The Court of Appeals
47 Trinity Avenue SW, Suite 501
Atlanta, Georgia 30334

STEPHEN E. CASTLEN
CLERK AND COURT ADMINISTRATOR

404-656-3450

August 5, 2015

Mr. Daniel Greenfield
Post Office Box 222
Roopville, Georgia 30170

Dear Mr. Greenfield:

Thank you for your recent application. I will keep a copy of your submission. However, I recommend that you submit your application to each judge individually (as soon as they are appointed) as each judge makes their own hiring decision.

I wish you well during the hiring process.

Sincerely,

Stephen E. Castlen
Clerk/Court Administrator
Court of Appeals of Georgia

SEC/ld

Steve Castlen - Letter to Mr. Greenfield

From: Steve Castlen
To: Lola Diamond
Subject: Letter to Mr. Greenfield

Dear Mr. Greenfield,

Thank you for your recent application. I will keep a copy of your submission. However, I recommend that you submit your application to each judge individually (as soon as they are appointed) as each judge makes their own hiring decision.

I wish you well during the hiring process.

Lola,
Please ~~keep~~ make a file for
any other resumes that we
receive. Thanks.
Steve

Don't send the resume back - Keep in a file.

Daniel B. Greenfield
P.O. Box 222
Roopville, GA 30170

July 23, 2015

Georgia Court of Appeals
47 Trinity Avenue, Suite 501
Atlanta, GA 30334

Dear Sir or Madam:

The pending appointment of three additional judges to the Court of Appeals leads me to believe that the Court may soon have openings for staff attorneys. As a former staff attorney myself, I would be interested in one of those positions.

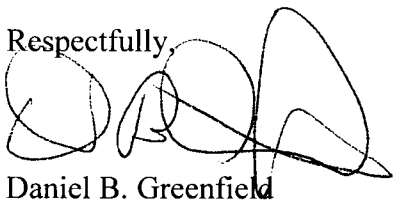
I am fifty-four years old and have practiced law for almost fifteen years, including a two-term stint as staff attorney for the Hon. G. Alan Blackburn in 2002-2003. Since then, I have been exposed to a much wider range of procedural and substantive law than I once brought to the Court, and have, I hope, become a more efficient researcher and a more effective writer. As part of my practice, I have written briefs in twenty-seven published appellate cases, and have argued before this Court and the Supreme Court five times. I also do freelance writing for other attorneys, with my employer's knowledge and permission.

I have worked at the Jack F. Witcher law firm for twelve years. I have made lifelong friends. My courtroom experience, which runs the gamut from magistrate hearings to jury trials, has been educational and enriching, and I am grateful for it. However, I am still a researcher and writer at heart, wired not so much to compete in the courtroom as to seek out the correct result. I know I can make a valuable contribution to the judicial process, and I would appreciate the opportunity to do so.

Please find enclosed my resume and references, a list of appellate cases on which I was the attorney of record, and two 2003 Court of Appeals opinions for which I was the responsible staff attorney. All my briefs should be accessible in the Court records, but for your convenience I have also enclosed two appellate briefs, one exactly as filed and one in Word format (slightly edited). If you require other materials, such as letters of recommendation or a law school transcript, please let me know.

Thank you very much for your time and consideration.

Respectfully,



Daniel B. Greenfield

DANIEL B. GREENFIELD

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EDUCATION

Juris Doctor, 2000

- **Walter F. George School of Law, Mercer University**, Macon, Georgia
  - Class Rank Top 20%, Law Review, 1998-2000.

Bachelor of Arts, 1983

- **University of North Carolina at Chapel Hill**

EXPERIENCE

September 2003 – Present

- **Attorney, Law Offices of Jack F. Witcher**
  601 Pacific Ave., P.O. Drawer 1330, Bremen, GA 30110; (770) 537-5848
  - Seven-attorney general practice law firm
  - Appellate and motion practice, depositions, hearings, and jury trials
  - Attorney of Record in numerous published appellate decisions (*see attached*)

November 2002 – July 2003

- **Staff Attorney, Georgia Court of Appeals**
  40 Capitol Square, Atlanta, GA 30334; (404) 656-3450
  - Drafted opinions for Hon. G. Alan Blackburn.

July 2001 – November 2002

- **Attorney, Waters & Gross, P.C.**
  Post Office Box 695, Metter, GA 30439 (912) 685-4619
  - General civil and criminal practice, commercial litigation, creditor's rights.

June 2000 – December 2001

- **Law Clerk, Superior Courts of Georgia, Atlantic Circuit**
  P.O. Box 713, Hinesville, GA 31310; (912) 368-2255 or 877-4770
  - Researched issues and drafted orders for four judges in six-county circuit.
  - Assisted Judge Charles Paul Rose in all stages of a death penalty case.

DANIEL B. GREENFIELD

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Hon. C. Paul Rose
Judge, Superior Courts of Georgia
Atlantic Judicial Circuit
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Judge of Candler County State Court
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DANIEL B. GREENFIELD

Appellate Decisions (* = prevailing party)

**Cottingham & Butler, Inc. v. Belu* (appellee)
2015 Ga. App. LEXIS 382 (July 1, 2015)
(certiorari applied for)

Ingles Mkts., Inc. v. Carroll (appellant)
329 Ga. App. 365, 765 S.E.2d 45 (2014)

**Buckner v. Buckner* (appellant)
294 Ga. 705, 755 S.E.2d 722 (2014)

**Swafford v. Elkins* (appellant)
327 Ga. App. 802, 761 S.E.2d 359 (2014)

**Thomas v. Chance* (appellant)
325 Ga. App. 716, 754 S.E.2d 669 (2014)

Pirkle v. QuikTrip Corp. (appellant)
325 Ga. App. 597, 754 S.E.2d 387 (2014)

**Barnett v. Ga. Dep't of Labor* (appellant)
323 Ga. App. 882, 748 S.E.2d 688 (2013)

**Haffner v. Davis* (appellee)
290 Ga. 753, 725 S.E.2d 286 (2012)

Cofield v. Halpern Enterprises (appellant)
316 Ga. App. 582, 730 S.E.2d 63 (2012)

Perry v. Gilotra-Mallik (appellant)
314 Ga. App. 764, 726 S.E.2d 81 (2012)

**Turner v. City of Tallapoosa* (appellee)
289 Ga. 13, 709 S.E.2d 211 (2011)

Brannon v. Perryman Cemetery, Ltd. (appellant)
308 Ga. App. 832, 709 S.E.2d 33 (2011)

**Benefield v. Tominich* (appellant)
308 Ga.App. 605, 708 S.E.2d 563 (2011)

Brown v. Host/Taco Joint Venture (appellant)
305 Ga. App. 248, 699 S.E.2d 439 (2010)

Gonzalez v. Crocket (appellant)
287 Ga. 430, 696 S.E.2d 623 (2010)

**Meacham v. Franklin-Heard County Water Auth.*
302 Ga.App. 69, 690 S.E.2d 186 (2009) (appellant)

**Levenson v. Word* (appellee)
286 Ga. 114, 686 S.E.2d 236 (2009)

**Levenson v. Word* (appellee)
294 Ga.App. 104, 668 S.E.2d 763 (2008)

Hardnett v. State (appellant)
285 Ga. 470, 678 S.E.2d 323 (2009)

**Cousins v. Macedonia Baptist Church of Atlanta*
283 Ga. 570, 662 S.E.2d 533 (2008) (appellant)

Roberts v. Lee (appellant)
289 Ga.App. 714, 658 S.E.2d 258 (2008)

**Allstate Indem. Co. v. Payton* (appellee)
289 Ga.App. 202, 656 S.E.2d 554 (2008)

Folsom v. Rowell (appellant)
281 Ga. 494, 640 S.E.2d 5 (2007)

Georgia Dept. of Natural Resources v. Willis
274 Ga.App. 801, 619 S.E.2d 335 (2005)

**White v. State* (appellant)
274 Ga.App. 805, 619 S.E.2d 333 (2005)

Young v. Richards Homes, Inc. (appellant)
271 Ga.App. 382, 609 S.E.2d 729 (2005)

J & M Aircraft Mobile T Hangars, Inc. v. Johnston County Airport Authority (appellant)
269 Ga.App. 800, 605 S.E.2d 611 (2004)

Nguyen v. Talisman Roswell, L.L.C.

