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The Effect of Georgia's Architectural Statutes of Limitations on Real and Personal Property Claims for Negligent Construction

Robert Jandrlich

THE EFFECT OF GEORGIA'S ARCHITECTURAL STATUTES OF LIMITATIONS ON REAL AND PERSONAL PROPERTY CLAIMS FOR NEGLIGENT CONSTRUCTION

INTRODUCTION

Today's construction projects are complex structures, often towering more than fifty stories. Unlike the simple structures of yesteryear, modern buildings cannot be given a cursory inspection and deemed defect-free. A million bolts connecting thousands of beams bring the architect's dream to life and provide many chances for the occurance of construction flaws.

The inspection of today's modern building cannot guarantee that all latent defects will be detected. The buyer must rely on the professionalism of the contractors, architects, and supervisors of the project. Negligence can still occur and go undetected until damage results which could range from a simple roof leak to a total, perhaps fatal, collapse.

All injured parties, from the owner of a leaky roof to the person injured by its collapse, see their cause of action as springing from the date of the injury. The actual negligent act and the time of its commission may have no meaning for these plaintiffs. They do not see that the negligent installation of a faulty bolt could have caused the roof to collapse. Plaintiffs tend to think the date of injury should be the first moment they had a personal right to a cause of action, not some indefinite time in the past when the negligence occurred. Plaintiffs consider it grossly unfair to mark the running of statutes of limitations with a past event which remains hidden until the plaintiff is injured. Instead, plaintiffs want the date of physical harm established as the legal "date of the injury." Such a date works to the advantage of plaintiffs where claims must be filed within a set period of time. If the legal date of the injury is defined as the date of the negligent act by the defendant, however, plaintiffs have less time to file their claims after physical harm. Therefore, defendants prefer that the legal date of injury be the date of the negligent act, giving plaintiffs a shorter time limit on filing.

Defendants have a second reason for preferring that plaintiffs' time for filing start on the date of the negligent act. Modern construction projects depend on many different professions for their completion, from the drafting architect to the finishing contractor. Immediately after the building is completed, these parties are known and available. If, for example, the sheetrock is faulty, the responsible party can be pinpointed. As more time passes from completion of the building to discovery of the damage, however, it becomes harder to reconstruct the actual cause of the injury and to find the responsible party. Witnesses and records become unavailable, memories fade, and on-site, day-to-day agreements are forgotten. Defendants then must fight an inference that the construction project collapsed because of their negligence. The inference that buildings don't collapse unless defective is difficult to overcome because of the staleness of the claim. Time robs the defendants of their weapons, and the theft is amplified when the law allows prolonged filing periods for plaintiffs.

Many states have come to the aid of the construction industry by enacting special statutes of limitations. The most common form of protection is a repose statute of limitations, which places outside time limits on the initiation of actions and cuts off a plaintiff's right to sue after that time period. Georgia enacted such a statute in 1968.[1] The statute established an eight-year outside limit for initiating claims based on negligence in constructing, designing, or supervising improvement to realty. It also sparked new debate over the traditional application of the statutes of limitations in Georgia, especially the court's method of determining when the appropriate statute of limitations begins to run or which of the several statutes applies.

This Note examines the traditional ways Georgia courts interpreted the statutes, the confusion the repose statute injected into those interpretations, and the current state of the law. The Note also proposes a method for ensuring that statutes of limitations are applied equitably toward both the construction industry and those injured by construction defects.

Section I discusses different methods for determining when the time period for a statute of limitations is triggered with an

1. The law was codified as O.C.G.A. § 9-3-51 (1982), enacted by 1968 Ga. Laws 127. This Note refers to the statute as an "architectural" statute of limitations. Hereinafter the term encompasses the "planning, supervising, and constructing of improvement[s] to realty." *Id.*

emphasis on Georgia case law. Section II addresses the application of Georgia's statutes of limitations to both personal injury actions and real and personal property damage actions. Section III discusses Georgia's architectural repose statute of limitations and the way the Georgia Supreme Court changed its method for determining when the statute is triggered. The *Mercer* decision, which reestablished the traditional method by which courts determine when the statute is triggered, is also examined, along with the current state of Georgia law.

I. ACCRUAL DATES

Identifying the starting point or accrual date of any cause of action is the first and most critical step courts must take in determining whether a statute of limitations bars a plaintiff's claim.[2] For example, in *Bicknell v. Richard M. Hearn Roofing & Remodeling, Inc.*,[3] the defendant completed the roofing of the plaintiff's building on April 7, 1978.[4] In February of 1981, the roof began to leak, and the plaintiff filed a cause of action based on negligence in April 1982.[5] Because, under the Georgia Code, the plaintiff must bring the action "within four years after the right of action accrues,"[6] the critical issue in determining whether Bicknell could proceed was the court's definition of "accrues."[7]

A. The Traditional Method

Historically, the general rule was that a statute of limitations begins running from the time of the negligent act, regardless of the time of the injury or the injured person's awareness of the injury.[8] Often this rule netted harsh results, because years passed

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2. *See* Note, *People Who Live in Glass Houses Should Not Build in Vermont: The Need for a Statute of Limitations for Architects*, 9 VT. L. REV. 101, 111 (1984) [hereinafter *Glass Houses*].

