

COMPLEX CONTRACT DISPUTE ISSUES AND REMEDIES

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I. Advanced Drafting Techniques of Arbitration Clauses

A. What Does the Arbitrator Decide?

“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. This axiom recognizes the fact arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.” *Multi-Fin. Secs. Corp. v. King*, 386 F.3d 1364, 1367 (11th Cir. 2004) (quoting *AT&T Techs., Inc. v. Commcn’s Workers of Am.*, 475 U.S. 643, 648-49 (1986)).

Ordinarily, “it is up to the parties to determine whether a particular matter is primarily for arbitrators or courts to decide.” *Bamberger Rosenheim, Ltd. v. OA Development, Inc.*, 862 F.3d 1284, 1287-88 (11th Cir. 2017) (quoting *BG Grp. PLC v. Republic of Arg.*, 134 S. Ct. 1198, 1206 (2014)). However, if “the contract is silent on the matter of who primarily is to decide ‘threshold’ questions about arbitration, courts determine the parties’ intent with the help of presumptions.” *Id.* at 1288.

“On the one hand, courts presume that the parties intend courts, not arbitrators, to decide ... disputes about ‘arbitrability.’ These include questions such as ‘whether the parties are bound by a given arbitration clause,’ or ‘whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.’”¹ *Id.* (quoting

¹ However, parties can agree to give arbitrators the ability to rule on these issues as well. *See Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1146 (11th Cir. 2015) (“[P]arties may agree to commit even threshold determinations to an arbitrator, such as whether an arbitration agreement is enforceable.”). For example, when parties incorporate the rules of the American Arbitration Association into their contract, they “clearly and unmistakably agree that the arbitrator should decide whether the arbitration clause applies.” *U.S. Nutraceuticals, LLC v. Cyanotech Corp.*, 769 F.3d 1308, 1311 (11th Cir. 2014) (citation and internal punctuation omitted).

BG Grp., 134 S. Ct. at 1206). See also *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (holding that whether contracting parties are “bound by a given arbitration clause raises a question of arbitrability for a court to decide”); *Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1267 (11th Cir. 2017) (stating that when courts decide whether a party has agreed that arbitrators should decide gateway issues of arbitrability, they “should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so”).

“On the other hand, courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration.” *Bamberger Rosenheim*, 862 F.3d at 1288 (quoting *BG Grp.*, 134 S. Ct. at 1207). Where an arbitration provision is valid, “procedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator to decide.” *Howsam*, 537 U.S. at 84. The “relevant question here is what kind of arbitration proceeding the parties agreed to. That question does not concern a state statute or judicial procedures. It concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question.” *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452-53 (2003) (plurality opinion) (citations omitted) (emphasis in original). “Procedural questions ‘are generally for the arbitrators themselves to resolve.’” *Bamberger Rosenheim*, 862 F.3d at 1288 (quoting *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1109 (11th Cir. 2004)). See also *Ga. Cas. & Surety Co. v. Excalibur Reinsurance Corp.*, 4 F. Supp.3d 1362, 1372 (N.D. Ga. 2014) (Carnes, C.J.) (“[O]nce a court has determined that the parties have an agreement to arbitrate, procedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide.”).

For example, the courts of appeals have uniformly held that “disputes over the interpretation of forum selection clauses in arbitration agreements raise presumptively arbitrable procedural questions.” *Bamberger Rosenheim*, 862 F.3d at 1288 (citing *UBS Fin. Servs., Inc. v. West Va. Univ. Hosps., Inc.*, 660 F.3d 643, 655 (2d Cir. 2011); *Cent. W. Va. Energy, Inc. v. Bayer Cropscience LP*, 645 F.3d 267, 273-74 (4th Cir. 2011);

Ridge at Red Hawk, L.L.C. v. Schneider, 493 F.3d 1174, 1178 & n.3 (10th Cir. 2007); *Richard C. Young & Co., Ltd. v. Leventhal*, 389 F.3d 1, 5 (1st Cir. 2004)). “Such clauses determine where and arbitration is conducted, ‘not whether there is a contractual duty to arbitrate at all.’” *Bamberger Rosenheim*, 862 F.3d at 1288 (citing *BG Grp.*, 134 S. Ct. at 1207). *Cf. McCullagh v. Dean Witter Reynolds, Inc.*, 177 F.3d 1307, 1310 (11th Cir. 1999) (“The arbitrators would presumably enforce the venue-selection clause in precisely the same way that a court would.”).

B. Judicial Review of Arbitrators’ Awards is Exceedingly Narrow.

The Federal Arbitration Act (“FAA”) “imposes a heavy presumption in favor of confirming arbitration awards; therefore, a court’s confirmation of an arbitration award is usually routine or summary.” *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 842 (11th Cir. 2011) (emphasis added). Because of this presumption, “federal courts should defer to an arbitrator’s decision whenever possible.” *Johnson v. Directory Assistants Inc.*, 797 F.3d 1294, 1299 (11th Cir. 2015).

Indeed, “judicial review of arbitration decisions is among the narrowest known to the law.” *AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 508 F.3d 995, 1001 (11th Cir. 2007) (citation and internal quotation marks omitted). The review is narrow because “arbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party.” *Cat Charter, LLC*, 646 F.3d at 843. “The FAA does not allow courts to roam unbridled in their oversight of arbitration awards, but carefully limits judicial intervention to instances where the arbitration has been tainted in specified ways.” *Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1190 (11th Cir. 1995) (internal punctuation and citation omitted).

The FAA provides that a district court must grant an order confirming an arbitration award unless the award is vacated, modified, or corrected under one of “the exceedingly narrow grounds” set forth in Sections 10² and 11 of the Act. *S. Commc’ns*

² An arbitration award may be vacated: (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the

Servs., Inc. v. Thomas, 720 F.3d 1352, 1357 (11th Cir. 2013). “These sections together give substance to a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway.” *Id.* at 1358 (citation and internal punctuation omitted).

A party seeking to have an arbitration award vacated under 9 U.S.C. § 10(a)(4) “bears a heavy burden. It is not enough to show that the arbitrator committed an error – or even a serious error.” *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013) (internal punctuation and citation omitted). “Because the parties bargained for the arbitrator’s construction of their agreement, an arbitral decision even arguably construing or applying the contract must stand, regardless of a court’s view of its (de)merits.” *Id.* (internal quotation marks and citation omitted). “Only if the arbitrator acts outside the scope of his contractually delegated authority – issuing an award that simply reflects his own notions of economic justice rather than drawing its essence from the contract – may

arbitrators; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. § 10(a). Manifest disregard of the law is not an available basis for vacating an arbitration award in the Eleventh Circuit. *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1324 (11th Cir. 2010). Manifest disregard of the law is an available ground for vacatur under the Georgia Arbitration Act, *see* O.C.G.A. § 9-9-13(b)(5), but it is very difficult to establish. *See ABCO Builders, Inc. v. Progressive Plumbing, Inc.*, 282 Ga. 308, 309 (2007) (holding that to “prove that a manifest disregard of the law has occurred, a party wishing to have an arbitration award vacated must provide evidence of record that, not only was the correct law communicated to an arbitrator, but that the arbitrator intentionally and knowingly chose to ignore that law despite the fact that it was correct.”).

a court overturn his determination.” *Id.* (internal punctuation and citation omitted). Thus, the sole question is “whether the arbitrator (even arguably) interpreted the parties’ contract, not whether he got its meaning right or wrong.” *Id.* See also *White Springs Agric. Chems., Inc. v. Glawson Inv. Corp.*, 660 F.3d 1277, 1280 (11th Cir. 2011) (holding that an arbitrator’s “incorrect legal conclusion is not grounds for vacating or modifying the award”). “The arbitrator’s construction holds, however good, bad, or ugly.” *Bamberger Rosenheim*, 862 F.3d at 1288 (quoting *Oxford Health Plans*, 133 S. Ct. at 2071).