Court of Appeals of Georgia, Third Division

July 22, 2003, Decided

A03A1515

Reporter
262 Ga. App. 480; 585 S.E.2d 911; 2003 Ga. App. LEXIS 959; 2003 Fulton County D. Rep. 2350

NGUYEN v. TALISMAN ROSWELL, LLC.

Prior History: **[***1]** Breach of contract, etc. Fulton Superior Court. Before Judge Baxter.

Disposition: Judgment affirmed.

Counsel: David J. Merbaum, Kevin S. Dale, for appellant.

Hartman, Simons, Spielman & Wood, Kristen A. Yadlosky, for appellee.

Judges: *BLACKBURN, Presiding* Judge. Ellington and Phipps, JJ., concur.

Opinion by: BLACKBURN

Opinion

[*480] **[**911]** *BLACKBURN, Presiding* Judge.

In this commercial lease dispute, Hong Nguyen, the lessee, appeals the trial court's grant of summary judgment to Talisman Roswell, LLC ("Talisman"), the lessor, contending that Talisman breached the lease by providing less square footage than the lease required. Because the evidence is unequivocal that Nguyen received exactly the amount of space he bargained for under the contract, we affirm.

Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law O.C.G.A. § 9-11- 56 (c). "A de novo standard of review applies to an appeal from a grant of summary judgment, and we view the evidence, **[*481]** and all reasonable conclusions and inferences drawn from it, in the light most **[**912]** favorable to the nonmovant." *Cotton v. NationsBank.* [1]

[*2]** Viewed in this light, the evidence of record is undisputed that in March 1999, Nguyen wrote a letter to Talisman in which he explicitly expressed an interest in renting "about 800 square feet" of commercial space in Talisman's shopping center for a nail salon. Following this written request, on April 12, 1999, the parties executed a five-year lease agreement commencing on May 1, 1999. Due to a scrivener's error, Section 1.02 of the lease described the premises as "Store Unit 290 indicated in the Site Plan consisting of approximately 1,710 square feet of Gross Leasable Area." In actuality, Store Unit 290 consisted of approximately 876 square feet. One week later, on April 19, 1999, Talisman informed Nguyen in writing about the clerical error, and included a copy of the relevant page, corrected to show the actual square footage of Store Unit 290. Nguyen did not raise any objections to the clerical error, and he thereafter set up his nail salon in Store Unit 290, paying rent as agreed and voicing no objections about the size of the premises. More than two years later, in the fall of 2001, Nguyen stopped paying rent and demanded a

[1] *Cotton v. NationsBank*, 249 Ga. App. 606, 607 (548 S.E.2d 40) (2001).

refund of "overpayments" on the grounds that the rental **[***3]** space was less than what had been described in the lease prior to the correction of the clerical error. Nguyen then sued Talisman for breach of contract and attorney fees, and Talisman counterclaimed for breach of contract, attorney fees, and writ of possession. Thereafter, Nguyen amended his complaint to seek damages for, among other things, wrongful eviction. Talisman moved for summary judgment on all claims, and it is from the grant of that motion that Nguyen appeals.

In support of his claim that Talisman breached the lease, Nguyen contends in his verified complaint that: (1) he informed Talisman that he required *at least* 1,000 square feet and (2) he was never informed of the clerical error in the contract until the fall of 2001, *after* he complained. We note that the complaint is not evidence. Absolutely nothing in the record supports these spurious contentions. To the contrary, the evidence of record clearly shows that Nguyen informed Talisman in writing that he required only about 800 square feet and that the clerical error in the contract was brought to his attention one week after the contract was signed and prior to his occupancy of the premises. And, Nguyen has **[***4]** provided nothing to dispute this evidence, as the record reveals that he neither showed up when subpoenaed for a deposition nor answered the **[*482]** defendant's interrogatories. Nguyen now attempts to profit from his noncompliance by arguing that the unsupported contentions in his complaint control this Court's decision. Nguyen has totally failed to come forward with evidence to refute that of Talisman. See *Lau's Corp. v. Haskins.* [2]

"The cardinal rule of [contract] construction is to ascertain the intention of the parties." (Punctuation omitted.) *Southern Airways Co. v. DeKalb County.* [3] "To this end the whole instrument, together with its circumstances, must be considered." (Punctuation omitted.) *Id. at 859* (5). In ascertaining that intent, parol evidence may be offered to prove that a written term in a contract was a mistake. *Smith v. Smith*; [4] *First Nat. Bank of Polk County v. Carr.* [5] See O.C.G.A. § 24-6-7 **[***5]** . Parol evidence is also admissible to explain a latent ambiguity O.C.G.A. § 24-6-3; *Southern Airways Co., supra.* "This is so despite an 'entire agreement' clause in the contract." *Baker v. Jellibeans, Inc.* [6]

Here, parol evidence offered by Talisman, and the only evidence offered by either **[**913]** party, [7] proves that the term "1,710" was a clerical error that did not reflect the true intentions of the parties. Nguyen's acceptance of the property with knowledge of the correction of the clerical error in the lease bars any claim for damages based on the original erroneous 1,710 feet **[***6]** shown in the lease. Nguyen originally requested about 800 square feet, he was told by Talisman that he would be

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[2] *Lau's Corp. v. Haskins*, 261 Ga. 491 (405 S.E.2d 474) (1991).

[3] *Southern Airways Co. v. DeKalb County*, 102 Ga. App. 850, 858 (5) (118 S.E.2d 234) (1960).

[4] *Smith v. Smith*, 223 Ga. 560, 561 (156 S.E.2d 901) (1967).

[5] *First Nat. Bank of Polk County v. Carr*, 260 Ga. App. 439 (579 S.E.2d 863) (2003).

[6] *Baker v. Jellibeans, Inc.*, 252 Ga. 458, 459 (314 S.E.2d 874) (1984).

[7] Nguyen's verified answer to Talisman's counterclaim does not constitute evidence, because it fails to set forth specific facts, *Five Star Steel Constr. v. Klockner Namasco Corp.*, 240 Ga. App. 736, 738 (524 S.E.2d 783) (1999), and is verified only to the best of Nguyen's knowledge and information. *Computer Maintenance Corp. v. Tilley*, 172 Ga. App. 220, 223 (322 S.E.2d 533) (1984). Nguyen also failed to respond to Talisman's discovery requests.

receiving 800 square feet, and he did, in fact, receive 800 square feet which he leased, without complaint, for over two years. Nguyen got exactly what he bargained for.

When viewing the entire agreement, together with its surrounding circumstances, it is clear that the true intention of the parties was to enter into a lease for a specific property containing between 800 and 900 square feet of space. Talisman did not breach **[***7]** the lease.

