Georgia Nuisance Law Provides Relief for Wronged Landowners

Everyone living in Georgia is familiar with the almost overnight appearance of large scale housing and commercial developments where large tracts of previously forested land once stood. Although many of us would prefer that the land remain in its natural state, economic growth is inevitable. Requiring the land to remain undeveloped may not be an option, but the law does require landowners, developers, municipalities, and counties to protect adjoining landowners from the unreasonable ravages of such development.

Responsible developers and landowners understand the impact their development may have on their neighbors and undertake their improvement projects with a minimal amount of disruption and damage to the property of their neighbors. On the other hand, a subset of these developers and landowners has little concern about their responsibilities and obligations under the law. These are the developers and landowners who make their neighbors pay high costs for their irresponsible practices.

With increasing development, counties and municipalities often struggle to install and maintain appropriate sewage and flood control measures. Georgia nuisance law also allows actions against counties and municipalities under special circumstances.

Georgia law recognizes the rights of these adjoining landowners to recover damages to their property caused by those responsible. In fact, an entire body of Georgia law relating to nuisance can provide wronged property owners with redress.

Furthermore, this is an area of law where lawyers can provide their clients with a fair recovery and, at the same time, feel good about protecting Georgia from environmental damage and property right infringement. Because these cases also have

the potential for recovery of attorney fees and for punitive damages awards, a properly prepared and executed case can also send the message to other developers and landowners that they should take their environmental responsibilities seriously.

A discussion of Georgia law regarding nuisance as well as the damages recoverable under this legal theory follows. [1]

I. Nuisance Is A Commonly Used Cause of Action in Cases Involving Property Damage.

Georgia nuisance law provides a potential remedy for landowners whose property has been damaged by the activities of a developer, neighboring landowner, or municipality. As nuisance law demonstrates, Georgia law strongly protects the rights of property owners to the full use and enjoyment of their property without interference from anyone else.

O.C.G.A. § 41-1-1 defines a nuisance as "anything that causes hurt, inconvenience, or damage to another and the fact that the act done may be otherwise lawful shall not keep it from being a nuisance. The inconvenience complained of shall not be fanciful, or such as would affect only one of fastidious taste, but it shall be as would affect an ordinary, reasonable man." Lawful acts become nuisances when they are conducted in a manner causing hurt, inconvenience, or damage to another.[2]

Georgia courts have considered several factors in determining whether a nuisance exists. Specifically,

> (1) The defect or degree of misfeasance must be to such a degree as would exceed the concept of mere negligence. (A single isolated act of negligence is not sufficient to show such a negligent trespass as would constitute a nuisance.)
>
> (2) The act must be of some duration . . . and the maintenance of the act or defect must be continuous or regularly repetitious.

(3) Failure of [defendant] to act within a reasonable time after knowledge of the defect or dangerous condition.[3]

These factors are interpreted consistent with a policy that "[p]rivate property cannot be physically harmed or its value impaired in [a negative] way, *however socially desirable the conduct*, without payment being made for the harm done, if the interference that is the consequence of the activity is substantial and considered to be unreasonable."[4]

As the above factors indicate, it is not necessary to directly own the land on which the nuisance is located to have liability for a nuisance. Instead, control of the land is the more important factor. To recover for a nuisance the plaintiff must demonstrate that the defendant was "either the cause or a concurrent cause of the creation, continuance, or maintenance of the nuisance."[5]

Defendants are not liable for flooding or other nuisances unless the activity occurs by "artificial" means.[6] In other words, the fact that a naturally created situation on a defendant's land is causing harm to the plaintiff is insufficient to support a nuisance claim unless the defendant cooperates with, augments, or accelerates the naturally occurring condition creating the nuisance.[7]

Nuisance law has a notice provision that applies to certain defendants. Pursuant to O.C.G.A. § 41-1-5 (b), it is necessary for a plaintiff to provide notice to a landowner about the nuisance prior to filing suit if the landowner "merely acquires property on which there is an existing nuisance, passively permits its continuance, and adds nothing thereto."[8] It is *not* necessary to provide notice to a defendant who created or increased the nuisance.[9] If notice is required, the notice must request the potential defendant to abate the nuisance.[10] "Mere passive or constructive knowledge by a defendant of the

existence of a nuisance is insufficient to satisfy the requirements of this statute" if the notice requirement applies.[11]

Because multiple parties may have control over a nuisance, multiple defendants may have liability for the nuisance. The obvious defendant is the party creating the nuisance. If a defendant created the nuisance, that defendant "is liable for it even if he has sold the property containing the nuisance."[12] In other words, a defendant cannot escape liability for creating a nuisance by selling the property.