3. 171 Ga. App. 128, 318 S.E.2d 729 (1984).

4. Bicknell v. Richard M. Hearn Roofing & Remodeling, Inc., 171 Ga. App. at 128, 318 S.E.2d at 730.

5. *Id.* at 128–29, 318 S.E.2d at 731.

6. O.C.G.A. § 9-3-30 (1982).

7. *Bicknell*, 171 Ga. App. at 130, 318 S.E.2d at 732. In *Bicknell* the plaintiff did not prevail because the court determined that the cause of action accrued at the time of completion of the project, rather than at the time of discovery of the defect, and the cause of action commenced later than the four-year limitation. *Id.*

8. *See* Kuniansky v. D. H. Overmeyer Warehouse Co., 406 F.2d 818 (1968). The court applied O.C.G.A. § 9-3-24, the six-year statute of limitations governing contracts. The issue was whether the plaintiff's awareness of the defective construction or the signing

between the accrual date and the date of actual injury or discovery of the negligent act.[9]

Under the traditional method, the wrongful conduct triggers the statute, and the parties' difficulties in discovering latent defects or damage are not considered.[10] In an action against an architect, for example, the negligent act and, therefore, the accrual date under the statute of limitations, would be the architect's tendering of the design, regardless of when the actual damage due to the defective design occurred.[11] The decisive factor under the traditional method is when the breach of duty occurred, not the date of the injury or discovery of the defect.[12] It is enough that a breach occurred, which gave rise to a claim in negligence.[13]

B. The Actual Injury Method

Some Georgia courts have considered actual damage or injury an essential component of the traditional rule.[14] The traditional

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of the lease triggers the running of the statute. *Id.* at 820. The court held that the plaintiff's knowledge of the defect is immaterial. It stated that "it is unnecessary that a party be aware of his cause of action or that he have actually suffered damage before the statute begins to run. Thus, the statute begins to run as soon as a complete cause of action accrues." *Id.* at 821. *See also* Davis v. Boyett, 120 Ga. 649, 48 S.E. 185 (1904), in which the court held that the wrongful act (seduction) itself, not the plaintiff-father's knowledge of his daughter's seduction, triggered the statute. *Id.* at 655, 48 S.E. at 186.

9. *See* Kuniansky v. D. H. Overmeyer Warehouse Co., 406 F.2d 818 (1968). In one case, for example, design flaws in the plaintiff's building led to its closure for repairs. The cause of action was dismissed since it was brought more than four years after construction of the building, although it was filed within four years of discovery of the defect. U-Haul Co. v. Abreu & Robeson, Inc., 247 Ga. 565, 277 S.E.2d 497 (1981).

10. Note, *Architectural Malpractice: Toward an Equitable Rule for Determining When the Statute of Limitations Begins to Run*, 16 FORDHAM L. REV. 509, 521 (1988) [hereinafter *Architectural Malpractice*]. "[M]ere ignorance of facts constituting a cause of action ... does not prevent the statute from running." *Id.*

11. Annotation, *When Statute of Limitations Begins To Run On Negligent Design Claim Against Architect*, 90 A.L.R.3d 507, 511 [hereinafter Annotation]. Of course, if the architect were responsible for overseeing the construction of the building, the project's completion would be the starting point. *Id.* at 513.

12. *See, e.g.*, Wellston Co. v. Sam N. Hodges, Jr. & Co., 114 Ga. App. 424, 151 S.E.2d 481 (1966). The *Wellston* court held that the discovery of the defect was immaterial to the running of the statute of limitations. In discounting the time of discovery, the court reasoned that "it cannot be seriously contended that if the plaintiff had discovered the negligence of the defendants at the time it was committed, it would have had no right of action against him simply because the building had not at that time fallen down." *Id.* at 426, 151 S.E.2d at 482.

13. *Id.*

14. Millard Matthews Builders v. Plant Improvement Co., 167 Ga. App. 855, 307 S.E.2d 739 (1983).

rationale still applies under this concept, but the cause of action accrues with the breach of duty when the property is actually damaged.[15] The effects, however, can remain harsh under this method as indicated by the results in *Wellston Co. v. Sam N. Hodges, Jr. & Co.*[16] Although the *Wellston* court used the traditional method to determine the accrual date, it stated that discovery of the actual injury was immaterial, even if that injury were determinative.