Moreover, even if Talisman had breached the lease, Nguyen waived any right to complain of the discrepancy. "A waiver of rights under a contract may be express or implied from acts or conduct." *James v. Mitchell.* [8] **[***8]** When a contract "is continued in spite of a known **[*483]** excuse, the defense thereupon is lost and the injured party is himself liable if he subsequently fails to perform." (Punctuation omitted.) *Southern Sav. Bank v. Dickey.* [9] Here, Talisman's evidence, together with Nguyen's own pleadings, show that Nguyen knowingly waived any defect in Talisman's performance of the lease by failing to object to notice of the correct square footage and then remaining on the premises for more than two years without complaint. See *Flair Fashions v. SW CR Eisenhower Drive* [10] (lessee of commercial space in shopping center waived claim that lessor breached lease by renting to nonconforming tenants, when lessee occupied premises for two years and offered no evidence of how he was unaware of the breach).

Because Nguyen has failed to create an issue of fact regarding whether Talisman breached the lease or whether Nguyen waived the alleged breach, the trial court correctly granted Talisman's motion for summary judgment on Nguyen's breach of contract claim. To the extent Nguyen contends that the trial court erred in granting summary judgment on Nguyen's other claims and Talisman's counterclaims, Nguyen has failed to present argument or citation of authority regarding them, and therefore we will not address them. *Smith v. Lewis.* [11] See Court of Appeals Rule 27 (c).

Judgment affirmed. Ellington and Phipps, **[***9]** *JJ., concur.*

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[8] *James v. Mitchell*, 159 Ga. App. 761, 762 (285 S.E.2d 222) (1981).

[9] *Southern Sav. Bank v. Dickey*, 58 Ga. App. 718, 722 (199 SE 546) (1938).

[10] *Flair Fashions v. SW CR Eisenhower Drive*, 207 Ga. App. 78, 79 (427 S.E.2d 56) (1993).

[11] *Smith v. Lewis*, 259 Ga. App. 548, 549 (578 S.E.2d 220) (2003).

Ga. Farm Bureau Mut. Ins. Co. v. Hall County

Court of Appeals of Georgia, Third Division

August 20, 2003, Decided

A03A0858

Reporter
262 Ga. App. 810; 586 S.E.2d 715; 2003 Ga. App. LEXIS 1040; 2003 Fulton County D. Rep. 2575

GEORGIA FARM BUREAU MUTUAL INSURANCE COMPANY v. HALL COUNTY et al.

Prior History: **[***1]** Declaratory judgment. Stephens Superior Court. Before Judge Woods.

Disposition: Judgment reversed.

Counsel: McClure, Ramsay, Dickerson & Escoe, John A. Dickerson, Larry L.Hicks II, for appellant.

McDonald & Cody, Phillip G. Cody, Jr., Stewart, Melvin & Frost, FrankArmstrong III, Fortson, Bentley & Griffin, Michael C. Daniel, Richard G. Douglass, for appellees.

Judges: *BLACKBURN, Presiding* Judge. Ellington and Phipps, JJ., concur.

Opinion by: BLACKBURN

Opinion

[*810] **[**716]** *BLACKBURN, Presiding* Judge.

Following a bench trial in this declaratory judgment action, Georgia Farm Bureau Mutual Insurance Company (Farm Bureau) appeals the trial court's ruling that it is contractually obligated to indemnify and defend its insured, co-defendant Jerry Randall Pirkle, against the ordinary or gross negligent counts of a third-party complaint brought by Jack Catlin against Pirkle, as such ruling is based on an erroneous interpretation of the terms of the insurance contract. For the reasons set forth below, we reverse.

[*811] This litigation arose out of Hall County's August 11, 2000 filing of a petition to condemn certain real property owned by Pirkle in Hall County. On August 15, 2000, four days after the condemnation petition was filed, Pirkle contracted with Jack Catlin, d/b/a Catlin Forestry Services, Inc. and Catlin Forestry Services, LLC (collectively referred to herein as "Catlin") for the sale of the timber on the subject property, without notice of the contract of sale to Hall County or **[***2]** notice of the condemnation action to Catlin. The unrecorded contract sold certain timber and granted a license to Catlin through February 15, 2002, to enter the property and harvest the timber.

Title to the subject real property transferred to Hall County when it was awarded a condemnation judgment thereon on September 12, 2000, which was recorded in the Superior Court of Hall County on September 13, 2000. The insurance policy in question became null and void under its terms on September 12, 2000, the date title transferred to Hall County. Catlin entered the property in October 2000 and began harvesting timber. On November 15, 2000, Hall County directed Catlin to cease removing timber from its property, which he refused to do based on his agreement with Pirkle.

On April 17, 2001, Hall County initiated an action against Catlin in Stephens County for

trespass and conversion of the subject timber, and Catlin filed a counterclaim for abusive litigation. On August 31, 2001, Catlin filed a third-party complaint against Pirkle, seeking indemnification for any sums awarded against him to Hall County and costs of litigation. Catlin also sought damages from Pirkle for breach of contract, unjust **[***3]** enrichment, and, by amendment to the third-party complaint, for ordinary and gross negligence in failing to advise him of the existence of the condemnation petition at the time of the contract and for failing to notify Hall County of his lien allegedly created by the August 15, 2000 contract. Pirkle gave timely notice to Farm Bureau of Catlin's claims.

In response, Farm Bureau filed the underlying declaratory judgment action. The parties agreed to try the case based upon numerous stipulations of fact and the briefs submitted by each party. The stipulations included the relevant facts and the admissibility of the pleadings in the companion action and the various depositions taken in this case.

By its amended order of October 25, 2002, the trial court ruled that Farm Bureau had no obligation to defend Pirkle for any breach of contract or fraud claims and could not be held liable for damages resulting therefrom, as such coverages were excluded under the language of the policy. The trial court further held that Farm Bureau had no obligation to defend Pirkle and could not be held **[**717]** liable for damages resulting from any unjust enrichment award or negligence claim arising after September 12, 2000, the **[***4]** date the property was **[*812]** transferred to Hall County, and the policy became void under its own terms.

The trial court also ruled, however, that Farm Bureau had an obligation to defend Pirkle and could be liable for any damages awarded on Catlin's claim that Pirkle negligently failed to advise him of the petition to condemn when they entered into their contract on August 15, 2000, and for his negligent failure to advise Hall County of the outstanding lien created by the August 15, 2000 contract. It is this ruling which Farm Bureau now appeals.

Determination of the issues herein requires us to construe the provisions of the subject insurance policy under the facts of record. Issues of construction of an insurance policy and the rights and obligations of the parties thereunder may involve mixed questions of law and fact. *Nationwide Mut. Ins. Co. v. Peek.* [1] **[***5]** However, when the trial court merely construes and interprets a contract where the material facts are undisputed, "an appellate court owes no particular deference to such legal conclusions," and the review is de novo. (Punctuation omitted.) *McCombs v. Southern Regional Med. Center*, [2] *Balata Dev. Corp. v. Reed.* [3]

1. Farm Bureau enumerates as error the trial court's order to defend Pirkle against Catlin's negligence and gross negligence claims occurring before the September 12, 2000 termination of the policy.

"If the facts as alleged in the complaint even arguably bring the occurrence within the policy's coverage, the insurer has a duty to defend the action." *City of Atlanta v. St. Paul Fire &c. Ins. Co.* [4] **[***6]** It is well established that the allegations of the complaint and third-party complaint provide the basis for

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[1] *Nationwide Mut. Ins. Co. v. Peek*, 112 Ga. App. 260, 262 (145 S.E.2d 50) (1965).

[2] *McCombs v. Southern Regional Med. Center*, 233 Ga. App. 676, 681 (2) (504 S.E.2d 747) (1998).

[3] *Balata Dev. Corp. v. Reed*, 249 Ga. App. 528, 529 (548 S.E.2d 668) (2001).