II. Picking Your Battles: Claims Between Owners vs. Designers, vs. General Contractors, Subcontractors and Suppliers

In *Atlanta Truck Parts, Inc. v. Zenon & Zenon Contractors, Inc.*, 345 Ga. App. 507 (2018), Atlanta Truck Parts entered into a contract with Zenon & Zenon Contractors, Inc., a demolition contractor, for it to complete the work necessary to prepare the Atlanta Truck Parts property to lease out space to park trucks. At trial the owner of Zenon & Zenon described the work he performed, testified that he completed all of the work in the proposal, and identified pictures of the property before and after the work was performed. *Id.* at 508. Once he had completed the job, Zenon & Zenon delivered an invoice to Atlanta Truck Parts. When Atlanta Truck Parts did not pay, Zenon & Zenon filed suit for breach of contract. *Id.* After a bench trial, the trial court awarded Zenon & Zenon \$128,972.90. *Id.* at 507.

On appeal, Atlanta Truck Parts argued that the trial court erred by awarding Zenon & Zenon the full contract amount because the work was not completed, the work was deficient, and Zenon & Zenon presented no receipts. *Id.* at 509. But Zenon & Zenon’s owner’s testimony that he completed the work in accordance with the terms of the proposal was some evidence to support the judgment, therefore requiring that the judgment be affirmed. *Id.* (citing *Broadcast Concepts v. Optimus Fin. Servs.*, 274 Ga. App. 632, 635-36 (2005)).

In *Baja Props., LLC v. Mattera*, 345 Ga. App. 101 (2018), Baja Properties agreed to build a house for Ugo Mattera on land he and Kellie Mattera owned. Baja Properties completed some of the construction, but disputes developed, and Ugo Mattera terminated

the contract before the house was completed. Stephen Golden, the owner of Baja, did not have a Georgia builder's or contractor's license when the parties entered into the contract or when the work was performed. In February 2015, Baja Properties sued the Matteras for breach of contract, quantum meruit, and claim of lien. The Matteras answered the complaint and filed a counterclaim for breach of contract and negligence. Ugo Mattera then filed a separate action against Stephen Golden and James Golden (as alleged owners and/or managers of Baja Properties), asserting claims for negligence and fraud. The trial court consolidated the two cases.

The Matteras moved for summary judgment on Baja Properties's claims against them, asserting that O.C.G.A. § 43-41-17(b) bars an unlicensed contractor from enforcing in law or equity a contract for the performance of work for which a license is required. The trial court granted the Matteras' motion for summary judgment on all of Baja Properties's claims, finding that the claims were barred by O.C.G.A. § 43-41-17(b). 345 Ga. App. at 101.

O.C.G.A. § 43-41-17(a) provides, in pertinent part, that no person shall have the right to engage in the business of residential or general contracting without a current valid contractor license. O.C.G.A. § 43-41-17(b) provides:

As a matter of public policy, any contract entered into on or after July 1, 2008, for the performance of work for which a residential contractor or general contractor license is required by this chapter *and not otherwise exempted under this chapter* and which is between an owner and a contractor who does not have a valid and current license required for such work in accordance with this chapter *shall be unenforceable in law or in equity by the unlicensed contractor....* Notwithstanding any other provision of law to the contrary, if a contract is rendered unenforceable under this subsection, no lien or bond claim shall exist in favor of the unlicensed contractor for any labor, services, or materials provided under the contract or any amendment thereto....

345 Ga. App. at 102-03 (quoting O.C.G.A. § 43-41-17(b)) (emphasis in original). "It is undisputed that Baja Properties and [its owners] did not have Georgia contractor's

licenses when the construction contract was executed and when the work was performed pursuant to the contract. The construction contract clearly identifies Baja Properties as the “Contractor” and Ugo Mattera as the “Owner” of the land on which the construction was to be completed. Thus, under O.C.G.A. § 42-41-17(b), the construction contract is not enforceable by Baja Properties in law or in equity unless an exemption applies.” 345 Ga. App. at 103.

Baja argued it was exempted from the rule set out in O.C.G.A. § 42-41-17(b) by a provision in O.C.G.A. § 43-41-17(h). Subsection (h) provides: “Nothing in this chapter shall preclude any person from constructing a building or structure on real property owned by such person which is intended upon completion for use or occupancy solely by that person and his or her family, firm, or corporation and its employees, and not for use by the general public and not offered for sale or lease. In so doing, such person may act as his or her own contractor personally providing direct supervision and management of all work not performed by licensed contractors....” Baja Properties argued that because subsection (h) permits a property owner to act as his own contractor and to use unlicensed contractors, the construction contract at the center of this dispute is “otherwise exempted” from the unenforceability provision of subsection (b). 345 Ga. App. at 103.

The Court of Appeals, however, held that it must give the statute its plain and ordinary meaning, and subsection (h) does not provide that an unlicensed contractor is exempt from the rule that prohibits an unlicensed contractor from enforcing an agreement for the performance of work for which a license is required. *Id.* The court refused to “interpret subsection (h) as allowing an unlicensed contractor to enforce a construction contract, when that subsection does not clearly provide such. Indeed, the general rule is that ‘[w]here a statute provides that persons proposing to engage in a certain business shall procure a license before being authorized to do so, ... contracts made in violation of such statute are void and unenforceable.’” *Id.* at 103-04 (quoting *Brantley Land & Timber, LLC v. W & D Investments, Inc.*, 316 Ga. App. 277, 278 (2012)). Thus, the trial court did not err by granting summary judgment to the Matteras on Baja Properties’ claims for breach of contract, quantum meruit, and lien.

In *Blackmon v. Pena*, 345 Ga. App. 7 (2018), restaurateur Irma Pena sued contractor Kirk Blackmon d/b/a Atlanta Concrete Creations and Kirk Blackmon, Inc. d/b/a Georgia Sunroom (collectively, “Blackmon”) for damages related to work Blackmon performed during the construction of an exterior patio and sunroom addition at Pena’s restaurant. Following a bench trial, the trial court entered a final judgment in Pena’s favor for breach of contract and negligent construction. Pena signed two contracts with Blackmon on May 9, 2013, for the construction of an exterior patio and a four-season sunroom. The contract prices for the sunroom and the exterior patio were \$53,997 and \$13,000, respectively, and construction was to begin “in 4–5 weeks” from May 9, 2013, and be completed in “3–5 weeks” (sunroom) and “1–2 weeks” (exterior patio). Pena gave Blackmon a deposit of \$28,000 when she signed the contracts for the project, but did not hear from him for six to seven weeks thereafter. In fact, Blackmon did not obtain a building permit until July 1, 2013—more than two weeks after construction was slated to begin and, in the case of the patio, after the patio should have been completed.