The facts of *Wellston* illustrate the court's point that discovery of the injury is immaterial. Negligent construction first manifested itself when the roof began to sag.[17] The sagging was not connected with the negligent construction until the roof finally collapsed.[18] The court stated that the sag alone was sufficient injury to trigger the statute of limitations, and the claim would be barred since it was not brought within four years from when the sag occurred.[19] The court applied the traditional method to bar the claim and discussed in dicta the triggering of the statute by the roof sag.[20]

The actual injury method, like the traditional method, provides little opportunity for plaintiffs to bring claims based on latent defects because they give little notice.[21] In *Wellston*, for example, the sagging roof was so slight that it did not cause the owner concern until the building collapsed.[22] Under either method, however, such defects are enough to trigger the statute of limitations.[23] In Georgia, defective construction meets the

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15. *Id.* at 855, 307 S.E.2d at 741. In this personal property action, the court determined that "the cause of action did not accrue until the actual injury to that property occurred." *Id.* (citing U-Haul v. Abreu & Robeson, Inc., 247 Ga. 565, 277 S.E.2d 497 (1981)).

16. 114 Ga. App. 424, 151 S.E.2d 481 (1966).

17. Wellston Co. v. Sam N. Hodges, Jr. & Co., 114 Ga. App. at 426, 151 S.E.2d at 482 (1966).

18. *Id.* at 425, 151 S.E.2d at 482.

19. *Id.* at 426, 151 S.E.2d at 482.

20. *Id.* The court was explicit, however, that it did not depend on the sag to determine that the four-year limitation had run before the plaintiffs brought their cause of action. *Id.* at 427, 151 S.E.2d at 483. The court employed the traditional rule to find that the statute began to run when the negligent act was committed. *Id.*

21. *Id.* This harsh limitation raises the possibility that daily inspectors are needed during the statutory period to insure that no latent defect manifests itself. In 1985, this rationale changed the law. The Georgia Supreme Court held that it was unreasonable to require parties to hire expert inspectors to protect against latent defects in the extremely complex world of modern construction. Lumbermen's Mut. Cas. Co. v. Pattillo Constr. Co., 254 Ga. 461, 464–65, 330 S.E.2d 344, 347 (1985).

22. *Wellston*, 114 Ga. App. at 426, 151 S.E.2d at 482.

23. *See Wellston*, 114 Ga. App. 424, 151 S.E.2d 481; U-Haul Co. v. Abreu & Robeson, Inc., 247 Ga. 565, 277 S.E.2d 497 (1981).

traditional test of breach of duty by constituting an injury in itself which satisfies the actual injury method.[24] The distinction is purely intellectual since either method nets the same result — the cause of action accrues at the time of the commission of the negligent act.

C. The Discovery Method

A few jurisdictions have adopted a more modern accrual rule based upon discovery of real property damage.[25] The discovery method permits plaintiffs to bring their actions after they know they have been injured.[26] This method benefits plaintiffs because it tolls the running of a statute of limitations until the essential elements of a cause of action are known.[27] Tolling of the statute mitigates the harsh consequences of the traditional and actual injury rules in latent defect cases involving latent defects by allowing plaintiffs to file claims after discovery of the damage.[28]

Discovery of a defect can occur long after the building is completed, the negligent act is committed, or the contract is breached.[29] The likelihood that subcontractors, architects, and suppliers are untraceable increases as the time from completion of the building to the filing of a claim lengthens which may lead to stale claims. The open-ended time frame used in the discovery method can defeat the fundamental purpose of statutes of limitations: the protection of the construction industry from these stale claims.[30]

D. The Substantial Completion Method

The fourth method, "substantial completion," bars claims that are not filed within a fixed length of time after substantial

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24. *Wellston*, 114 Ga. App. at 426, 151 S.E.2d at 482.

25. *See Architectural Malpractice*, *supra* note 10, at 525—27. *See also* Annotation, *supra* note 11, at 509. Florida endorses the discovery rule. Its law specifically states that in latent defect cases "the [statute of limitations] runs from the time the defect is discovered or should have been discovered with the exercise of due diligence." Fla. Stat. Ann. § 95.11(3)(c) (West 1982). *See* Kelley v. School Bd., 435 So. 2d 804 (Fla. 1983) for an example of the application of the statute.

26. *Architectural Malpractice*, *supra* note 10, at 525.

27. *Id.* at 526.