But, purchasing property with a nuisance may obligate the subsequent purchaser. Purchasers of a nuisance are liable for the nuisance if it continues to adversely affect the property after the new purchaser is requested to remedy the problem. "The maintenance of the nuisance after notice is continuance of the nuisance, and the purchaser of the property causing the nuisance is responsible for that continuance, if there is a request for abatement before the action is filed."[13]

Plaintiffs also have the choice of suing multiple entities that may have an ownership interest and control over the property. These options are often necessary when a developer has created a corporation solely for the purpose of owning the specific property at issue. Furthermore, under Georgia law, if the nuisance is caused by the actions of a corporate agent, the plaintiff "may sue the individual agent, the corporation or both."[14]

Georgia law has also created exceptions for certain activities the law classifies as not qualifying as a nuisance. These exceptions apply to certain agricultural activities,[15] cultural facilities,[16] and shooting ranges.[17]

Defendants may be liable for nuisances created by independent contractors if the defendant accepts the independent contractor's work with knowledge of the nuisance under a rule very similar to that which makes a principal responsible for unauthorized wrongs committed by his agent by ratifying them.[18] This legal theory has been used to impose liability on homeowners who hired a contractor to make improvements on their property when the landowner had notice of numerous complaints about the development while it was still under construction.[19] These same landowners were also potentially liable under a theory that they also now control and maintain the nuisance.[20]

Nuisances have often been found in cases where an upstream landowner's actions have caused flooding or increased silt deposits on a downstream landowner's property. Georgia courts have held that one landowner "has no right to concentrate and collect water and thus cause it to be discharged upon the land of a lower proprietor in greater quantities at a particular locality or in a manner different from that in which the water would be received by the lower property if it simply ran down upon it from the upper property by the law of gravitation."[21]

For flooding caused by an upstream drainage ditch, "[t]he owner of a drainage ditch is under a duty to maintain it so that the surface waters do not overflow to the damage of adjacent property owners. Similarly, the owner of a creekbed containing a creek flowing through culverts constructed by such owner or his predecessor in title is under a duty to maintain them so that the waters do not overflow to the damage of adjacent property owners."[22] It is necessary, however, for plaintiffs alleging nuisances from increased water flow to provide evidence that the water flow is occurring "in a manner different from simply running down upon it by the law of gravitation."[23] It is not

enough to simply allege that defendant is directing water flow directly onto plaintiffs' property.[24]

As the long body of Georgia case law on nuisance indicates, landowners who have suffered injury from the actions of a neighboring landowner or developer may have a good claim under nuisance law. If a defendant interferes with a plaintiff's property rights, Georgia law protects that plaintiff's right to the full use and enjoyment of his or her property from that interference.

II. Municipalities Are Responsible for the Nuisances They Create and Maintain.

Municipalities are liable for nuisances under certain circumstances. Municipal immunity from tort liability does not extend to nuisance actions. "A municipality like any other individual or private corporation may be liable for damages it causes . . . from the operation or maintenance of a nuisance, irrespective of whether it is exercising a government or ministerial function."[25] The policy underlying this exception to sovereign immunity is "based on the principle that 'a municipal corporation can not, under the guise of performing a governmental function, create a nuisance dangerous to life and health or take or damage private property for public purpose, without just and adequate compensation being first paid.'"[26]

Georgia courts have established factors establishing municipal liability: "the defect or degree of misfeasance must exceed mere negligence (as distinguished from a single act); the act complained of must be of some duration and the maintenance of the act or defect must be continuous and regularly repetitious; and there must be a failure of municipal action within a reasonable time after knowledge of the defect or dangerous

condition."[27] When municipalities approve development projects which create a nuisance, the city may be responsible for approving such projects.[28] For example, "where a municipality negligently constructs or undertakes to maintain a sewer or drainage system which causes the *repeated* flooding of property, a continuing abatable nuisance is established, for which the municipality is liable."[29]