According to Pena, after viewing photographs of Blackmon’s work, Blackmon told her that the sunroom addition “was going to blend in with the existing building ... [a]nd that’s what I expected.” As a result, Pena believed that Blackmon would install a gabled roof on the sunroom, as depicted in his marketing materials, to match the roof of the original restaurant. However, when work on the project commenced, Pena reported being dissatisfied with Blackmon’s work. With regard to the patio, Pena cited Blackmon’s use of warped wood on the pergola and the lack of any support for concrete pavers on the patio resulting in uneven flooring and puddling. 345 Ga. App. at 7-8. Concerning the sunroom, Pena stated that Blackmon used residential doors, rather than commercial doors with a push bar, for the emergency exits, and complained that the painting was “bad,” the ceiling was too low, the flooring was “really bad,” and the exterior stucco did not match the stucco on the original building as promised. *Id.* at 8. At one point, Pena asked Blackmon and his subcontractor, Hiram “Shane” Stone, to rebuild the patio; they declined. Despite these concerns, particularly with the installation of a flat roof rather than a gabled roof as she envisioned, Pena neither asked Blackmon to stop

work on the roof nor provided any concerns in writing. In fact, Blackmon always told her that he had not finished and that “[i]t’s going to be gorgeous, it’s going to look beautiful, you need to wait.”

On September 23, 2013, Pena sent Blackmon a letter instructing him to stop work on the project. At that point, some ten weeks after construction was due to be completed, Pena testified that neither the exterior patio nor the sunroom was functional for serving customers. Pena retained a new contractor, Bobby Ivey, who removed and replaced the pergola and completed work on the exterior patio and the sunroom. In doing so, Ivey removed the residential doors Blackmon installed and replaced them with emergency exit doors and replaced the stucco. Ivey also removed and replaced the flat roof of the sunroom with a gabled roof.

Blackmon denied that Pena asked for a gabled roof. Instead, he claimed Pena asked about a gabled roof but balked at the price. Regarding the quality of the work, Blackmon testified that, while an inspector required that he make certain changes to the electrical system, it and all other facets of his work ultimately passed inspection. Blackmon’s subcontractor, Stone, testified that he began working on the project in July 2013. Blackmon gave Stone a scope of work, which included blueprints and drawings, and Stone used pre-engineered materials ordered specifically for the project. The pre-engineered materials are designed to be waterproof, and Stone never received any complaint concerning leaks at the project. *Id.* at 8-9. No one complained to Stone concerning the kind of roof being installed or attempted to stop him from performing work. *Id.* at 9. When he was eventually instructed to leave the project in September 2013, Stone estimated that his work was “98 percent” complete and further testified that the project was substantially complete, including completion of the roof, windows, doors, trim, stucco, electrical system, and HVAC system. In fact, Stone testified that the only work remaining to be done was cosmetic work to the concrete floor. While the roof he built was a flat roof, Stone observed that the roof on the adjacent original restaurant was a gabled roof.

On appeal, Blackmon argued that the trial court “ignored” Pena’s failure to provide a written objection to his work, as required by the parties’ contracts, and instead allowed Blackmon to continue working on a roof Pena did not want. *Id.* at 10. The Court of Appeals noted, however, that the proper inquiry for it was “whether there was *any evidence* to support the trial court’s conclusion that Pena was entitled to recover for a breach of the parties’ contracts.” *Id.* at 11 (citing *Infinite Energy v. Cottrell*, 295 Ga. App. 306, 307 (2008)). The evidence showed that Pena and Blackmon executed two contracts for the construction of an exterior patio and sunroom, respectively; that the sunroom contract was silent as to the type of roof to be installed; that, after discussions with Blackmon and reviewing Blackmon’s marketing materials, Pena expected Blackmon to construct a gabled roof for the sunroom that matched the roof of the existing restaurant building; that Pena never received contrary drawings or specifications for the sunroom from Blackmon; that an engineered roof as stated in the parties’ sunroom contract could refer to a gabled or “studio” roof; that Blackmon failed to commence work within a certain time frame as required by the contracts; and that Blackmon constructed a “studio” (i.e., more flat) roof. *Id.* at 11-12. As the trier of fact, the trial court apparently determined that Blackmon’s conflicting testimony that Pena ordered a flat roof and that she gave her plans demonstrating a flat roof was not credible. *Id.* at 12 n.13.

Further, the trial court found that Pena paid Ivey, the second contractor, a total of \$60,748.08 for his work. *Id.* at 12. By subtracting the amount outstanding in Pena’s contract with Blackmon (\$22,700) from the amount Pena paid Ivey (\$60,748.08), the trial court concluded that Pena “paid \$38,084[.08] more than what [she] bargained for with Mr. Blackmon” and awarded Pena \$38,084.08. *Id.* As a result, because there was some evidence to support the trial court’s conclusion, the trial court’s judgment in favor of Pena on her claim of breach of contract was affirmed.

In *Douglas Asphalt Co. v. Martin Marietta Aggregates*, 339 Ga. App. 435 (2016), Martin Marietta Aggregates filed a suit on account against Douglas Asphalt Company and Douglas Asphalt Paving, Inc. It alleged that Douglas Asphalt Company owed it \$547,056 on an open account/line of credit under which Martin Marietta had provided

aggregate material to Douglas Asphalt Company on numerous occasions. It further alleged that Douglas Asphalt Paving was the successor to Douglas Asphalt Company and had assumed its debts. The defendants answered the complaint and Douglas Asphalt Company filed a counterclaim, alleging that “pursuant to one or more agreements” between Douglas Asphalt Company and Martin Marietta, Martin Marietta was required to provide aggregate material within a specific schedule, but, on numerous occasions, it had failed to do so. Douglas Asphalt Company did not specify the occasions on which Martin Marietta allegedly failed to meet a specific schedule, but in the course of litigation, it clarified that it sought damages for delays in regard to seven particular projects that it identified as the Brantley County project, the Monroe County project, the Crisp/Turner project, the Bacon/Ware project, the Appling project, the Appling/Wayne project, and the Barco–Duval project. The trial court granted Martin Marietta’s motion for summary judgment on the counterclaim. *Id.* at 436.

Here, Douglas Asphalt Company alleged an unspecified number of breaches of contractual terms relating to seven particular projects. It argued that two different kinds of contracts between Martin Marietta and Douglas Asphalt Company governed the seven projects. The first kind of contract was a job requirements contract, in which Martin Marietta would submit a quotation to supply the materials for a specific job. According to Douglas Asphalt Company, if Douglas Asphalt selected Martin Marietta as a supplier, then Martin Marietta would prepare a sales order and occasionally send an acknowledgment of order to Douglas Asphalt Company for its files. Douglas Asphalt Company contended that the Crisp/Turner, Bacon/Ware, Appling, Appling/Wayne, and Barco–Duval projects at issue in this case were governed by this type of job-specific agreement.