28. *Id.*

29. *Id.*

30. *Id.*

completion of the construction project.[31] Unlike the traditional, actual damage, or discovery methods, this rule is not related to whether the plaintiff could have brought a cause of action during the statutory period.[32] The other methods require that an element of the cause of action trigger the statute of limitations: under the traditional method the time period begins when the duty is breached; under the actual injury method, when the injury occurs; and under the discovery method, when the damage is found.[33] Unlike these, the substantial completion method hinges on an outside condition, the project's completion.[34] In effect, this method can cut off a plaintiff's claim before it ever becomes viable.[35] This method contrasts with the other methods, which require that a viable claim exist before the time period is triggered.[36]

E. Comparison of The Rules

The methods are best illustrated by comparison of their effect on a plaintiff's right to bring a claim. The discovery method is the least restrictive, because the statute of limitations does not begin to run until the plaintiff discovers the wrong.[37] Under this method, the court must first determine that the plaintiff was aware of the defect before the period begins to run.[38] By requiring notice, this rule allows claims to be filed at the time the latent defect causes noticeable damage, which may be years after a claim becomes viable or the project is completed.[39]

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31. *Id.* at 522. "Substantial completion generally means that the building or project has reached a point where it is ready for the use for which it was intended and that whatever work remains to be done is minor." *Id.*

32. Note, *Oklahoma's Statute of Repose Limiting the Liability of Architects and Engineers for Negligence: A Potential Nightmare*, 22 TULSA L.J. 85, 90—91 (1986) [hereinafter *Architects and Engineers*].

33. Under the traditional method, although the plaintiff might not know about a possible cause of action, it is at least theoretically possible for the cause of action to go forward since it has technically accrued. *See* Wellston v. Sam N. Hodges Jr. & Co., 114 Ga. App. 424, 151 S.E.2d 481 (1966). "Mere ignorance of the facts constituting a cause of action does not prevent the running of the statute of limitations." *Id.* at 426, 151 S.E.2d at 482.

34. *Architects and Engineers*, *supra* note 32, at 90—91.

35. *Id.* In this Note, "viable" refers to claims in which there is an injury, a plaintiff, and a defendant.

36. *Architectural Malpractice*, *supra* note 10, at 521.

37. *See* King v. Seitzingers, Inc., 160 Ga. App. 318, 287 S.E.2d 252 (1981). The general rule in Georgia is that the discovery method is used for determining the accrual date for the running of the statute of limitations in personal injury cases. *Id.* at 320, 287 S.E.2d at 254.

38. *Id.*

39. *See id.*

The traditional view merges the injury with the negligent act and allows a claim to be brought from the latter time.[40] This approach severely restricts the plaintiff's ability to bring a claim in latent defect cases. Since the wrong is hidden, the plaintiff may have no way of discovering the claim until damage occurs. The statutory time period begins to run when the act and legal injury are merged, although the plaintiff may be unaware that he even has a claim until he is injured. As a result, the plaintiff can bring an effective claim only if his damage occurs within the statutory time limit, measured from the time of the negligent commission.[41] When the damage occurs or is discovered is irrelevant.

The substantial completion method, on the other hand, puts a plaintiff on notice that any claims he may have against the contractor or architect must be brought within a time limit that is measured from the project's completion.[42] The time period begins running at completion regardless of whether the claim is discovered or even exists, or whether only legal injury has been incurred or actual damage has occurred.[43] The running of the statute of limitations depends only on the project's completion and no other factor.[44] Again, the plaintiff only has a triable case when the claim manifests itself during the applicable time period.

From a plaintiff's viewpoint, the discovery method is the most fair, and the traditional method is the most harsh. A comparison of the methods in the following example illustrates the effects on a plaintiff. Suppose a building completed in March 1984, collapses in September 1988, because of a design defect in June 1983. The first sign of an actual defect was the slight shifting of the building in January 1987. The plaintiff did not connect this shift with a defective design and did not bring suit until the building collapsed. A four-year statute of limitations applies to the claim.

Under the traditional method, the claim would be barred as outside the statutory time period because the cause of action accrued in June 1983 when the negligent design was submitted. Under the actual injury method, the claim would be allowed,

40. *See* Wellston Co. v. Sam N. Hodges, Jr. & Co., 114 Ga. App. 424, 151 S.E.2d 481 (1966).

41. *Id.* at 426, 151 S.E.2d at 482.

42. *Architects and Engineers*, *supra* note 32, at 91.

43. *Id.*

44. *Architectural Malpractice*, *supra* note 10, at 521.

since it was brought within four years of January 1987 when the first damage occurred. Under the discovery method the claim would also be allowed because the injury was not discovered until the building collapsed in September 1988. Under the substantial completion method the suit would be barred because the building was completed more than four years prior to the claim.

II. APPLICATION OF THE PROPERTY STATUTE OF LIMITATIONS IN GEORGIA

Causes of action based on damage to realty are governed by O.C.G.A. section 9-3-30.[45] The Code defines the critical starting point in general terms as "after the right of action accrues."[46] Additionally, O.C.G.A. section 9-3-31 addresses personal property injury and uses identical language to limit the time in which a plaintiff may initiate a cause of action.[47] As a result of the ambiguous and identical language, Georgia courts have employed the traditional method,[48] actual damage method,[49] and the discovery method[50] to determine when the time limit starts to run, depending upon whether real or personal property is damaged in negligent construction cases.[51]

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45. "All actions for trespass upon or damage to realty shall be brought within four years after the right of action accrues." O.C.G.A. § 9-3-30 (1982).