[4] *City of Atlanta v. St. Paul Fire & Marine* Ins. Co., 231 Ga. App. 206, 207 (498 S.E.2d 782) (1998).

determining whether liability exists under the terms of the insurance policy. See *Great American Ins. Co. v. McKemie*; [5] *Bates v. Guaranty Nat. Ins. Co.* [6] The one claiming a benefit has the burden of proving that a claim falls within the coverage of the policy. *Allstate Ins. Co. v. Grayes.* [7]

Catlin's complaint alleged that Pirkle licensed timber rights to Catlin, but failed to inform Catlin that condemnation proceedings had begun and also failed to inform Hall County that the property now had a lien attached to it. Additionally, the complaint alleged that Pirkle specifically warranted to Catlin that he had the right to **[*813]** sell the timber under the terms of their contract. Finally, Catlin's amended complaint sought punitive damages, describing Pirkle's acts and omissions as "wilful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences and their effects upon Third-Party Plaintiff." See O.C.G.A. § 51-12-5.1.

Regardless of the outcome of Catlin's suit, Farm Bureau would **[***7]** not be obligated to pay the claims because Catlin's factual allegations do not constitute an occurrence. Occurrence is defined by the policy as an "accident," which in Georgia means "an event which takes place without one's foresight or expectation or design." (Punctuation omitted.) *O'Dell v. St. Paul Fire &c. Ins. Co.* [8]

First, the only reasonable inference to be drawn from the alleged facts is that Pirkle's failure to inform Catlin and Hall County of each other's interest was not an "accident." In that regard, this case is analogous to *City of Atlanta, supra*, where we held that the insured city's instruction to its contractor to clear property it knew was privately owned was not an "accident" and thus not an **[**718]** "event" within the meaning of its policy. *Id. at 208 (498 S.E.2d 782)*.

We note that Catlin's damages resulted from the State's obtaining title to certain real property through condemnation **[***8]** . Pirkle had warranted to Catlin his right to sell the timber and permit its harvesting through February 15, 2002, with knowledge of the pending condemnation proceeding. These facts constitute a breach of contract, or fraud, and any loss is not a covered occurrence under the terms of the policy.

Pirkle's failure to advise Hall County of the lien created by the August 15, 2000 contract did not itself cause injury to Catlin. Moreover, Pirkle's decision to enter into the contract with Catlin was a deliberate, *intentional* act of which the damages were a natural and expected consequence. Pirkle cannot negotiate and consummate a contract with Catlin with knowledge of the State's pending condemnation action and then look to his insurance company to defend him, or to insulate him, from the damages which naturally resulted from his conduct. Pirkle intentionally struck a bargain within three days of the filing of the condemnation petition and received the sum of $ 36,500 in exchange for the right of Catlin to cut timber through February 15, 2002, knowing that title to the property would transfer to the State long before that time. His conduct in this contract matter **[***9]** does not constitute an "occurrence" or an "accident" and is not

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[5] *Great American Ins. Co. v. McKemie*, 244 Ga. 84, 85-86 (259 S.E.2d 39) (1979).

[6] *Bates v. Guaranty Nat. Ins. Co.*, 223 Ga. App. 11 (476 S.E.2d 797) (1996).

[7] *Allstate Ins. Co. v. Grayes*, 216 Ga. App. 419 (454 S.E.2d 616) (1995).

[8] *O'Dell v. St. Paul Fire & Marine Ins. Co.*, 223 Ga. App. 578, 580 (478 S.E.2d 418) (1996).

covered by the policy. The trial court erred in holding otherwise, and we must reverse.

[*814] Second, by seeking punitive damages, Catlin has explicitly alleged that the act was intentional or at least evinced an expectation of harm. See *Consolidated American Ins. Co. v. Spears* [9] **[***10]** (facts necessary to support punitive damages require a level of intent greater than that necessary to trigger the "intended or expected" exclusion in insurance policy); *Tecumseh Products Co. v. Rigdon* [10] ("conscious indifference to consequences" relates to an intentional disregard of the rights of another, knowingly or wilfully disregarding such rights); *E-Z Serve Convenience Stores v. Crowell* [11] ("reckless and wanton disregard of consequences" may evince an intention to inflict injury and is equivalent to an intentional tort). Deliberate acts with expected consequences are simply not covered by the policy. Therefore, Farm Bureau was under no obligation to defend Pirkle in this action. The trial court erred in holding otherwise, and we must reverse.

2. Because of our holding, it is unnecessary to address Farm Bureau's remaining arguments.

Judgment reversed. Ellington and Phipps, JJ., concur.

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[9] *Consolidated American Ins. Co. v. Spears*, 218 Ga. App. 478, 480 (462 S.E.2d 160) (1995).

[10] *Tecumseh Products Co. v. Rigdon*, 250 Ga. App. 739, 743 (552 S.E.2d 910) (2001).

[11] *E-Z Serve Convenience Stores v. Crowell*, 244 Ga. App. 43, 45 (535 S.E.2d 16) (2000).

IN THE COURT OF APPEALS
STATE OF GEORGIA

EUGENE OSCAR SWAFFORD,	:	
	:	
Appellant,	:	
	:	
vs.	:	Docket No. A14A0042
	:	
JEFF ELKINS and QUALITY OUTDOOR PRODUCTS OFTHE SOUTHEAST, LLC,	:	
	:	
Appellee.	:	

BRIEF OF APPELLANT

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IN THE COURT OF APPEALS
STATE OF GEORGIA

EUGENE OSCAR SWAFFORD,	:	
	:	
Appellant,	:	
	:	
vs.	:	Docket No. A14A0042
	:	
JEFF ELKINS and	:	
QUALITY OUTDOOR PRODUCTS	:	
OFTHE SOUTHEAST, LLC,	:	
	:	
Appellee.	:	

BRIEF OF APPELLANT

COMES NOW, EUGENE OSCAR SWAFFORD, Appellant and Plaintiff below, and files this Brief in Support of his appeal from the Superior Court of Haralson County, which set aside a default judgment obtained against co-defendant Quality Outdoor Products of the Southeast, LLC. Appellant shows that the trial court erred in concluding that Appellee was not subject to the jurisdiction of a Georgia Court under O.C.G.A. § 9-10-91, and in concluding that Appellee did not waive the issue of personal jurisdiction under the Long Arm Statute.

PART ONE: STATEMENT OF THE CASE

On April 14, 2011, Appellant-Plaintiff, a homeowner, filed a lawsuit against Jeff Elkins, a roofing contractor, and Quality Outdoor Products of the Southeast, LLC ("QOP" or "Appellee") in the Superior Court of Haralson County. (R 4-7) The cause of action arose out of Defendant Elkins' failure to properly install a roof on Appellant's home. Appellant also alleged, based on Elkins' representations, that QOP was liable because Elkins was QOP's agent or employee. It is at least undisputed that QOP sells products related to metal carports and metal buildings (R-51), that Defendant Elkins buys them from QOP and installs them as part of his contracting business, and that he installed a QOP carport for Appellant. (R-89)

Defendant Elkins filed a *pro se* Answer (R-12), but soon after filed for bankruptcy protection, and the claim was discharged. After Appellant determined that QOP was not registered to do business in Georgia, but was a business entity registered with the State of Alabama. (R-42) Appellant served QOP's registered agent in that state. (R-10-11). However, QOP failed to file an Answer, apparently because the registered agent never informed QOP. (R-91) Based on QOP's default, Appellant filed a Motion for Entry of Default Judgment, which was granted on August 10, 2011. (R-16) Following a damages hearing, judgment was

entered for Appellant against Appellee QOP for $8,500.00 plus court costs and interest. (R-26) Appellant eventually located QOP's home office in Tennessee and served it with post-judgment discovery. (R 31-40)