The second kind of contract, according to Douglas Asphalt Company, was a “plant requirements agreement.” Under this type of agreement, Martin Marietta would provide Douglas Asphalt Company with a quotation for the price per ton of material from its quarries for a certain period of time. *Id.* at 436-37. According to Douglas Asphalt

Company, the Brantley County and Monroe County projects at issue in this case were governed by this type of agreement. *Id.* at 437.

Douglas Asphalt Company argued that both kinds of agreements were evidenced by two types of documents: the quotation that Martin Marietta would provide to Douglas Asphalt Company and either a sales order or acknowledgment of order that Martin Marietta would supply once Douglas Asphalt Company had accepted the quotation. It argued that under O.C.G.A. § 11–2–309, Martin Marietta had to deliver the material within a reasonable time. It also argued that the parties’ course of conduct established that a reasonable delivery time was one week.

The Court of Appeals held that Douglas Asphalt Company's breach of contract claim depends upon evidence that Martin Marietta violated the contractual terms governing the seven projects at issue. “[A]s the party alleging that a contract exists, [Douglas Asphalt Company would have] the burden of proving its existence and its terms.” *Id.* (citation omitted). Douglas Asphalt Company alleged that Martin Marietta was required to provide aggregate material within a specific schedule, but, on numerous occasions, it had failed to do so. Yet it failed to point to evidence of the contractual terms imposing the specific schedules, or, in other words, the dates by which Martin Marietta had to deliver the aggregate material for these seven projects. “A contract cannot be enforced if its terms are incomplete, vague, indefinite[,] or uncertain.” *Id.* (citation omitted). And although “some details might be supplied under the doctrines of reasonable time or reasonable requirements[,] ... indefiniteness [is] not cured [where] the agreement relied upon was so vague, indefinite and uncertain as to make it impossible for courts to determine what, if anything, was agreed upon, therefore rendering it impossible to determine whether there had been performance.” *Id.* at 437-38. Without pointing to evidence of the contractually required delivery dates for the materials for the seven projects, Douglas Asphalt Company cannot show that Martin Marietta failed to deliver the materials in a timely manner, and it failed to point “to specific evidence giving rise to a triable issue.” *Id.* at 438 (citation omitted).

III. Advanced Remedies for Breach

“The elements for a breach of contract claim in Georgia are the (1) breach and the (2) resultant damages (3) to the party who has the right to complain about the contract being broken.” *Inland Atlantic Old Nat’l Phase I, LLC v. 6425 Old Nat’l, LLC*, 329 Ga. App. 671, 677 (2014) (citation omitted). “A breach occurs if a contracting party repudiates or renounces liability under the contract; fails to perform the engagement as specified in the contract; or does some act that renders performance impossible.” *UWork.com, Inc. v. Paragon Techs., Inc.*, 321 Ga. App. 584, 590 (2013) (citing *Bd. of Regents of the Univ. Sys. of Ga. v. Doe*, 278 Ga. App. 878, 887 (2006)).

“Restitution, damages and specific performance are the three remedies for breach of contract.” *City of Union Point v. Greene County*, 303 Ga. 449, 455 (2018) (quoting *PMS Constr. Co. v. DeKalb County*, 243 Ga. 870, 872 (1979)).

A. Damages

1. Measure of damages, generally

Damages are “intended to place an injured party, as nearly as possible, in the same position they would have been if the injury had never occurred. Juries, therefore, are given wide latitude in determining the amount of damages to be awarded based on the unique facts of each case.” *John Thurmond & Assocs., Inc. v. Kennedy*, 284 Ga. 469, 469 (2008) (citations omitted).

“The measure of damages in the case of a breach of contract is the amount which will compensate the injured person for the loss which fulfillment of the contract would have prevented or the breach of it entailed. In other words, the person injured, is, so far as it is possible to do so by a monetary award, to be placed in the position he would have been in had the contract been performed.” *Austin v. Bank of Am., N.A.*, 293 Ga. 42, 49 (2013) (quoting *Redman Dev. Corp. v. Piedmont Heating & Air Conditioning, Inc.*, 128 Ga. App. 447, 451 (1973)). When a contract is breached, “the best measure of the value of the broken promise is the value assigned to it by the parties themselves ... [B]asing damages on an amount equal to what the promisor and, especially, the promisee believed the promise to be worth, reflects better than any other measure the loss caused by the

breach[.] ... Damages based on protection of the promisee's expectation interest are not only the most accurate means of measuring loss following a breach of contract but also the most typical measure of recovery granted." *Legacy Academy, Inc. v. JLK, Inc.*, 330 Ga. App. 397, 405-06 (2014) (quoting 24 Williston on Contracts, § 64:2 (4th ed., 2014)). Damages for breach of contract claims "are compensatory awards designed to give the injured party the benefit of his bargain." *Id.* at 406 (quoting *Turner Broad. Sys., Inc. v. McDavid*, 303 Ga. App. 593, 611 (2010)).

"Ordinarily, anticipated profits are too speculative to be recovered, but where the business has been established, has made profits and there are definite, certain and reasonable data for their ascertainment, and such profits were in contemplation of the parties at the time of the contract, they may be recovered even though they can not be computed with exact mathematical certainty." *Legacy Academy, Inc. v. Dole-Smith Enters., Inc.*, 337 Ga. App. 575, 585 (2016) (quoting *KAR Printing v. Pierce*, 276 Ga. App. 511, 511-12 (2005)). "Nonetheless, to recover lost profits one must show the probable gain with great specificity as well as expenses incurred in realizing such profits. In short, the gross amount minus expenses equals the amount of recovery." *Id.*

2. Liquidated damages

"If the parties agree in their contract what the damages for a breach shall be, they are said to be liquidated and, unless the agreement violates some principle of law, the parties are bound thereby." O.C.G.A. § 13-6-7. "Georgia law allows parties to provide for liquidated damages in their contracts, and unless the provision violates some principle of law, the parties are bound by their agreement." *Gwinnett Clinic, Ltd. v. Boaten*, 340 Ga. App. 598, 599 (2017) (quoting *Mariner Health Care Mgmt. Co. v. Sovereign Healthcare*, 306 Ga. App. 873, 874 (2010)). "[A] liquidated damages clause is enforceable if (1) the injury caused by the breach of the contract is difficult or impossible to accurately estimate; (2) the parties intended to provide for damages rather than a penalty; and (3) the sum stipulated upon by the parties is a reasonable pre-estimate of the probable loss." *Id.* (quoting *Caincare, Inc. v. Ellison*, 272 Ga. App. 190, 192 (2005)).