To prevail on a nuisance claim against a municipality, plaintiffs are required to establish a municipality's notice of the nuisance and its failure to correct the problem once the municipality has notice of the problem. Direct or constructive notice can satisfy this requirement. Constructive notice of a nuisance can be established through evidence about how long the nuisance has existed.[30] "Notice may also be imputed to the city from the knowledge of its own agents or employees."[31]

III. Counties Also Have Liability for Nuisances Which Qualify as "Takings."

Counties are liable for nuisances under certain circumstances, but these conditions differ from those applicable to municipalities.[32] The Georgia Constitution provides for a waiver of a county's sovereign immunity in cases where a county creates a nuisance "which amounts to an inverse condemnation."[33] Although a county is generally not liable for creating nuisances,[34] "[w]here a county causes, creates, or maintains a nuisance which amounts to an inverse condemnation, the county is liable in damages that would be recoverable in an action for inverse condemnation."[35] Liability against counties is proper in cases where the government entity created or maintained a nuisance "which constitutes either a danger to life and health or a taking of property."[36] On the other hand, a county is not liable for a nuisance "which does not rise to the level of a taking of property."[37]

IV. Continuing Nuisances May "Extend" the Statute of Limitations

In cases involving property damage, the statute of limitations is typically four years.[38] Even if the act starting the nuisance occurred outside the statute, however, a lawsuit may still be filed for damages caused by a nuisance "where the damages were inflicted within the four years before the time of filing suit, though the act which originally caused the nuisance was not done within the period of limitations of the action."[39] In other words, in cases involving a continuing nuisance, a plaintiff can recover for the damages the nuisance caused during the four years preceding the date the lawsuit is filed as well as future damages and damages incurred until the date of trial.[40]

V. Prevailing Plaintiffs May Be Entitled to Injunctive Relief in Cases Involving Nuisance.

Courts will authorize injunctions in causes where the nuisance is continuing.[41] Injunctions may be granted in cases to "prevent an impending nuisance, continuing in nature, the consequences of which are reasonably certain."[42] Pursuant to O.C.G.A. § 41-2-4, "[w]here the consequence of a nuisance about to be erected or commenced will be irreparable damage and such consequence is not merely possible but to a reasonable degree certain, an injunction may be issued to restrain the nuisance before it is completed."

Along with the potential damage recoveries discussed in the following sections, injunctive relief can be an important tool in having the nuisance cleaned up and the wrongful activity abated. If an injunction is granted, however, a plaintiff may not be entitled to future damages. Because future damages may be a large part of any recovery

in a nuisance case, plaintiffs should carefully consider whether or not to pursue injunctive relief.

VI. Plaintiffs Are Entitled to Several Classes of Compensatory Damages in a Nuisance Claim.

Georgia law allows the recovery of repair damages, diminution of market value, personal damages, and/or nominal damages in a nuisance case. Plaintiffs generally have the choice in determining what types of nuisance damages are alleged. If the nuisance is abatable, plaintiffs can elect to repair the property and recover past loss of use and enjoyment. If the nuisance is permanent and not abatable, plaintiffs can elect to recover the permanent damage to the property's value and damages for past and future loss of use and enjoyment.

One measure of damages in a nuisance case is the cost of repair.[43] "Georgia law recognizes that the cost to repair or restore land may be an appropriate measure of damages as long as restoration would not be an 'absurd undertaking.'"[44] Plaintiffs are entitled to recover the repair costs that may exceed the losses due to diminution of market value.[45]

Plaintiffs may also be entitled to the diminution of their land's value caused by the nuisance. "If the nuisance is permanent, the measure of damages is the diminution of fair market value of the property."[46] Damages for diminution of the property's value can be recovered even when the market value of the property increases during the nuisance period because plaintiffs are still entitled to recover for diminution in the value for their use of the property.[47]

In a nuisance action, there may also be a recovery for damages to the person. These damages recognize that the unlawful interference with the right of the owner to enjoy possession of his property should be compensated.[48] A prevailing plaintiff is entitled to damages for "discomfort, loss of peace of mind, unhappiness and annoyance" caused by the nuisance which is determined by the "enlightened conscious of the jury."[49]

