Ga. App. 106, 761 S.E.2d 520 (2014); Sapp vs ABC Credit & Inv.Co., 243 Ga. 151, 253 S.E.2d 82 (1979); Bryant v. Randall, 244 Ga. 676, 261 S.E.2d 602 (1979); and Waldroup v. State 198 Ga. 144, 30 S.E.2d 896 (1944). This Court should discount the authorities relied upon by Appellee, which speak to the date of loss for an owner under an Owner's title policy, as the same are inapplicable to the facts of the case *sub juris*.

2. Appellee's Cases are Not Compelling and Should be Distinguished

In support of its position, Appellee, both at the trial level and in this Court, relies upon a series of Georgia cases to argue the measurement of loss "under a title policy" is the closing date. However, each and every case relied upon and cited by Appellee and the Trial Court in its July 14, 2014 ruling, deal with the date of loss measurement on ***an Owner's title policy***, not a Lender's title policy. These cases [U.S. Life Title Ins. Co. of Dallas v. Hutsell, 164 Ga. App. 443, 296 S.E.2d 760 (1983); Beaullieu v. Atlanta Title & Trust Co., 60 Ga. App. 404, 4 S.E.2d 78 (1939); and Doss & Associates v. First American Title Inc. Co., Inc., 325 Ga. App.

448, 754 S.E.2d 851 (2013)], all heavily relied upon by Appellee, specifically discuss the ***owner's*** damages under a title policy. As discussed herein, these cases are simply inapplicable to the case *sub juris*. The Trial Court clearly missed this finite, but important, distinction of an Owner's title policy versus a Lender's title policy when making its ruling and this error continues with the Appellee's reliance on these same authorities.

C. Public Policy Demands a Reversal of the Trial Court 's Decision Regarding the Motion in Limine Speaking to Date of Loss

It would be improper as a matter of public policy to make a finding that a loss under a Lender's title policy occurs and is calculated as of the date the transaction closed. The ruling by the Trial Court is inconsistent with the national standard, as shown via the cases cited above. A policy of insurance for a lender insures against a very specific category of loss – one that stems from a title defect, lien, or encumbrance. It is not only possible but very common for a lender's title to have a title defect, lien, or encumbrance and not sustain a loss. As long as the underlying loan continues to perform, the lender has suffered no loss. The loan will continue to be paid, and eventually satisfied, all without the lender ever being

affected by the title issue. Finding that an insured's loss occurs at the time of the closing is completely contrary to the standard practice of title insurance and is simply nonsensical. A ruling which upholds the Trial Court's findings is, in essence, negating the necessity for an actual loss, circumventing the title policy language used nationwide, and forcing title insurance to insure value when a defect is found. The ruling also paves the way for a complete manipulation of the title insurance process and gross unjust enrichment for insured lenders.

For purposes of example, a lender extends a loan for $500,000.00 on March 1, 1998 and it is a performing loan until 2014. The loan goes into default and it is discovered that a prior lien was not paid off at the time of the closing in 1998 and has now foreclosed out the insured's security deed. The balance of the loan at the time of default is $250,000.00. The insured in this scenario, under the Trial Court's ruling, could make a claim under its title policy based on the date of loss being March 1, 1998 and would be entitled to $500,000.00 under the Lender's title policy despite the amounts paid down by the borrower. The lender would experience a $250,000.00 windfall.

Another example would be as follows: Lender A originates a $400,000.00 loan secured by Property A, valued at the time at $400,000.00. The same day,

Lender B originates a $400,000.00 loan secured by the neighboring property, Property B, which at that time was also worth $400,000.00. Both Lender A's and Lender B's loans go into default and at the time of default both Property A and Property B are valued at $300,000.00. Both Lender A and Lender B foreclose with an opening bid of $300,000.00 such that a potential third party purchaser could bid $300,001.00 and purchase the property in question. No one bids at either foreclosure sale and Property A goes back to Lender A and Property B goes back to Lender B. Lender A puts Property A on the market and is able to sell the property for $300,000.00 due to the current value of Property A. Lender B discovers a title defect that prevents Lender B from being able to convey title to Property B to a third party and makes a claim under its title policy. Under Appellee's date of loss theory, Lender B can demand, and is entitled under the Trial Court's ruling, to $400,000.00 and, due to the good luck of having a title defect, Lender B recovers $100,000.00 more than the identical Lender A. Lender B is not made whole by its title policy as that amount would be $300,000.00, the amount Lender B would have obtained had there been no defect. Instead, Lender B receives an extra windfall of $100,000.00 as a result of the title defect, in essence being compensated for the property's loss of value. Finding the date of

loss to be the date of origination completely shifts the coverage provided by a title policy to a policy insuring value, not title. Such a finding is completely contrary to public policy. Title insurance does not insure the value of the subject property; it insures only that the title to such property is unencumbered by unknown liens, easements, and the like which might affect the property's value. Blackhawk Prod. Credit Ass'n v. Chicago Title Ins. Co., supra. A lender's loss cannot be determined unless the note is not repaid and the security for the mortgage proves inadequate. Such is the case because it is only after the insurer or the insured sues on the note and the debtor fails to pay, that the actual loss can be determined. Put another way, it is not the value of the mortgage note that is insured, but rather, what is insured is the loss resulting from a defect in the security. Southwest Title Ins. Co. v. Northland Bldg. Corp., 552 S.W.2d 425, 430 (Tex.1977).