On March 5, 2013, two months after Appellant began attempting to execute the judgment, Appellee filed a Motion to Set Aside. (R 47-53) Appellee claimed that it "had nothing to do with the materials, nor the labor for the roof installation that is the subject of this lawsuit," and that Appellee "did not receive any information about this action until the Plaintiff tried to collect on the judgment.... All notices relating to this action had been sent to the State of Alabama." (R-47) Appellant responded to the motion, pointing out that Appellee had not raised any valid legal grounds to set aside the judgment pursuant to O.C.G.A. § 9-11-60, only contending that Appellant had sent its notices to Alabama (which was true), that it had no notice of the lawsuit (which was irrelevant), and that Appellee was not liable. (R 54-60)

3 Appellee DK 7/22/15

On March 21, 2012, Appellant filed an amended Motion (containing Jeff Elkins' affidavit explaining that he was an independent contractor, and Alabama Registered Agent Linda Elkins, explaining that she never sent he Complaint to QOP's home office). Two weeks later, Appellee filed a Reply to Plaintiff's

Response, which again stressed that QOP had no actual notice because its agent hadn't sent it the lawsuit, and complaining that Appellant should not have pursued the judgment because Jeff Elkins told Appellant that QOP had "nothing to do with the lawsuit." (R 94-95)

> "For these reasons, the motion to set aside should be granted. **If the plaintiff truly does have a case against Quality Outdoor Products of the Southeast, LLC, then it should prevail upon the evidence.** The company hereby consents to venue in Haralson County and will acknowledge service."

(R-95) (Emphasis supplied.)

After an oral argument in which Appellee again emphasized the unfairness of Appellee's purported "lack of notice" (R-97), the parties filed one more round of briefs. On June 19, three months after filing its initial motion, Appellee abandoned its "lack of notice" ground, and raised for the first time a lack of personal jurisdiction under Georgia's Long Arm statute OCGA § 9–10–91(1), specifically a failure to meet the three-prong minimum contacts test set forth in *Vibratech, Inc. v. Frost*, 291 Ga. App. 133, 137, 661 S.E.2d 185 (2008). (R 106-08) Appellant responded that the issue of personal jurisdiction under the Long Arm Statute was waived, but that it lacked merit in any event. (R 110-115) In a

follow up brief, Appellee of course disagreed, and again asked the trial court to "allow the lawsuit to show how QOP is connected to the Plaintiff's claims." (R-118)

In its Order, the trial agreed that service was proper, but ruled (in a footnote) that the Long Arm Statute issue was not waived, concluding that Appellant had "not acquired long arm jurisdiction" because QOP had not "purposefully done some act or consummated some transaction in this state..., such that [QOP] should reasonably anticipate being haled into court...." (R-126) What began as a Motion to Set Aside a Judgment based on defective service apparently evolved into a Motion to Dismiss based on lack of personal jurisdiction. The trial court then not only granted Appellee's motion to set aside the judgment, but dismissed the lawsuit altogether. (Id.)

PART TWO: ENUMERATION OF ERROR

1. The trial court erred in ruling that Appellee did not waive the issue of personal jurisdiction under the Long Arm Statute.
2. The trial court erred in concluding that it lacked personal jurisdiction over Appellee under the Long Arm Statute.
3. The trial court erred in dismissing Appellee rather than simply setting aside the default judgment, as Appellee had requested.

Standard of Review

> In Georgia, a defendant who files a motion to dismiss for lack of personal jurisdiction has the burden of proving lack of jurisdiction. Where, as here, the motion was decided on the basis of written submissions alone, "any disputes of fact in the written submissions supporting and opposing the motion to dismiss are resolved in favor of the party asserting the existence of personal jurisdiction," and the appellate standard of review is nondeferential.

Home Depot Supply, Inc. v. Hunter Management LLC, 289 Ga.App. 286, 286, 656 S.E.2d 898 (2008) (footnotes and citations omitted).

PART THREE: ARGUMENT AND CITATION TO AUTHORITY

Appellee waived issues of lack of jurisdiction under the Long Arm Statute by arguing only issues of notice and substantive defenses, and by explicitly consenting to a trial on the merits. Even if the issue was not waived, evidence that Appellee sold related products to independent contractors in Georgia provided a sufficient connection to the lawsuit to convey jurisdiction. Finally, the trial court was not authorized to convert Appellee's motion into a Motion to Dismiss when Appellee's motion requested only that the default judgment be set aside.

I. Appellee waived the Issue of Lack of Personal Jurisdiction under the Long Arm Statute

Although a nonresident does not waive the defense of lack of jurisdiction merely by failing to answer the complaint (even if properly served, as in this case), that defense may still be waived by making a general appearance or otherwise engaging in litigation without raising the issue. Generally "a waiver results when a nonresident submits to the jurisdiction of the court by seeking a ruling from the court on the merits of the case or otherwise enters a general appearance without raising the issue." *Hoesch America, Inc. v. Dai Yang Metal Co., Ltd.*, 217 Ga.App. 845, 848, 459 S.E.2d 187 (1995)

In this case, Appellee's first *four* appearances over the course of three months made no mention of personal jurisdiction, and repeatedly argued that, because Appellee had been served in Alabama (which turned out to be proper), it had no opportunity to prove it was not liable. Appellee sought only a "fair" opportunity to argue the merits of the claim. Appellee's Reply Brief was quite explicit on this point.

> "For these reasons, the motion to set aside should be granted. **If the plaintiff truly does have a case against Quality Outdoor Products of the Southeast, LLC, then it should prevail upon the evidence.** The company hereby consents to venue in Haralson County and will acknowledge service."

Thus, not only did Appellee fail to raise the issue, it actively waived it, by seeking a trial on the merits.

In *Packer Plastics, Inc. v. Johnson*, 205 Ga.App. 797, 423 S.E.2d 690 (1992), Johnson, a Georgia resident, filed a motion contesting the domestication of a default judgment from Kansas, arguing that Kansas lacked personal jurisdiction over him when it obtained the judgment. However, Johnson had previously filed a motion to set aside the default judgment in the Kansas court, seeking only to open the default and arguing that his failure to file an answer was due to excusable

neglect (an available basis to open a pre-judgment default under O.C.G.A. § 9-11-55 (b)). In reversing the Georgia court's order vacating the default judgment, the Court of Appeals held that "Johnson appeared in the Kansas court and thus had the opportunity to litigate the issue of lack of personal jurisdiction when he filed his motion to set aside the default judgment. Johnson is therefore precluded from collaterally attacking Packer Plastic's action to domesticate the default judgment on the basis of lack of personal jurisdiction." *Id.* at 798.

Here, the same principles apply. The grounds for Appellee's Motion to Set Aside the judgment, filed on or about March 6, appeared to be lack of notice of the lawsuit itself, with evidence presented as to the lack of substantive merit (analogous to presenting a meritorious case under oath under O.C.G.A. § 9-11-55)[1]. Appellee's Amended Motion in May merely amplified the service issue with an affidavit from Appellee's registered agent.

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[1] However, "it is well established that prior to entry of final judgment in a default situation, the proper motion by the defaulting party is a motion to open default pursuant to OCGA § 9–11–55(b); once final judgment is entered, the provisions of OCGA § 9–11–55(b) are inapplicable and the case must proceed under OCGA § 9–11–60." *Smithson v. Harry Norman, Inc.* 192 Ga.App. 796, 386 S.E.2d 546 (1989)

Even at oral argument in June, Appellee did not raise the issue of jurisdiction under the Long Arm Statute, but continued to argue lack of proper notice to Defendant and a lack of substantive merit to the claim.