Nominal damages are also recoverable in nuisance cases. A verdict of at least nominal damages is required if the plaintiff presents undisputed evidence that property rights were tortiously invaded.[50] "[W]here the violation of a right is shown, substantial damages claimed, and some actual loss proved, and yet the damages are not susceptible of reasonable certainty of proof as to their extent," nominal damages may be appropriate.[51] A recovery of nominal damages may be sufficient to support an award of attorney fees[52] and punitive damages.[53]

VII. Attorney Fees Are Often Recoverable in Nuisance Actions.

Pursuant to O.C.G.A. § 13-6-11, "[t]he 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." In other words, attorney fees are recoverable in actions involving bad faith. A nuisance is an intentional tort, and "[e]very intentional tort invokes a species of bad faith that entitles a person wronged to recover the expenses of litigation including attorney fees."[54]

"Bad faith in an action sounding in tort means bad faith in the transaction out of which the cause of action arose."[55] Bad faith is also established in the defendant's dealings with plaintiff.[56] The fact that disputed issues are involved in the litigation does not preclude a finding of attorney fees.[57]

The party seeking attorney fees must prevail on the basic cause of action to recover attorney fees under O.C.G.A. § 13-16-11.[58] Although attorney fees are only recoverable by prevailing parties, recovery of nominal damages is sufficient to support an award of attorney fees under O.C.G.A. § 13-6-11.[59]

Georgia courts have also awarded attorney fees in cases where the court determines punitive damages are not appropriate. Even though the plaintiff establishes an intentional tort and bad faith sufficient to support an award of attorney fees, the defendant's actions still may not be egregious enough to warrant punitive damages.[60]

The recovery of attorney fees is limited to the claims for which the party was successful at trial. The party seeking attorney fees must prove the attorney fees attributable to each of the claims on which they were awarded damages as separate from those on which no recovery was had.[61] "[E]vidence of the existence of a contingent fee contract, without more, is not sufficient to support an award of attorney fees."[62]
It is acceptable, however, for an attorney to "testify as to the reasonableness of his own fees. [63] But, the better practice is to have an expert attorney testify that the time spent and hourly rate are reasonable.

VIII. Because Nuisance Actions Involve Intentional Torts, Punitive Damages Are Often Awarded in These Cases.

A nuisance is an intentional act for which a willful repetition will support a claim for punitive damages.[64] Punitive damages may be awarded even when the actual damages are small.[65] Punitive damages can also be appropriate against defendants who maintained but did not create the nuisance.[66]

IX. Conclusion

Nuisance is a cause of action providing plaintiffs with real relief from the tortious actions of adjoining landowners and developers. These cases have the real potential to award damages for diminution of value, cost of repair, emotional distress, punitive damages, and attorney fees. These cases also have the additional value of addressing the wrongs caused by irresponsible development. Accordingly, both plaintiff and defendant attorneys should seriously examine and prosecute these cases.

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[1] Nuisance and trespass are both intentional torts long recognized under Georgia law. Both allow redress for invasions of property rights. "The distinction between trespass and nuisance consists in the former being a direct infringement of one's right of property, while in the latter the infringement is the result of an act which is not wrongful in itself, but only in the consequences which may flow from it. In the one case the injury is immediate; in the other it is consequential, and generally results from the commission of an act beyond the limits of the property affected." *Baumann v. Snider*, 243 Ga. App. 526, 528, 532 S.E.2d 468, 472 n. 4 (2000). Because both legal theories involve similar requirements and damage recoveries, facts establishing a trespass may also support a nuisance case, and facts establishing a nuisance may also support a trespass action.

Furthermore, environmental regulations, restrictive covenants, and building codes may also provide a basis for recovery. Because of the limited scope of this article, however, only Georgia nuisance law is discussed.

[2] *Id.; see also Sumitomo Corp. of Am. v. Deal*, 256 Ga. App. 703, 708, 569 S.E.2d 608, 613 (2002).

[3] *Earnheart v. Scott*, 213 Ga. App. 188, 189, 444 S.E.2d 128, 129 (1994).

[4] *Sumitomo Corp.*, 256 Ga. App. at 708, 569 S.E.2d at 614.