46. *Id.*

47. "Actions for injuries to personalty shall be brought within four years after the right of action accrues." O.C.G.A. § 9-3-31 (1982).

48. Wellston Co. v. Sam N. Hodges, Jr. & Co., 114 Ga. App. 424, 151 S.E.2d 481 (1966). In *Wellston* the plaintiff claimed damage to real property. The applicable statute of limitations was the precursor to O.C.G.A. § 9-3-30, which barred the suit because the claim was not commenced within four years of completion of the building. *Id.* at 427, 151 S.E.2d at 483.

49. Millard Matthews Builders v. Plant Improvement Co., 167 Ga. App. 855, 307 S.E.2d 739 (1983). In *Millard*, the court applied the discovery rule in deciding when the applicable statute of limitations began to run in a claim for personal property damage. The time period begins to run under this statute when the injury occurs. Because the claim in *Millard* was filed within four years of injury, it was not barred. *Id.* at 855—56, 330 S.E.2d at 741.

50. Lumbermen's Mut. Cas. Co. v. Pattillo Constr. Co., 254 Ga. 461, 330 S.E.2d 344 (1985). The *Lumbermen's* court stated that the discovery rule applied to both the real and personal property statutes of limitations. *Id.* at 465, 330 S.E.2d at 348.

51. O.C.G.A. § 9-3-30 (1982) involves real property, whereas O.C.G.A. § 9-3-31 involves personal property. Different rules for determining the date of accrual are used for each section even though the language is the same. *Compare* Wellston Co. v. Sam N. Hodges, Jr. & Co., 114 Ga. App. 424, 151 S.E.2d 481 (1966), which addresses real property damage *with* Hunt v. Star Photo Finishing Co., 115 Ga. App. 1, 153 S.E.2d 602 (1967), which addresses personal property damage.

A. Decisions Involving Injury to Real Property

Historically, Georgia courts have employed the traditional method to determine when the time limit accrues in real property cases.[52] Under this method, the legal injury occurs when the negligent act is committed. This creates a legal right in the plaintiff at that time and allows her to bring an immediate claim.[53] Because the statute of limitations begins to run at this moment, whether the plaintiff has suffered actual damage or is even aware of her legal right to bring a cause of action is immaterial.[54]

Georgia courts in the early 1980s continued to employ tradition and utilized the standard that a legal cause of action accrues at the time the duty to the plaintiff is breached.[55] In the mid-1980s, however, a subtle shift in the court's application of the traditional method took place. More and more courts began to use language that implied that the breach of duty occurred when the project was substantially completed, not at the time the negligent act was committed.[56] The transition was natural because the completion date can readily be determined, it puts plaintiffs on notice, and it is the time when a builder certifies to the plaintiff that the building is free of defects.[57] The change in application

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52. *See* Wellston Co. v. Sam N. Hodges, Jr. & Co., 114 Ga. App. 424, 151 S.E.2d 481 (1966).

53. *Id.* at 426, 151 S.E.2d at 482. Many times, however, because of the complexity of most projects, the plaintiff has no idea she has been injured and, therefore, does not pursue a claim. Annotation, *supra* note 11, at 510.

54. *Wellston*, 114 Ga. App. at 426, 151 S.E.2d at 482.

55. *See* U-Haul Co. v. Abreu & Robeson, Inc., 247 Ga. 565, 277 S.E.2d 497 (1981) (injury to building determined to be injury to realty). In construction cases the courts equate the accrual of a cause of action with the completion date. *See* Bicknell v. Richard M. Hearn Roofing & Remodeling, Inc., 171 Ga. App. 128, 318 S.E.2d 729 (1984).

56. *Compare* the mid-1980 cases U-Haul Co. v. Abreu & Robeson, Inc., 247 Ga. 565, 277 S.E.2d 497 (1981) *and* Miles Ins. & Realty Co. v. Gilstrap, 187 Ga. App. 858, 371 S.E.2d 672 (1988) *with* Wellston Co. v. Sam N. Hodges, Jr. & Co., 114 Ga. App. 424, 151 S.E.2d 481 (1966). In *Wellston* the action accrued "from the time there [was] a breach of duty[.]" *Id.* at 426, 151 S.E.2d at 482 (quoting Mobley v. Murray County, 178 Ga. 388, 173 S.E. 680 (1933)). In *Miles*, completion of construction triggered the statute, not the negligent act, which occurred months before the house was completed. *Miles*, 187 Ga. App. at 858, 371 S.E.2d at 673. In *U-Haul*, the court also equated the completion of the project with the negligent act, even though the negligent design occurred previously. *U-Haul* at 566—67, 277 S.E.2d at 498—99.