In its final supplemental post-argument brief, Appellee contended that it had indeed raised the issue, by arguing and presenting evidence that "it had nothing to do with the lawsuit." Clearly, however, Appellee had simply been arguing that a default judgment was unfair because Appellee was "innocent" and should have a chance to defend on the merits. That is not the same as making a jurisdictional argument.

II. Jurisdiction was Proper under the Long Arm Statute

"A motion to set aside may be brought to set aside a judgment based upon: (1) Lack of jurisdiction over the person or the subject matter...." O.C.G.A. § 9-11-60 (d) The burden of showing lack of jurisdiction is on the movant. *Tanis v. Tanis*, 240 Ga. 718, 242 S.E.2d 71 (1978). O.C.G.A. § 9-10-91 provides in pertinent part:

> A court of this state may exercise personal jurisdiction over any nonresident or his or her executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use, or possession enumerated in this Code section, in the same manner as if

he or she were a resident of this state, if in person or through an agent, he or she:

(1) Transacts any business within this state;

(2) Commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act; ...

O.C.G.A. § 9-10-91

Appellant's Complaint alleged that Defendant Elkins failed to live up to his obligations under a contract to install a metal roof, and was negligent in the manner in which he installed it, causing additional damages as a result.

Appellee is correct that *Vibratech, Inc. v. Frost*, 291 Ga.App. 133, 661 S.E.2d 185 (2008), lays out a three-part test for jurisdiction under O.C.G.A. § 9-10-91 (1), which makes the Long Arm Statute slightly more restrictive than the Constitution demands, by requiring not only that "(1) the nonresident defendant has purposefully done some act or consummated some transaction in this state," but that (2) "the cause of action arises from or is connected with such act or transaction...." *Id.* at 137 (quoting *Aero Toy Store v. Grieves,* 279 Ga.App. 515, 518, 631 S.E.2d 734 (2006). This is essentially the difference between general jurisdiction and specific jurisdiction. See *Grieves*, supra at 521 ("when a[s]tate

exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the [s]tate is exercising specific jurisdiction over the defendant").

Generally, the requirement of a connection between the cause of action and the defendant's acts within the state (i.e., specific jurisdiction) means that "before a nonresident may be sued in Georgia, such nonresident "must have purposefully directed (its) activities at residents of the forum, and the litigation must result from alleged injuries that arise out of or relate to those activities." *Sol Melia, SA v. Brown*, 301 Ga.App. 760, 764, 688 S.E.2d 675 (2009) In *Sol*, a Georgia plaintiff booked a vacation package with a hotel in the Dominican Republic and sued in Georgia when a taxi which a hotel employee called for him was involved in a collision, injuring the plaintiff. Issues of proximate cause aside, the Court of Appeals held that because the defendant's Georgia vacation packages did not include transportation, there was simply no connection between what the defendant allegedly did wrong (which was unclear from the facts of the case), and the purpose of the defendant's Georgia contacts (selling hotel packages).

Under Subsection (1), Georgia has jurisdiction because Appellee's acts within the State and Appellant's claims are connected. Although Appellee may

dispute the accuracy of the claims, they still arise out of Defendant Elkins' negligence as an employee or agent of QOD. Elkins admitted in his Answer ("I install carports for them") that he was hired by QOP to do installations, and the only difference between that admission and Appellant's claim is whether the roof is for a porch or carport on the same house. This is a far cry from attempting to hold a Dominican hotel liable in Georgia for the negligence of a Dominican taxi cab driver for an incident that occurred in another country.

In addition, although captioned "Suit for Breach of Contract," the claim additionally sounds in tort. See *Thomson Motor Co. v. Story*, 59 Ga.App. 433, 1 S.E.2d 213, 214 (1939). O.C.G.A. § 9-10-91(2) (committing a tort within the state through an agent) provides yet another basis for jurisdiction, because Plaintiff alleged that Elkins was employed by QOP and that Elkins committed a tort within the state.

III. The Trial Court lacked Authority to Dismiss Appellee.

The trial court did not merely grant Appellee motion, but ruled that "Defendant Quality Outdoor Products of the Southeast, LLC is DISMISSED." (R-127). However, throughout its pleadings, Appellee sought only that the default

judgment be set aside so that Appellee could defend the suit on the merits. Appellee never sought an outright dismissal.

"The Civil Practice Act provides that every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings, providing the matter is litigated. OCGA §9-11-54(c)(1)" (emphasis supplied.) *Mr. Transmission, Inc. v. Thompson*, 173 Ga.App. 773, 774, 328 S.E.2d 397 (1985). "The propriety of the relief must have been litigated and the opposing party must have had opportunity to assert defenses to such relief." *Church v. Darch*, 268 Ga. 237, 486 S.E.2d 344 (1997) (injunctive relief granted in suit for money damages was authorized when the plaintiff argued for injunctive relief and presented evidence authorizing it during the trial).

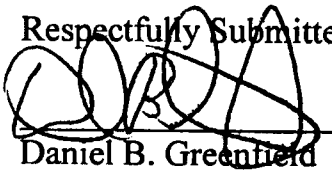
Here, Appellee simply never asked for dismissal, and therefore Appellant had no opportunity to argue against it. The issue of whether Appellee should be dismissed was never litigated, and the trial court should not have dismissed Appellee (and, effectively, the entire lawsuit, given that the co-defendant has been discharged in bankruptcy).

CONCLUSION

Georgia has jurisdiction over the Appellee, because Appellee regularly introduces products not just into the stream of interstate commerce, but directly into the hands of a contractor for installation in Georgia, whose negligence in installing those products is the basis of Appellant's claim. It does not offend notions of fundamental fairness for a company to be sued in Georgia for the negligent installation of its products by contractors it hires.

Regardless, however, Appellee's repeated appearances before the court arguing only service issues and substantive merit, and expressing its earnest desire to have its day in court have waived the issue.

Respectfully Submitted,



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IN THE COURT OF APPEALS
STATE OF GEORGIA

FREIDA C. THOMAS,	:	
	:	
Appellant,	:	
	:	
vs.	:	Docket No. A13A2372
	:	
DONALD CHANCE,	:	
	:	
Appellee.	:	

BRIEF OF APPELLANT

COMES NOW, FREIDA THOMAS, Appellant and Plaintiff below, and appeals the order of the Superior Court of Carroll County, in which it granted summary judgment to Appellee-Defendant Donald Chance. In this suit to enforce re-payment of a loan, Appellant Thomas shows that the trial court erred in concluding that the loan was unenforceable because it lacked the "essential terms" of a maturity date and specified interest rate. Appellant Thomas shows that the loan at issue was interest-free and payable on demand, which is sufficiently specific, and that jury issues remain regarding whether Appellee Chance agreed to repay the funds which were indisputably advanced by Appellant.

PART ONE: STATEMENT OF THE CASE

Appellant Freida Thomas sued her brother, Appellee Donald Chance, to recover more than $100,000 in loans made to him between approximately 1998 and 2000. Appellee contends that the payments were not loans.