“Determining whether such a clause constitutes an enforceable liquidated damages provision or an unenforceable penalty is a question of law for the court.” *Northside Bank v. Mountainbrook of Bartow County Homeowners Assoc., Inc.*, 338 Ga. App. 126, 131 (2016) (quoting *Jamsky v. HPSC, Inc.*, 238 Ga. App. 447, 449 (1999)). At trial, the burden is on the defaulting party to show that an alleged liquidated damages provision is actually an unenforceable penalty. *West Asset Mgmt., Inc. v. NW Parkway, LLC*, 336 Ga. App. 775, 785 n.9 (2016). However, in “cases of doubt, the courts favor the construction [of a contract] which holds the stipulated sum to be a penalty, and limits the recovery to the amount of damage[s] actually shown, rather than a liquidation of the damages.” *Id.* at 785 (quoting *Fortune Bridge Co. v. Dep’t of Transp.*, 242 Ga. 531, 532 (1978)).

“Whether a provision represents liquidated damages or a penalty does not depend upon the label the parties place on the payment but rather depends on the effect it was intended to have and whether it was reasonable.” *Pierre v. St. Benedict's Episcopal Day Sch.*, 324 Ga. App. 283, 288 (2013). However, the court does ascertain the parties’ intent by first looking to the language of the contract, and although “the words used by the parties are not conclusive, they are a significant factor in determining the parties’ intent.” *Mariner*, 306 Ga. App. at 876. Thus, where the contract specifically referred to the payment of “liquidated damages” in the event of early termination, it supported the inference that the parties intended to provide for liquidated damages rather than a penalty. *Id.* (citing *Liberty Life Ins. Co. v. Thomas B. Harley Constr. Co.*, 258 Ga. 808, 809 (1989)).

B. Specific Performance

“Specific performance is not a form of damages. To the contrary, specific performance is an equitable remedy that generally is appropriate only where an award of damages would be insufficient to compensate the injured party for the other’s breach.” *Estate of Callaway v. Garner*, 297 Ga. 52, 53 (2015) (citing O.C.G.A. § 23-2-130). “One who is injured by another’s breach is in fact required to elect between these two distinct remedies.” *Id.* (citing *Clayton v. Deverell*, 257 Ga. 653 (1987)). But, even if a plaintiff

elects specific performance as his remedy instead of contract damages, he may still be able to recover other types of damages, such as attorney' fees, consequential damages, and punitive damages. *Id.* at 53 n.2.

To succeed on a claim for specific performance regarding a real estate purchase contract, a plaintiff must show that the contract is “certain, definite, and specific as to all essential elements: (1) subject matter; (2) purpose; (3) parties; (4) consideration; and (5) time and place of performance.” *Hutson v. Young*, 255 Ga. App. 169, 171 (2002). “Further, the contract must be fair in all parts; based upon an adequate consideration; and capable of being performed.” *Id.* (citing *Williams v. Manchester Bldg. Supply Co.*, 213 Ga. 99, 101 (1957)) (additional citations omitted).

The purchaser “must prove the value of the property so far as to enable the court to determine that the contract was fair, just and not against good conscience.” *Id.* at 172 (quoting *Moody v. Mendenhall*, 238 Ga. 689, 693 (1977)). “Whether the price was adequate and whether enforcement of the contract was equitable [are] for the trial court to determine as a matter of equity.” *Id.* (citing *English v. Muller*, 270 Ga. 876, 877 (1999)).

“Further, although all of the essential elements for specific performance for the sale of realty may exist, a party is not entitled to such remedy as a matter of right, because whether or not specific performance is appropriate in a specific case is a matter in the sound discretion of the superior court judge as equitable and just.” *Id.* (citing *Kelly v. Vargo*, 261 Ga. 422, 423 (1991)) (additional citations omitted). *See also Surman v. Blansett*, 246 Ga. App. 183, 186 (2000) (“[S]pecific performance is not a matter of absolute right.”).

A “court of equity can not decree the specific performance of a contract wherein the purported vendor agrees to sell land which belongs to another.” *Viola E. Buford Family Ltd. P’ship v. Britt*, 283 Ga. App. 676, 677 (2007) (quoting *Chastain v. Schomburg*, 258 Ga. 218 (1988)). *See also Jolles v. Holiday Builders, Inc.*, 222 Ga. 358, 360 (1966) (“Holiday Builders, Inc. could not be required to specifically perform the contract, because, under the allegations of the petition, this corporation does not hold title to the land described in the contract.”); *Brega v CSRA Realty Co.*, 223 Ga. 724, 726

(1967). “One cannot make good title to that which he does not own.” *Smith v. Hooker/Barnes, Inc.*, 253 Ga. 514 (1984) (citing *Northington-Munger-Pratt Co. v. Farmers’ Gin and Warehouse Co.*, 119 Ga. 851, 853 (1904)). However, “specific performance is available to the extent of the purported vendor’s own interest in the property where he has contracted in his own name.” *Viola E. Buford Family Ltd. P’ship*, 283 Ga. App. at 677 (citation omitted).

C. Rescission of the contract

A party may not recover on both claims for breach of contract and for rescission of the contract. *Champion Windows of Chattanooga, LLC v. Edwards*, 326 Ga. App. 232, 239 (2014). This is because rescission represents “a remedy in which neither party is held liable in damages for breach of the contract, because the contract is considered void.” *Id.* at 239-40 (quoting *Martin v. Rollins, Inc.*, 238 Ga. 119, 120 (1977)).

“To justify rescission of a contract for fraud in the inducement, the party seeking rescission must prove that the party with whom it contracted made a knowingly false representation; that it did so with the intent of inducing the first party to act in reliance on the deliberate misrepresentation; and that the first party justifiably relied on the misrepresentation, to that party’s detriment.” *Id.* at 236 (citing *Turner Outdoor Adver. v. Fidelity Eastern Fin.*, 185 Ga. App. 815, 816 (1988)). “When evidence as to any one of these elements is lacking, then the rescission claim must fail.” *Id.* at 237 (quoting *Young v. Oak Leaf Builders*, 277 Ga. App. 274, 278 (2006)).

Further, “Georgia law allows equitable rescission of a contract for nonperformance under O.C.G.A. § 13-4-62.” *Radio Perry, Inc. v. Cox Commc’ns, Inc.*, 323 Ga. App. 604, 608 (2013) (citing *Lanier Home Ctr. v. Underwood*, 252 Ga. App. 745, 746 (2001)). “The remedy of rescission for nonperformance ‘is appropriate when the breach is so substantial and fundamental as to defeat the object of the contract.’” *Id.* at 609 (quoting *Yi v. Li*, 313 Ga. App. 273, 277 (2011)). “A party may rescind a contract without the consent of the opposite party on the ground of nonperformance by that party but only when both parties can be restored to the condition in which they were before the contract was made.” *Id.* (quoting O.C.G.A. § 13-4-62). This means that the “parties

must be returned as nearly as possible to the status quo ante.” *Id.* (quoting *Southern Prestige Homes v. Moscoso*, 243 Ga. App. 412, 417 (2000)).