57. Theoretical differences exist. Under a repose statute a cause of action may never accrue, but under the traditional method, a cause of action must exist at some point. *See Architects and Engineers*, *supra* note 32, at 91. The cases, however, implied that at completion a cause of action always existed, netting the same result as a statute of repose that defined the beginning time as at "substantial completion." *See* Bicknell v. Richard M. Hearn Roofing & Remodeling, Inc., 171 Ga. App. 128, 318 S.E.2d 729 (1984).

materially deviated from the precepts of the traditional method. It no longer mattered when the claim became viable; the project's completion became the controlling factor.

The courts, by equating the time the breach of duty occurred with the substantial completion of the project, effectively created a repose statute of limitations.[58] Under a repose statute, the time limit is triggered by an outside event, not the breach of duty or any other element of the claim.[59] The substantial completion of a project became the outside event in the construction industry.[60] This shift required plaintiffs to file claims based on damage to real property in Georgia within four years of the substantial completion of the project, regardless of when the actual damage occurred, the claim arose, or the injury was discovered.[61]

B. Decisions Involving Injury to Personal Property

Georgia's statute of limitations addressing personal property damage has been applied differently from the statute that covers

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58. *Architects and Engineers*, *supra* note 32, at 91.

59. *Id.*

60. *Id.* "[t]he statutes limiting the liability of architects and engineers run from the conclusion of construction." *Id.*

61. Miles Ins. & Realty Co. v. Gilstrap, 187 Ga. App. 858, 858, 371 S.E.2d 672, 673 (1988) (citing Mercer University v. National Gypsum Co., 258 Ga. 365, 368 S.E.2d 732 (1988)). In 1968, the Georgia General Assembly passed a repose statute of limitations imposing an eight-year limit on causes of action based on damage to real property. It states in full:

> (a) No action to recover damages:
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> (1) For any deficiency in the survey or plat, planning, design, specifications, supervision or observation of construction, or construction of an improvement to real property;
>
> (2) For injury to property, real or personal, arising out of any such deficiency; or
>
> (3) For injury to the person or for wrongful death arising out of any such deficiency shall be brought against any person performing or furnishing the survey or plat, design, planning, supervision or observation of construction, or construction of such an improvement more than eight years after substantial completion of such an improvement.
>
> (b) Notwithstanding subsection (a) of this Code section, in the case of such an injury to property or the person or such an injury causing wrongful death, which injury occurred during the seventh or eighth year after such substantial completion, an action in tort to recover damages for such an injury or wrongful death may be brought within two years after the date on which such injury occurred, irrespective of the date of death, but in no event may such an action be brought more than ten years after the substantial completion of construction of such an improvement.

O.C.G.A. § 9-3-51 (1982), enacted by 1968 Ga. Laws 127.

This statute uses "substantial completion" to determine the starting point of the eight-year time limit and is therefore considered to be a repose statute. Lumbermen's Mut. Cas. Co. v. Pattillo Constr. Co., 254 Ga. 461, 465, 330 S.E.2d 344, 347 (1985).

real property, although the statutory language describing when the time period begins is exactly the same.[62] Judicial decisions on personal property damage state that the time of actual injury is the determining factor courts should use in fixing the proper accrual date.[63]

For example, in *Millard Matthews Builders v. Plant Improvement Co.*,[64] the plaintiff contracted to have his building roofed, and the defendant completed the project in 1974.[65] On August 31, 1979, the roof collapsed, and on March 25, 1982, the plaintiff filed a negligence suit.[66] Eight years had passed from the project's completion to the date the plaintiff filed the complaint.[67] Filing a claim for damages to realty four years after substantial completion would have barred the suit under the four-year statute of limitations.[68] The court found that because there was a possibility of damage to personalty, however, the running of the statute of limitations did not begin until injury to the property occurred.[69] On this reasoning, the court allowed the plaintiff's cause of action to proceed since he commenced the suit within four years of the damage.[70]

Recovery for damage to personal property was also at issue in *Hunt v. Star Photo Finishing Co.*[71] The determination that the damage was to personal rather than real property was critical to the court's allowing the suit to continue. In a previous case, *Wellston Co. v. Sam N. Hodges, Jr. & Co.*,[72] the court foreclosed an action involving a roof collapse brought more than four years after the building was completed.[73] In *Hunt*, the roof, designed in the same novel way and built by the same contractor as in

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62. *Compare* O.C.G.A. § 9-3-30 *with* O.C.G.A. § 9-3-31 (1982). *See also Lumbermen's* at 462, 330 S.E.2d at 345.

63. *See* Wall v. Middle Georgia Bank, 180 Ga. 431, 179 S.E. 363 (1935); Hunt v. Star Photo Finishing Co., 115 Ga. App. 1, 153 S.E.2d 602 (1967).

64. 167 Ga. App. 855, 307 S.E.2d 739 (1983).