[5] *Id.* at 707, 569 S.E.2d at 613.

[6] *Bracey v. King*, 199 Ga. App. 831, 832, 406 S.E.2d 265, 266 (1991) (holding that defendants were not liable for damage that beaver dams on their property caused to plaintiffs' property where there was no evidence that the defendants "imported the offending beavers onto their property, trained them to build the dams, or in any way assisted or encouraged them in this activity").

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[7] *Id.*

[8] *Macko v. City of Lawrenceville*, 231 Ga. App. 671, 676, 499 S.E.2d 707, 712 (1998).

[9] *Id.*

[10] O.C.G.A. § 41-1-5 (b).

[11] *Macko*, 231 Ga. App. at 675, 499 S.E.2d at 712.

[12] *West v. CSX Transp., Inc.*, 230 Ga. App. 872, 875, 498 S.E.2d 67, 71 (1998), *aff'd* 240 Ga. App. 209, 523 S.E.2d 63 (1999).

[13] *Id*. at 876, 498 S.E.2d at 71.

[14] *Foxchase, LLP v. Cliatt*, 254 Ga. App. 239, 241, 562 S.E.2d 221, 224 (2002).

[15] O.C.G.A. § 41-1-7

[16] O.C.G.A. § 41-1-8

[17] O.C.G.A. § 41-1-9

[18] *Greenwald v. Kersh*, 265 Ga. App. 196, 199-200, 593 S.E.2d 381, 384-85 (2004).

[19] *Id.*

[20] *Id.*

[21] *Sumitomo Corp. of Am. v. Deal*, 256 Ga. App. 703, 705, 569 S.E.2d 608, 611 (2002) (*quoting Gill v. First Christian Church, Atlanta, Ga., Inc.,* 216 Ga. 454, 117 S.E.2d 164 (1960)).

[22] *West v. CSX Transp., Inc*., 230 Ga. App. 872, 874, 498 S.E.2d 67, 70 (1998), *aff'd* 240 Ga. App. 209, 523 S.E.2d 63 (1999) (*quoting Equitable Life Assur. Soc. of U.S. v. Tinsley Mill Village*, 249 Ga. 769, 771, 294 S.E.2d 495 (1982)).

[23] *Cox v. Martin*, 207 Ga. 442, 443, 62 S.E.2d 164, 165 (1950).

[24] *Id.*

[25] *City of Thomasville v. Shank*, 263 Ga. 624, 624, 437 S.E.2d 306, 307 (1993).

[26] *Id*. at 624-25, 437 S.E.2d at 307 (*quoting Delta Air. Corp. v. Kersey*, 193 Ga. 862, 870, 20 S.E.2d 245 (1942)).

[27] *Hibbs v. City of Riverdale*, 267 Ga. 337, 338, 478 S.E.2d 121, 122 (1996).

[28] *City of Columbus v. Myszka*, 246 Ga. 571, 572, 272 S.E.2d 302, 304 (1980).

[29] *Hibbs*, 267 Ga. at 338, 478 S.E.2d at 122.

[30] *Carter v. Mayor & Alderman of City of Savannah*, 200 Ga. App. 263, 265-66, 407 S.E.2d 421, 424 (1991).

[31] *Id.* at 266, 407 S.E.2d at 424.

[32] *Dekalb County v. Orwig*, 261 Ga. 137, 138, 402 S.E.2d 513, 514 (1991).

[33] *Duffield v. Dekalb County*, 242 Ga. 432, 433, 249 S.E.2d 235, 236 (1978).

[34] *Id*. at 434, 249 S.E.2d at 237.

[35] *Fielder v. Rice Constr. Co., Inc.*, 239 Ga. App. 362, 364, 522 S.E.2d 13, 15 (1999).

[36] *City of Thomasville v. Shank*, 263 Ga. 624, 625, 437 S.E.2d 306, 307 (1993).

[37] *Dekalb County*, 261 Ga. at 138, 402 S.E.2d at 514.

[38] O.C.G.A. § 9-3-30.

[39] *West v. CSX Transp., Inc.*, 230 Ga. App. 872, 873, 498 S.E.2d 67, 69 (1998), *aff'd* 240 Ga. App. 209, 523 S.E.2d 63 (1999).