However, there are “circumstances under which a party need not offer restoration in order to rescind a contract, such as ‘where nothing of any value is received by the party seeking to rescind; and where the amount received under the contract sought to be rescinded may be less than the amount actually due the party seeking to rescind.’” *Id.* (quoting *Metter Banking Co. v. Millen Lumber & Supply Co.*, 191 Ga. App. 634, 637-38 (1989)). Moreover, the “rule that he who desires to rescind a contract must restore whatever he has received under it is one of justice and equity and must be reasonably construed and applied. The object of the rule is theoretically to place the parties in status quo; but the rule is equitable, not technical, and does not require more than that such restoration be made as is reasonably possible and such as the merits of the case demand.” *Id.* quoting *Int’l Software Solutions v. Atlanta Pressure Treated Lumber Co.*, 194 Ga. App. 441, 442 (1990)).

D. Attorney’s Fees

“The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.” O.C.G.A. § 13-6-11. Attorney’s fees under O.C.G.A. § 13-6-11 are available only to plaintiffs. *HA&W Capital Partners, LLC v. Bhandari*, 816 S.E.2d 804 (Ga. 2018). A defendant and plaintiff-in-counterclaim cannot recover such damages where there is a compulsory counterclaim. *Id.* (citing *Byers v. McGuire Props.*, 285 Ga. 530, 540 (2009)).

“Bad faith warranting an award of attorney fees must have arisen out of how the defendant acted in dealing with the plaintiff.” *City of Lilburn v. Astra Group, Inc.*, 286 Ga. App. 568, 571 (2007). Specifically, the element of bad faith “relates to the defendant’s conduct in entering into the contract or pertains to the transaction and dealings out of which the cause of action arose, not to the defendant’s conduct after the cause of action arose.” *Id.* “Bad faith other than mere refusal to pay a just debt is

sufficient, provided it is not prompted by an honest mistake as to one's rights or duties but by some interested or sinister motive. So defendants can be held liable for attorney fees if they committed the breach in bad faith. *Graves v. Diambrose*, 243 Ga. App. 802, 803 (2000). Moreover, “[e]ven where there is a bona fide controversy as to liability, a jury may find that a defendant acted in the most atrocious bad faith in its dealing with the plaintiff.” *City of Lilburn*, 286 Ga. App. at 571.

“As to whether the defendant was stubbornly litigious or caused the plaintiff unnecessary trouble and expense, mere refusal to pay a disputed claim, without suit is not sufficient to award attorney fees. The key to the test is whether there is a bona fide controversy. Where none exists, forcing a plaintiff to resort to the courts in order to collect is plainly causing him to go to unnecessary trouble and expense. However, recovery of attorney fees for stubborn litigiousness is not authorized where there is a bona fide controversy.” *Graves*, 243 Ga. App. at 803. *See also Vol Repairs II Inc. v. Knighten*, 322 Ga. App. 416, 419 (2013) (“Where a bona fide controversy exists, attorney fees may be awarded under O.C.G.A. § 13-6-11 only where the party sought to be charged has acted in bad faith in the underlying transaction.”).

“As indicated by the plain language of the statute, the determination of whether there has been bad faith in support of an award pursuant to O.C.G.A. § 13-6-11 is normally an issue for a jury.” *Caldwell v. Church*, 341 Ga. App. 852, 858 (2017) (citations omitted). Consequently, “because both the liability for and amount of attorney fees pursuant to [the statute] are solely for the jury’s determination, a trial court is not authorized to grant summary judgment in favor of a claimant therefor.” *Id.* (quoting *Covington Square Assoc. v. Ingles Mkts.*, 287 Ga. 445, 446 (2010)).

IV. Large Multiparty Contract Dispute Do’s and Don’ts

A. Don’t Forget Alternative Quasi-Contractual Causes of Action.

1. Quantum Meruit

“The essential elements of a claim of quantum meruit are that the provider performed services valuable to the recipient that were requested by or knowingly accepted by the recipient, that the recipient’s receipt of the services without

compensating the provider would be unjust, and that the provider expected compensation at the time the services were performed.” *One Bluff Drive, LLC v. K.A.P., Inc.*, 330 Ga. App. 45, 47 (2014) (citing *Hollifield v. Monte Vista Biblical Gardens*, 251 Ga. App. 124, 128-29 (2001)). Even if there is an express contract, “if services not contemplated by the original agreement become necessary to achieve the contractual objective and are rendered and accepted, the law implies and enforces performance of a promise to pay for such extra services.” *Id.* (quoting *Puritan Mills, Inc. v. Pickering Constr. Co.*, 152 Ga. App. 309, 310 (1979)).

“Proof of the reasonable value of services rendered to and accepted by a defendant is an element essential to recovery on a quantum meruit basis. The key inquiry is not the value of the labor but the value of the benefit resulting from such labor to the recipient; if there is no benefit to the recipient, then there is no recovery for something of value to the recipient.” *Hamler v. Wood*, 337 Ga. App. 319, 322-23 (2016) (quoting *Diegert v. Cedarbrook Homes*, 267 Ga. App. 264, 265 (2004)).

“It has long been the law in Georgia that although a party may plead in alternative counts, no recovery may be had in quantum meruit when a contract governs all claimed rights and responsibilities of the parties.” *Graybill v. Attaway Constr. & Assocs., LLC*, 341 Ga. App. 805, 811-12 (2017) (quoting *Holder Constr. Group v. Ga. Tech Facilities*, 282 Ga. App. 796, 801 (2006)). “Similarly, while it is true that ‘a party may pursue inconsistent remedies, he is not permitted a double recovery of the same damages for the same wrong. He is entitled to only one satisfaction of the same damages.’” *Id.* at 812 (quoting *Marvin Nix Dev. Co. v. United Community Bank*, 302 Ga. App. 566, 568 (2010)). Thus, while a claimant is “not required to make an election between inconsistent remedies prior to the verdict, he must make, and be given the opportunity to make, an election prior to the formulation and entry of judgment.” *Id.* (quoting *UIV Corp. v. Oswald*, 139 Ga. App. 697, 699 (1976)).

2. Unjust Enrichment

“The theory of unjust enrichment is basically an equitable doctrine that the benefitted party equitably ought to either return or compensate for the conferred benefits

when there was no legal contract to pay.” *Marvin Hewitt Enters., Inc. v. Butler Capital Corp.*, 328 Ga. App. 317, 322 (2014) (quoting *Bedsole v. Action Outdoor Adver. JV*, 325 Ga. App. 194, 200 (2013)). “The doctrine applies when, as a matter of fact, there is no contract.” *Id.* (citing *Tuvim v. United Jewish Communities*, 285 Ga. 632, 635 (2009)) (additional citations omitted). “Where there is an express contract, there can be no recovery based upon an unjust enrichment theory.” *Id.* at 322-23 (citing *Han v. Han*, 295 Ga. App. 1, 4 (2008)). However, where the existence of a contract is a jury question, the plaintiff’s alternative claim for unjust enrichment can survive summary judgment. *Id.* at 323 (citation omitted).