In addition to providing an environment in which title defects could actually be desired by a lender, the trial court's ruling also greatly negatively impacts and harms the everyday consumer. The process of a borrower/consumer obtaining a residential real estate loan is a balance of many moving pieces, one of which is title insurance. The cost of the loan to the consumer is based upon the cost of each piece of the transaction. The Trial Court's erroneous ruling is of such public

importance because of the effect it will have to not just the title insurance companies, but to the consuming public as a whole. With title insurance companies suddenly responsible for more than actual loss, the risk associated with issuing policies rises, title insurance rates rise, and the increased costs ultimately fall to the consumer.

The loss under a Lender's title insurance policy is calculated as of the date of foreclosure. This is the most accurate and equitable determination as it does exactly what insurance is intended to do in case of a loss – make its insured whole. A bid of $750.001.00 at Appellee's foreclosure sale could have purchased the property in question and, had there been no title defect, that is the amount Appellee would have obtained either through a third party sale or through the sale of the Property post-foreclosure. Appellee received over four times what it would have recovered from a standard foreclosure with no title issue due to the Trial Court's rulings. An affirmation that allows such a windfall cannot be in the best interest of public policy. A lender's loss cannot be determined until the foreclosure sale – prior to that time, any loss is anticipatory and not actualized.

CONCLUSION

Accordingly, the American Land Title Association (ALTA) respectfully submits that this Court provide full and complete consideration of the position of the Appellant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the Appellant and Appellees, through their counsel of record in this matter, with the within and foregoing **BRIEF OF AMICUS CURIAE** by placing a true and correct copy of this pleading in the United States Mail, with prepaid first-class postage affixed thereto, properly addressed as follows as well as via electronic mail:

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This 19th day of January 2016.

/s/ Monica K. Gilroy

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NOTES:

APPLICATION FOR MEMBERSHIP

☐ACTIVE - Active Members are companies/firms directly and primarily engaged in the real estate title abstract industry, or the real estate title insurance industry, and which have been continuously so engaged for the five (5) years prior to their application for membership. Attorney issuing agents, whether sole practitioners or law firms, may qualify for Active Membership. Annual dues are $250, which entitles up to three employees to be individual members with full benefits, including a listing in the membership directory, reduced registration rates for all DLTA events, a subscription to our quarterly newsletter, access to the Members Only section of our website and more. Additional employees may be added for $25 each per year.

☐ASSOCIATE - Applicants not otherwise qualified to become Active Members, but whose primary business activity bears a direct relationship upon qualifying activity as engaged in by Active Members, may qualify as Associate Members. Annual dues are $200, which entitles up to three employees to be individual members with full benefits, including a listing in the membership directory, reduced registration rates for all DLTA events, a subscription to our quarterly newsletter, access to the Members Only section of our website and more.

1. Company Name: _____

2. Company Address: _____

   City/State/Zip: _____

   Phone: _____

3. Company Website: _____

4. Type of Business (primary):

☐ Title Agent - Corporate ☐ Title Agent - Attorney/Law Firm

☐ Closing/Settlement ☐ Title Underwriter ☐ Other: _____

5. Classification (check all that apply):

☐ Abstractor ☐ Attorney ☐ Closing/Settlement ☐ Issuing Agent ☐ Underwriter

6. Number of years in the title business: _____ Date of Incorporation/Organization: _____

7. Is Company a member of the American Land Title Association? ☐ Yes ☐ No

8. Is Company an licensed Title Insurance Agency? (if applicable) ☐ Yes ☐ No

   If yes, Company Agency License # _____

9. Number of Employees: ___ Number of Licensed Title Insurance Agents (if applicable): ____

10. List all Underwriters for whom Company is an Agent (if applicable):

_____
_____
_____
_____

11. List all active officers and years of experience in the title business:

a.

b.

c.

12. References: Must include two references who are either members of DLTA or ALTA:

Name	Company
_____	_____
_____	_____

One primary Individual Member + two more Individual Members are included in the base annual dues rate for the Company. Additional employees may be added for $25 per person per year.

Name	Email Address	Bar #/ALDOI # (if applicable)
1. (Primary)		
2.		
3.		

(NOTE: For any additional employees to be DLTA members, please submit their name, email address, work phone, and Bar# or ALDOI #, and add an additional $25 to your payment for each.)

Date of Application: _____

Applicant endorsed and sponsored by:

_____
(Name of Underwriter)

By: _____
(Individual - signature requested)

Payment for annual dues:

Online ☐

Check ☐

Active Membership $250.00
Associate Membership $200.00
(Plus $ 25 for any individual members over 3)