65. Millard Matthews Builders v. Plant Improvement Co., 167 Ga. App. 855, 855, 307 S.E.2d 739, 740 (1983).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 855, 307 S.E.2d at 741.

70. *Id.* at 855—56, 307 S.E.2d at 740—41.

71. 115 Ga. App. 1, 153 S.E.2d 602 (1967).

72. 114 Ga. App. 424, 151 S.E.2d 481 (1966).

73. Wellston Co. v. Sam N. Hodges, Jr. & Co., 114 Ga. App. 424, 427, 151 S.E.2d 481, 483 (1966).

Wellston, collapsed because of defective design.[74] The cause of action, though it was brought more than four years after completion of the building, was found to accrue at the time of the collapse and was allowed to proceed.[75] The court stated that the situation in *Hunt* was entirely different from *Wellston*, since the plaintiff purchased the building six years after it was completed.[76] The plaintiff, therefore, could not have brought his action successfully until the building collapsed.[77]

Although the court considered the Code section treating personal property damage to be applicable in *Hunt*, it based its decision on the plaintiff's lack of privity with the contractor at the time the building was constructed. Therefore, no cause of action existed until the roof collapsed.[78] According to the *Hunt* court, the statute of limitations begins to run when the act invades a plaintiff's legal right.[79] Thus *Hunt* upheld the traditional view that a legal injury generally exists when a defective building is completed. The cause of action accrues and triggers the statute of limitations at completion.[80]

In *Hunt*, however, the injured party incurred no legal injury until the building collapsed, since he did not acquire the building until after it was constructed.[81] The result was that the plaintiff was allowed recourse because he did not contract to have the building constructed and because the court considered the building

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74. Hunt v. Star Photo Finishing Co., 115 Ga. App. 1, 5, 153 S.E.2d 602, 605 (1967). *Hunt* explained that the roof in *Wellston* was also designed in a novel way. *Id.*

75. *Id.* at 5—6, 153 S.E.2d at 605.

76. *Id.* at 5, 153 S.E.2d at 605.

77. *Id.*

78. *Id.*

79. *Id.* at 5—6, 153 S.E.2d at 605. The court stated:

> "The test to be applied in determining when the statute of limitations begins to run against an action sounding in tort is in whether the act causing the damage is in and of itself an invasion of some right of the plaintiff, and thus constitutes a legal injury and gives rise to a cause of action."

Id. (quoting Barrett v. Jackson, 44 Ga. App. 611, 162 S.E. 308 (1932)).

80. *Id.* The court stated:

> "[I]f the act causing such subsequent damage is of itself unlawful in the sense that it constitutes a legal injury to the plaintiff [present owner], and is thus a completed wrong, the cause of action accrues and the statute begins to run from the time the act is committed, however slight the actual damage then may be."

Id. at 6, 153 S.E.2d at 605 (quoting Barrett v. Jackson, 44 Ga. App. 611, 162 S.E. 308 (1932)).

81. *Id.* at 5, 153 S.E.2d at 605.

to be the plaintiff's personal property.[82] By determining the property was personal rather than real, the court was able to use the moment of actual injury as the accrual date to avoid falling outside the statutory time limit.[83]

C. Decisions Involving Personal Injury

Claims based on personal injury caused by construction defects are limited by Georgia's two-year statute of limitations.[84] The statute, however, does not begin to run until the plaintiff either discovers or through the exercise of due diligence should have discovered the injury.[85] Therefore, unlike the statute covering damage to real property, the discovery rule applies in personal injury cases.[86]

III. GEORGIA'S REPOSE STATUTE OF LIMITATIONS

All statutes of limitations are considered "repose" statutes, because they limit the time period in which a person may bring a claim.[87] A true repose statute of limitations differs materially from regular statutes of limitations, though. Georgia case law has defined the starting point for the time limit in regular

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82. *Id.* In *Wellston*, however, the plaintiff was denied recourse because he contracted to have the building built, and it was considered real property. Wellston Co. v. Sam N. Hodges, Jr. & Co., 114 Ga. App. 424, 151 S.E.2d 481 (1966).

83. Hunt v. Star Photo Finishing Co., 115 Ga. App. 1, 5, 153 S.E.2d 602, 605 (1967). Under the reasoning of *Hunt*, a plaintiff might be able to avoid the "substantial completion" accrual date by having the building constructed for another before purchasing it.

84. O.C.G.A. § 9-3-33 (1982). The statute states:

> Actions for injuries to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year after the right of action accrues, and except for actions for injuries to the person involving loss of consortium, which shall be brought within four years after the right of action accrues.

Id.