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[40] *Id.*

[41] *Ponce De Leon Condominiums v. DiGirolamo*, 238 Ga. 188, 191, 232 S.E.2d 62, 65 (1977).

[42] *City of Columbus v. Myszka*, 246 Ga. 571, 573, 272 S.E.2d 302, 305-06 (1980).

[43] *Sumitomo Corp. of Am. v. Deal*, 256 Ga. App. 703, 708, 569 S.E.2d 608, 614 (2002).

[44] *Georgia Northeastern R.R., Inc. v. Lusk*, 277 Ga. 245, 247, 587 S.E.2d 643, 645 (2003).

[45] *Id.* at 247, 587 S.E.2d at 645.

[46] *City of Warner Robins v. Holt*, 220 Ga. App. 794, 797, 470 S.E.2d 238, 241 (1996). In cases of abatable nuisances, however, where the damage will stop occurring if repairs are made or the nuisance is abated, a plaintiff is not entitled to the diminution of market value as measured by the selling price. *Kiel v. Johnson*, 179 Ga. App. 43, 45, 345 S.E.2d 131, 133 (1986). Instead, "the measure of damages is the loss in fair market rental value plus actual damages." *Baumann v. Snider*, 243 Ga. App. 526, 527-28, 532 S.E.2d 468, 472 (2000); *see also Ledbetter Bros., Inc. v. Holcomb*, 108 Ga. App. 282, 285, 132 S.E.2d 805, 807 (1963).

[47] *Id.*

[48] *Nichols v. Main Street Homes, Inc*., 244 Ga. App. 591, 595, 536 S.E.2d 278, 281 (2000).

[49] *Arvida/JMB Partners, L.P. v. Hadaway*, 227 Ga. App. 335, 340, 489 S.E.2d 125, 129 (1997); *see also Nichols v. Main St. Homes, Inc.*, 244 Ga. App. 591, 595, 536 S.E.2d 278, 281 (2000).

[50] *Kiel v. Johnson*, 179 Ga. App. 43, 44, 345 S.E.2d 131, 133 (1986).

[51] *Ponce De Leon Condominiums v. DiGirolamo*, 238 Ga. 188, 190, 232 S.E.2d 62, 64 (1977).

[52] *Savannah College of Art and Design, Inc. v. Nulph*, 265 Ga. 662, 663, 460 S.E.2d 792, 793-94 (1995).

[53] *Bauer v. North Fulton Medical Ctr., Inc.* **,** 241 Ga.App. 568, 574, 527 S.E.2d 240, 246 (1999).

[54] *Tyler v. Lincoln*, 272 Ga. 118, 121, 527 S.E.2d 180, 183 (2000).

[55] *City of Atlanta v. Murphy*, 194 Ga. App. 652, 653-54, 391 S.E.2d 474, 476-77 (1990).

[56] *Nichols*, 244 Ga. App. at 593, 536 S.E.2d at 280.

[57] *City of Atlanta*, 194 Ga. App. at 654, 391 S.E.2d at 477; *see also City of Warner Robins v. Holt*, 220 Ga. App. 794, 795, 470 S.E.2d 238, 240 (1996).

[58] *Ellis v. Gallof*, 220 Ga. App. 518, 519, 469 S.E.2d 288, 289 (1996).

[59] *Savannah College of Art and Design, Inc. v. Nulph*, 265 Ga. 662, 663, 460 S.E.2d 792, 793-94 (1995).

[60] *Ross v. Hagler*, 209 Ga. App. 201, 204, 433 S.E.2d 124, 127 (1993).

[61] *D.G. Jenkins Homes, Inc. v. Wood*, 261 Ga. App. 322, 326, 582 S.E.2d 478, 482 (2003).

[62] *Nichols v. Main Street Homes, Inc*., 244 Ga. App. 591, 594, 536 S.E.2d 278, 281 (2000).

[63] *Id.* at 593, 536 S.E.2d at 280.

[64] *Tyler v. Lincoln*, 272 Ga. 118, 120, 527 S.E.2d 180, 183 (2000).

[65] *Id*. at 121, 527 S.E.2d at 183.

[66] *Ponce De Leon Condominiums v. DiGirolamo*, 238 Ga. 188, 189-90, 232 S.E.2d 62, 64 (1977).