3. Promissory Estoppel

“Under the doctrine of promissory estoppel, “[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.” *Zhong v. PNC Bank, N.A.*, 345 Ga. App. 135, 148 (2018) (quoting O.C.G.A. § 13-3-44(a)). To recover for promissory estoppel, a plaintiff must show: “(1) the defendant made a promise or promises; (2) the defendant should have reasonably expected the plaintiff to rely on such promise; (3) the plaintiff relied on such promise to [her] detriment; and (4) an injustice can only be avoided by the enforcement of the promise, because as a result of the reliance, plaintiff changed [her] position to [her] detriment by surrendering, forgoing, or rendering a valuable right.” *Id.* (quoting *Hendon Props., LLC v. Cinema Dev., LLC*, 275 Ga. App. 434, 438-39 (2005)). “Promissory estoppel claims are extremely fact specific and are not susceptible to application of general rules.” *Id.* (quoting *DPLM, Ltd. v. J.H. Harvey Co.*, 241 Ga. App. 219, 220 (1999)).

B. Do Assert Claims for Breach of the Covenant of Good Faith and Fair Dealing if Appropriate.

“Every contract implies a covenant of good faith and fair dealing in the contract’s performance and enforcement.” *Layer v. Clipper Petroleum, Inc.*, 319 Ga. App. 410, 419 (2012) (quoting *Secured Realty & Inv. v. Bank of North Ga.*, 314 Ga. App. 628, 630

(2012)). “The implied covenant modifies and becomes part of the provisions of the contract, but the covenant cannot be breached apart from the contract provisions that it modifies and therefore cannot provide an independent basis for liability.” *Id.* (quoting *Myung Sung Presbyterian Church v. North Am. Assoc. of Slavic Churches & Ministries*, 291 Ga. App. 808, 810 (2008)). *See also Walker v. Oglethorpe Power Corp.*, 341 Ga. App. 647, 673 (2017) (holding that the plaintiffs could not maintain a claim for the breach of the covenant of good faith and fair dealing because they had not alleged a viable claim for breach of contract).

The implied duty of good faith and fair dealing “requires both parties to a contract to perform their promises and provide such cooperation as is required for the other party's performance. And, whether the manner of performance is left more or less to the discretion of one of the parties to the contract, he is bound to the exercise of good faith.” *Brazeal v. NewPoint Media Group, LLC*, 340 Ga. App. 689, 692 (2017) (quoting *Hunting Aircraft, Inc. v. Peachtree City Airport Auth.*, 281 Ga. App. 450, 451 (2006)). At the same time,

[f]irms that have negotiated contracts are entitled to enforce them to the letter, even to the great discomfort of their trading partners, without being mulcted for lack of “good faith.” Although courts often refer to the obligation of good faith that exists in every contractual relation, this is not an invitation to the court to decide whether one party ought to have exercised privileges expressly reserved in the document. “Good faith” is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties. When the contract is silent, principles of good faith fill the gap. They do not block use of terms that actually appear in the contract.

Id. (quoting *Martin v. Hamilton State Bank*, 314 Ga. App. 334, 335-36 (2012)). *See also Nine Twenty, LLC v. Bank of the Ozarks*, 337 Ga. App. 180, 183 (2016) (“[T]here can be

no breach of an implied covenant of good faith where a party to a contract has done what the provisions of the contract expressly give him the right to do.”).

V. Who’s Responsible? Recent Case Law and Current Trends

A. Contract Construction Questions are Often Decided on Summary Judgment.

“The cardinal rule of construction is, of course, to ascertain the intention of the parties, as set out in the language of the contract. In this regard, contract disputes are particularly well suited for adjudication by summary judgment because construction of contracts is ordinarily a matter of law for the court.” *Fannie Mae v. Las Colinas Apts., LLC*, 815 S.E.2d 334, 336 (Ga. App. 2018) (quoting *Y. C. Dev., Inc. v. Norton*, 344 Ga. App. 69, 72-73 (2017)).

It is well established that contract construction entails a three-step process, beginning with the trial court’s determination as to whether the language is clear and unambiguous. *If no construction is required because the language is clear, the court then enforces the contract according to its terms.* But if there is ambiguity in some respect, the court then proceeds to the second step, which is to apply the rules of contract construction to resolve the ambiguity. Finally, in the third step, if the ambiguity remains after applying the rules of construction, the issue of what the ambiguous language means and what the parties intended must be resolved by a jury. Importantly, as an initial matter, the existence or nonexistence of an ambiguity is a question of law for the court. Should the court determine that ambiguity exists, a jury question does not automatically arise, but rather the court must first attempt to resolve the ambiguity by applying the rules of construction in O.C.G.A. § 13-2-2.

Id. (quoting *Y. C. Dev., Inc.*, 344 Ga. App. at 73) (emphasis in original).

“The existence or nonexistence of ambiguity in a contract is a question of law for the court.” *H&E Innovation, LLC v. Shinhan Bank Am., Inc.*, 343 Ga. App. 881, 885 (2017) (quoting *Safe Shield Workwear v. Shubee, Inc.*, 296 Ga. App. 498, 502) (2009)).

Georgia courts “have defined ambiguity to mean duplicity, indistinctness, an uncertainty of meaning or expression used in a written instrument, and it also signifies being open to various interpretations.” *Healthy-IT, LLC v. Agrawal*, 343 Ga. App. 660, 667 (2017) (quoting *Shepherd v. Greer, Klosic & Daugherty*, 325 Ga. App. 188, 190 (2013)). “Or to put it more simply, ‘[a] word or phrase is ambiguous when its meaning is uncertain and it may be fairly understood in more ways than one.’” *Id.* (quoting *Freund v. Warren*, 320 Ga. App. 765, 769 n.4 (2013)).

Under the rules of contract construction, “words generally bear their usual and common signification; but technical words, words of art, or words used in a particular trade or business will be construed, generally, to be used in reference to this peculiar meaning. Ambiguities in terms used in written contracts, and their meanings as understood in the trade and by the contracting parties, may be explained by parol proof of this trade usage and custom. Parol evidence is admissible to explain the meaning of technical terms employed in written contracts.” *May v. S.E. GA Ford, Inc.*, 344 Ga. App. 459, 462 (2018) (quoting *Southland Dev. Corp. v. Battle*, 272 Ga. App. 211, 214 (2005)).