Thomas was the president and 90% owner of Formaboard, Inc. Over several years, starting in the late 1980s, she hired each of her three siblings, Donald Chance, Joan Chance Hayes, and Andy Chance to work at Formaboard. (*Deposition of Freida Thomas*, D-15, 21.) In 1998, Thomas met with Donald, Joan and Andy to tell them she had decided to sell the business. Thomas agreed to help each of them with their financial needs during the transition by lending them money. (Plaintiff Interrogatory Responses, R-202; *F. Thomas dep.*, D. 43-44.) Thomas explained that when her own financial need arose, she would demand repayment of the loans. (R-202) As Ms. Thomas testified:

> Q: Okay, can you recall if you specifically told Donald that these were loans that he would have to repay at some point?
>
> A: I did.
>
> Q: You did tell him that, correct?
>
> A: I did tell him that.
>
> Q: Okay.

A: I told the three of them that these were loans, and when I needed to recall the loans I would let them know.

Q: Okay. Do you recall Donald, particularly, telling you that he would repay these loans?

A: There was no disagreement.

(*F. Thomas dep.*, D-44.)

The parties' brother, Andy Chance, had a similar recollection:

A: Well, as the company was being prepared to be sold, as Freida was streamlining and working negotiating with ITW, we had several meetings about it.

Q: About?

A: About the sale of the company –

Q: Uh-huh.

A: -- and the fact that she hoped to be able to distribute or share some of the proceeds in the form of a loan. It would have to be in the form of a loan.

Q: But you didn't specifically hear her say she was going to loan Donald money, correct?

A: All of us. All three of us in that context, yes.

Q: You heard her say that she was going to lend Donald money?

A: Donald, Joan, and Andy. The three of us. She was addressing the three of us, yes.

(R. 145-146; T. 37-38)[1]

All three accepted funds almost immediately, with Donald requesting that his payments be made out in separate checks to himself and to his wife Beverly and their son Clint. (*F. Thomas dep.*, D. 34 et seq. and Exhibit 1; R-203) Joan and Andy testified that ledgers prepared by Thomas were reasonably accurate records of the funds loaned to them between 1998 and 2000 (*Hayes dep.*, D-21; *Andy Chance dep.*, D-34) During the same period, Thomas lent Donald Chance money either by writing checks directly to him or his family, giving him cash, or by making payments to merchants on his behalf. (*F. Thomas dep.*) As time went by and Appellant loaned more money, she periodically reminded Donald, generally with each payment, that if she her own cash flow was depleted, she would need to call the loan(s) due and payable. (R-202) Finally, in October 2000, Donald Chance requested two $10,000 checks, one to Beverly Chance and one to Clint Chance. (*F. Thomas dep.* D-40, Exhibit 1 page 2.)

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[1] Appellant served a Request to File Original Discovery on Appellee to file the deposition transcript of Andy Chance (R-132), but Appellee apparently failed to do so. However, portions of the transcript quoted herein were attached to Appellee's own summary judgment motion brief and authenticated by Defense Counsel. (R-102) The parties also stipulated at oral arguments that the Court could consider it.

Eventually, Appellant Thomas's need for funds did arise, and by 2009 Joan and Andy had fully re-paid the money she had lent to them. (*Hayes dep.*, D. 21-24; *A. Chance dep.,* T-36, R-144) As for Donald Chance, Ms. Thomas testified that she made an oral demand for repayment upon him in late 2007 (R-2006), and more formally met with Donald, Andy, and Joan "in July or August of 2009, and ... at that time made a specific request that Donald re-pay $100,000. Donald indicated that he was unable to pay it all at once, but said he would get back to Appellant to discuss the amount he could start paying. However, he did not." (R. 205-206; *F. Thomas dep.*, D. 46-47.) After written demands went unheeded, Appellant Thomas filed this lawsuit.

After extensive discovery, Appellee filed a motion for summary judgment, arguing that there was no evidence he had agreed that the funds received from Appellant Thomas were a loan.[2] The trial court granted summary judgment on different grounds, concluding that the alleged terms lacked essential elements.

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[2] Appellee also argued strenuously that the plaintiff and her witnesses lacked credibility. However, it is well-settled that "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, when he is ruling on a motion for summary judgment. [Cit.] *Tronitec, Inc. v. Shealy*, 249 Ga.App. 442, 448, 547 S.E.2d 749 (2001) (overruled on unrelated grounds).

PART TWO: ENUMERATION OF ERROR

1. The trial court erred in concluding that because the loan agreement lacked a maturity date and did not specify an interest rate, it was unenforceable.

Standard of Review

On appeal from the denial or grant of summary judgment, the appellate court conducts "a de novo review of the evidence to determine whether there exists a genuine issue of material fact, and whether the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law." (Citations and punctuation omitted.) *Benton v. Benton*, 280 Ga. 468, 470, 629 S.E.2d 204 (2006).

PART THREE: ARGUMENT AND CITATION TO AUTHORITY

Summary Judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law; but nothing in this Code section shall be construed as denying to any party the right to trial by jury where there are substantial issues of fact to be determined." OCGA § 9-11-56 (c) " 'If, and only if, no disputed issue of material fact remains is the trial court authorized to grant summary judgment.' *Georgia Canoeing Assn. v. Henry*, 263 Ga. 77, 78, 428 S.E.2d 336 (1993)." *Montgomery v. Barrow*, 286 Ga. 896, 898, 692 S.E.2d 351 (2010).

A. The Loan Agreement was Enforceable.

A loan agreement need not be in writing and does not require a definite maturity date. "Simple contracts may either be in writing or rest only in words as remembered by witnesses" (OCGA 13-1-5), and an oral contract is just as binding as a written contract. *Venable v. Block*, 138 Ga.App. 215, 225 S.E.2d 755 (1976); OCGA § 13-1-6. "Open-ended" loans or loans whose maturity is contingent upon an event or circumstance, such as the one made in this case, have been held

enforceable. *Mills v. Barton,* 205 Ga.App. 413, 422 S.E.2d 269 (1992); *Murphy v. Varner*, 292 Ga.App. 747, 748, 666 S.E.2d 53 (2008).

In *Mills v. Barton*, a stepmother sued her stepdaughter to recover money she had lent under an oral loan agreement. There, the plaintiff testified that her stepdaughter had approached the plaintiff's husband (the defendant's father) and told him that she wanted to borrow $10,000 from the plaintiff.

> Defendant did not communicate directly with plaintiff because they had a strained relationship. Plaintiff gave around $10,000 to her husband to give to his daughter. Plaintiff testified she expected the loan to be paid back when defendant was able to repay it. Defendant later claimed she understood it to be a gift from her father [who died before the lawsuit was filed]. She denied she agreed to accept a loan. Plaintiff, however, testified defendant had acknowledged to her on numerous occasions that she owed plaintiff money, had thanked her and told her she had plans to repay the money.

Id. at 413.

The three-judge panel explicitly rejected "defendant's enumerations of error in which she argues no contract existed because the parties did not reach an

enforceable agreement." *Id.* at 414 (the opinion included a special concurrence on an unrelated holding).

> "Construing the evidence in the light most favorable to the judgment, as we are required to do, the evidence showed the defendant, through her father as her agent, accepted the money from the plaintiff in exchange for the understanding that she would repay the plaintiff when she was financially able. Even when the terms of an agreement are too indefinite to be enforceable, it may later become enforceable " 'by virtue of the subsequent acts, words, or conduct of the parties....' " [Cit.]" *Pine Valley Apts., etc., v. First State Bank*, 143 Ga.App. 242, 245, 237 S.E.2d 716 (1977).

Id. at 414. See *Murphy*, supra; *McRae v. Smith*, 159 Ga.App. 19, 282 S.E.2d 676 (1981) (parties understood only that loans would be repaid when borrower was able, within a reasonable time).

In this case, an expectation of repayment when the lender's need arose is equivalent to expectation of repayment when the borrower's ability arose. Similarly, Donald Chance's response to Thomas's 2009 oral demand that he could not pay all the money back at once but would see how much he could pay, is no

different than the stepdaughter in *Mills* telling the plaintiff that she had plans to repay the money. This manifestation of assent, among others, also cures any possible argument, valid or not, that the terms of the loan were too vague or open-ended to be enforced.

Dolanson Co. v. Citizens & Southern Nat. Bank, 242 Ga. 681, 251 S.E.2d 274 (1978) and *Wachovia Bank of Georgia, N.A. v. Mothershed*, 210 Ga.App. 853, 437 S.E.2d 852 (1993), cited by the trial court for the proposition that a loan is unenforceable "which fails to specify an interest rate and a maturity date" do not change the result, for three reasons.

First, the holdings in the above cases are not as broad as their language (in isolation) would suggest. The lack of a maturity date does not automatically render a loan unenforceable. See *West v. Diduro*, 312 Ga.App. 591, 718 S.E.2d 815 (2011) ("buyers' oral promise to pay the $10,000 shortfall at an unspecified future time, if proved at trial, would be analogous to a promissory note without any specified due date. The absence of a maturity date in a promissory note would not render the note uncertain and vague, but would merely create an obligation due on demand." *Id.* at 597, fn 12)

Second, the loans do have a "maturity date," even though the exact date could not, at the time the loan was made, be ascertained. As in *Mills*, supra, repayment was contingent upon an event or circumstance, which, although not known when the money was lent, was not held to be too indefinite. A specific named numeric date is not necessary.

Third, the cases cited by the trial court involve defendants countersuing plaintiff banks for the bank's failure to follow through on an alleged oral promise to loan money. Unlike in this case, no funds were tendered, and no part of the alleged agreement was performed. In those cases, the alleged contracts were held to be unenforceable "contracts to enter a contract." See *Malone Const. Co., Inc. v. Westbrook*, 127 Ga.App. 709, 194 S.E.2d 619 (1972), another unexecuted commercial loan case cited by the trial court. The loan agreement in this case was not a "contract to make a contract," because it had already been partially performed.

Fourth, an "interest rate" in this case was not an essential term, because there was no interest. Both *Dolanson Co. v. Citizens & Southern Nat. Bank* and *Wachovia Bank of Georgia, N.A. v. Mothershed* involved alleged promises to make commercial construction loans by banks in which interest rates were obviously

essential terms. See *Advance Tufting, Inc. v. Daneshyar*, 259 Ga.App. 415, 417, 577 S.E.2d 90 (2003) (contrasting a personal loan between relatives with a commercial account). Here, none of the siblings ever testified to repaying the principal with interest, and the obvious inference is that these intra-family loans were interest free.

B. **There is Evidence Appellee manifested his Assent when he accepted Funds from 1998 to 2000 and when he promised to Repay them in 2009.**

Appellee Chance argued repeatedly below that there was no evidence that he agreed his sister's payments were a loan, and therefore there was no mutual assent. The trial court did not issue its ruling on that basis. However, from an abundance of caution, Appellant will address the issue. Simply put, there is ample evidence (denied by Appellee, of course), that Donald Chance accepted funds from Freida Thomas with full knowledge that they were to be paid back, and confirmed at various times that he understood. Even if Donald Chance never said a word, however, Thomas's evidence would still bind him.

"Acquiescence or silence, when the circumstances require an answer, a denial, or other conduct, may amount to an admission. OCGA § 24-3-36." *St. Mary's Hosp. of Athens, Inc. v. Cohen,* 216 Ga.App. 761, 763, 456 S.E.2d 79

(1995) Here, there is evidence not only of Appellee's affirmative agreement to repay the loan at the time he received payments, but he accepted the money after hearing Appellant describe the funds as a loan in the presence of his siblings. To accept loan payments for two years and now claim that these loans were something else entirely, works a fraud upon Appellant. That Andy Chance and Joan Hayes repaid their loans, provides further circumstantial evidence that all parties understood the nature of these payments to be loans, not bonuses or charity.

A party does not need to sign a contract to be bound by its terms, if he accepts the benefits of the contract. See, e.g., *Cahoon v. Kubatzky* 138 Ga.App. 393, 397, 226 S.E.2d 467 (1976). This principle is just as valid in the context of an oral agreement as it is in a written one. Chapter 3 of The Restatement (Second) of Contracts, Topic 5, § 69, "Acceptance Of Offers," states this fundamental principle of contract law, applicable to this situation:

"Acceptance By Silence Or Exercise Of Dominion:

(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:

(a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to

know that they were offered with the expectation of compensation.

...

REST 2d CONTR § 69

The associated Comments note that "the exceptional cases where silence is acceptance fall into two main classes: those where the offeree silently takes offered benefits, and those where one party relies on the other party's manifestation of intention that silence may operate as acceptance."

In Georgia, the doctrine of acquiescence by silence, whereby silence when one should speak can be an admission to the truth or accuracy of another's statement, is centuries old. It is codified at O.C.G.A. § 24-8-801 (2) of the new version of Georgia's Rules of Evidence (unchanged in this respect from the prior statute), which states that "admissions [by a party opponent] shall not be excluded by the hearsay rule. An admission is a statement offered against a party which is: ... (B) A statement of which the party has manifested an adoption or belief in its truth;..." (Emphasis supplied.) Importantly, the manifestation need not be verbal. See, e.g., *Giles v. Vandiver*, 91 Ga. 192, 17 S.E. 115 (1893); *Wilensky v. O.C. & H.E. Martin*, 60 S.E. 1074 (Ga. App. 1908) (silence in the face of a defendant

landowner's statement that he would not be liable if the plaintiff's horse were injured on the defendant's pasture, and the plaintiff's silence, "incorporated into the contract a limitation excluding any liability … for injury resulting from the well or the canal….").

Thus, even if Donald Chance **never** explicitly agreed that the funds were loans, not a gifts (and Thomas has presented evidence that he did), he would be bound to repay them, because Appellant made this clear again and again. Here, there is evidence Chance heard Thomas explain the purpose and nature of the payments at the 1998 meeting. Chance indisputably accepted payments, the first and largest ($30,000 and $40,000) within months of the meeting. And Thomas testified that she reminded her brother, on multiple occasions, as she handed him more money, that these were loans which would need to be repaid in the future. Finally, Thomas testified that, when she "called" the loan at a family meeting in 2009 and asked Chance to repay $100,000, he merely protested that he was unable to pay it all back at once, and would let Thomas know how much he could begin to pay, and when. Evidence of Appellee Chance's assent is as bountiful as the harvest he reaped from his sister's hard work.

CONCLUSION

In the context of an interest-free family loan, a specific maturity date is not required, but a contingent event may serve that purpose (see *Miller*, supra). The loan can even be made and called "on demand." Moreover, subsequent conduct (such as accepting the funds and otherwise acquiescing to the terms) can shore up any potential weakness in the agreement. The trial court mistakenly failed to apply these principles, instead relying on commercial bank loan cases where the money was allegedly orally promised but never tendered, and where actual essential terms were left open. Here, the terms were certainly clear to at least two of the siblings, who abided by this agreement.

Donald Chance had a duty to decline the funds and disagree with his sister when she reminded him of his obligation to repay them. His silence constituted an admission that he knew the payments were loans, not gifts, and his response to Appellant's 2009 oral demand ("I don't have that much money, I'll let you know how much I can pay and when I can pay it") was also an admission that he owed the money. The trial court erred in granting Appellee's motion for summary judgment, and should be reversed.

(*FREIDA C. THOMAS v. DONALD CHANCE*
Court of Appeals docket No. A13A2372
BRIEF OF APPELLANT
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Respectfully submitted,

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