B. Statutes of Limitations Can Be Changed Contractually.

In *Langley v. MP Spring Lake, LLC*, 345 Ga. App. 739 (2018), Langley filed suit against Spring Lake Apartments on March 3, 2016, alleging that on March 3, 2014, while she was a tenant, she fell in a common area of the complex when her foot got caught and slid on a crumbling portion of curb. She later made claims of negligence and negligence per se due to Spring Lake’s alleged failure to repair the curb despite being aware of its disrepair. Spring Lake asserted, as one of its defenses, that Langley’s claims were barred by a contractual limitation period contained within her lease. Spring Lake then moved for summary judgment on this basis, arguing that, because Langley’s lease contained a one-year limitation period for legal actions and she filed her complaint two years after the injury occurred, her claim was time-barred. *Id.* The lease agreement stated: “To the extent allowed by law, Resident also agrees and understands that any legal action against Management or Owner must be instituted within one year of the date any claim or cause of action arises and that any action filed after one year from such date shall be time

barred as a matter of law.” *Id.* at 740. The trial court granted Spring Lake’s motion for summary judgment, finding that Langley’s personal-injury claims were time-barred because she filed suit after the expiration of the one-year contractual limitation period. *Id.*

On appeal, Langley argued that a contractual limitation period should not apply to claims that did not arise out of the lease agreement. *Id.* The Georgia Court of Appeals held that the limitation provision in the lease was unambiguous and that the one-year contractual limitation period was applicable to any action, “not just those which arose from breaches of the lease. Accordingly, although personal-injury claims are ordinarily subject to a two-year statute of limitation, Langley contractually agreed to bring any action against Spring Lake—including, but not limited to, personal-injury actions—within one year. And Langley failed to do this when she filed suit on March 3, 2016, seeking to recover damages for an injury that occurred on March 3, 2014.” *Id.* at 741-42. The court rejected “Langley’s assertion that the provision at issue should be unenforceable as a matter of law, when contractual-limitation-period clauses are enforceable in Georgia.” *Id.* at 742 (citing *Rain & Hail Ins. Servs., Inc. v. Vickery*, 274 Ga. App. 424, 425 (2005)) (additional citations omitted). Here, although “the language of the limitation-on-actions provision is broad and does not explicitly specify that it includes personal-injury actions, it nevertheless encompasses any legal action that Langley might have instituted against the owner or management of her apartment complex. Thus, Langley’s repeated assertions that her personal-injury claim is ‘unrelated’ to the contract are of no consequence because her personal-injury claim, and any other claim that she might have brought against Spring Lake, were encompassed by this broad contractual limitation period.” *Id.* at 743.

The court also rejected Langley’s argument that the contractual limitations provision should be prohibited by public policy because the provision at issue is not listed in O.C.G.A. § 13-8-2(a), “which includes a non-exclusive list of contracts that our General Assembly has deemed contrary to public policy. This, combined with our Supreme Court’s explicit holding that parties to a contract have the power to ‘agree

among themselves upon a period of time which would amount to a statute of limitations, either greater *or less than* the period fixed by the law,’ leads us to conclude that the unambiguous provision at issue is enforceable.” *Id.* at 744. *See also Wolf Creek Landfill, LLC v. Twiggs County*, 337 Ga. App. 211, 214 (2016) (“Although we typically are called upon to interpret a shortening (rather than an extension) of the statute of limitation, we have stated that ‘[c]ontractual periods of limitation are generally enforceable under Georgia law.’”).

C. Parties Can Have An Intent Not To Be Bound Even With A Signed “Contract”

In *Moreno v. Smith*, 299 Ga. 443 (2016), Dolores Moreno acquired a residential property as a gift. Three years later, she gave a one-half interest in the property to her daughter Gina as a gift, and Dolores and Gina signed a document purporting to be a contract. According to that document, Dolores agreed to sell her remaining one-half interest in the property to Gina, and Gina agreed to pay \$75,000 to Dolores in \$400 monthly installments. After six more years passed, Gina had made no payments to Dolores, and Dolores filed a lawsuit against Gina for breach of contract and for an equitable accounting as between tenants in common. The trial court granted partial summary judgment to Dolores, concluding that the undisputed evidence showed as a matter of law that Dolores and Gina had entered into a binding and enforceable contract for the purchase and sale of the property.

On appeal, Gina argued that the trial court erred when it awarded partial summary judgment to Dolores and concluded as a matter of law that Dolores and Gina had entered into a binding and enforceable contract, and the Supreme Court agreed. *Id.* at 444. Although the document that Dolores and Gina signed purported to be a binding contract, Gina offered evidence that tended to show that no contract was made. Indeed, Gina submitted an affidavit in opposition to the motion for summary judgment in which she said, among other things, that she had signed the document in question at the request of her mother for the sole purpose of enabling Dolores to demonstrate an interest in the property and that she was earning income from it. Gina also said in her affidavit that, as

of the time the document was signed, Dolores consistently had made statements to indicate that Gina was not expected to pay anything to Dolores for the property.

The Supreme Court noted that it is “well settled that an agreement between two parties will occur only when the minds of the parties meet at the same time, upon the same subject-matter, and in the same sense.” *Id.* (quoting *Cox Broadcasting Corp. v. Nat. Collegiate Athletic Assoc.*, 205 Ga. 391, 395 (1982)). To determine whether the parties had the mutual assent or meeting of the minds that is essential for the formation of a binding and enforceable contract, “courts apply an objective theory of intent whereby one party's intention is deemed to be that meaning a reasonable man in the position of the other contracting party would ascribe to the first party's manifestations of assent, or that meaning which the other contracting party knew the first party ascribed to his manifestations of assent.” *Id.* at 444-45. The court further explained, “in those unusual instances in which one *intends* that one's assent have *no* legal consequences[,] [u]nder the objective theory, a court will honor that intention if the other party has reason to know it. And it will honor it if the other party actually knows it.... The same result has been reached even though a written agreement is made as a sham, for the purpose of deceiving others, with an oral understanding that it will not be enforced.” *Id.* at 445. “The circumstances surrounding the making of the contract, such as correspondence and discussions, are relevant in deciding if there was a mutual assent to an agreement, and courts are free to consider such extrinsic evidence. And where such extrinsic evidence exists and is disputed, the question of whether a party has assented to the contract is generally a matter for the jury.” *Id.* (internal citations omitted).

Dolores relied on the parol evidence rule, arguing that where a written contract is facially clear and complete, extrinsic evidence of contractual intent is immaterial and inadmissible to vary the terms of the contract. “Although parol evidence cannot be used to contradict or vary the terms of a valid written agreement, parol evidence may be used to show no valid agreement ever went into existence.” *Id.* (citation omitted). “In particular, ‘the basic rule that a sham contract or a contract that the parties understood

was not to be binding may be refuted by parol evidence to show that there was, in fact, no contract, is sensible and widely followed.” *Id.* at 446 (citations omitted).

Here, Gina brought forward admissible evidence to show that Dolores and Gina did not intend to make a binding and enforceable contract when they signed the document, that the document was a mere sham, and that no binding and enforceable contract existed. And although it is the parties’ intent at the time they allegedly entered the contract that matters, the evidence presented by Gina of their discussions at that time is arguably bolstered by other evidence of the circumstances surrounding the purported contract, including the ongoing relationship between the parties as mother and daughter, the undisputed fact that Dolores gifted a one-half interest in the property to Gina, the subsequent failure of Gina to make any monthly payments to Dolores, the failure of Dolores to assert a breach more promptly, and the repeated statements of Dolores that the property belonged to Gina and that Gina did not have to pay her anything. Dolores disputed that evidence and presented her own evidence to show that she and Gina entered into a binding and enforceable contract. But courts are not authorized to weigh disputed evidence and resolve conflicts in the evidence on summary judgment. Accordingly, the court concluded that there was a genuine issue of disputed fact about the existence of a binding and enforceable contract in this case, and the trial court erred by granting partial summary judgment to Dolores on her claim for breach of contract. *Id.*