85. King v. Seitzingers, Inc., 160 Ga. App. 318, 287 S.E.2d 252 (1981). The *King* court found that "the statute of limitation did not run against [the plaintiff] until he knew or through the exercise of due diligence should have discovered not only the nature of his injury but also the causal connection between the injury and the alleged negligent conduct of [the defendant]." *Id.* at 320, 287 S.E.2d at 255. In *King* the plaintiff contracted lead poisoning because of his employer's negligence. More than two years passed from the poisoning until its connection with the injury. *Id.* at 318, 287 S.E.2d at 254. If the two-year statute had been triggered at the time of poisoning, the claim would have been barred. The court, however, held that the discovery of the connection in personal injury cases triggered the statute and that the claim, if filed within two years of discovery, was not barred. *Id.* at 320, 287 S.E.2d at 255.

86. *Id.* at 318, 287 S.E.2d at 254.

87. BLACK'S LAW DICTIONARY 835 (5th ed. 1979).

statutes of limitations as the first instant when a cause of action can be brought.[88] Generally, that point in real property injury is the commission of the negligent act, regardless of when the actual damage is discovered.[89] The discovery of actual damage is the general rule when personal property is injured.[90]

True repose statutes use an event unrelated to the cause of action, actual injury, or the discovery of damage to determine the starting point for the statutory time limit.[91] Under the Georgia statute addressing defects in "planning, supervising, or constructing improvement to realty,"[92] the limit for bringing a cause of action is no "more than eight years after the substantial completion of such an improvement."[93] The timing of the statute is geared to the substantial completion of a project and is unrelated to when the negligent act occurred or might be deemed to have occurred.[94]

It is even possible for the time limit to preclude the plaintiff's ever having a right to bring a cause of action.[95] For example, if, as in *Hunt*,[96] the roof collapsed more than eight years after the building's completion, the plaintiff would have no cause of action under Georgia's repose statute governing the designing of a building,[97] since no legal injury would have occurred until the building was damaged.[98]

A. Purposes of Repose Statutes of Limitations

Repose statutes of limitations are special statutes designed to protect certain groups.[99] Georgia's architectural repose statute

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88. *See, e.g.*, Wellston Co. v. Sam N. Hodges, Jr. & Co., 114 Ga. App. 424, 151 S.E.2d 481 (1966).

89. *Id.* at 426, 151 S.E.2d at 482.

90. Hunt v. Star Photo Finishing Co., 115 Ga. App. 1, 153 S.E.2d 602 (1967).

91. *Architects and Engineers, supra* note 32, at 90—91. The statute begins to run at the completion of the construction project. *Id.*

92. O.C.G.A. § 9-3-51 (1982).

93. O.C.G.A. § 9-3-51(a) (1982).

94. *Architects and Engineers, supra* note 32, at 91.

95. *Id. See also Architectural Malpractice, supra* note 10, at 523.

96. Hunt v. Star Photo Finishing Co., 115 Ga. App. 1, 153 S.E.2d 602 (1967).

97. O.C.G.A. § 9-3-51 (1982).

98. *Hunt*, 115 Ga. App. at 6, 153 S.E.2d at 605. Repose statute of limitations have been constitutionally challenged. *Glass Houses, supra* note 2, at 116—28. The Georgia Supreme Court held that Georgia's architectural repose statute is constitutional because it is not unreasonable or arbitrary or in violation of the equal protection clauses of the state and federal constitutions. Mullis v. Southern Co. Servs., 250 Ga. 90, 92, 296 S.E.2d 579, 582 (1982).

99. *See Glass Houses, supra* note 2.

was enacted to prevent stale causes of action. Without a repose statute, the potential for liability would be unending and would "increase ... vulnerability to tenuous claims, impose ... onerous record-keeping requirements and handicap ... the defense of an action because of faded memories, unavailable witnesses and lost evidence."[100] These problems surface when a jurisdiction employs the discovery method to determine the accrual date.[101]

B. Application of Georgia's Architectural Repose Statute

In *Benning Construction v. Lakeshore Plaza Enterprises*,[102] the Georgia Supreme Court held that the state's architectural repose statute did not replace the existing statutes of limitations.[103] Further, the court stated that the repose statute "was intended to establish an outside time limit which would commence upon the substantial completion of an improvement to the real property, within which preexisting statutes of limitations would continue to operate."[104] The plaintiff argued that its cause of action could be pursued, since it was brought within eight years of the completion of the construction project.[105] The court held, however, that the architectural repose statute of limitations did not preempt the existing statutes of limitations.[106]

C. The Real/Personal Property Distinction

Whether the property is real or personal is critical because the architectural repose statute applies only to claims based on defective real property.[107] The court's distinction between real

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100. Vandall, *Architects' Liability in Georgia: A Special Statute of Limitations*, 14 GA. STATE B.J. 164, 166 (1978).

101. *Id.*

102. 240 Ga. 426, 241 S.E.2d 184 (1977).

103. Benning Constr. v. Lakeshore Plaza Enter., Inc., 240 Ga. at 428, 241 S.E.2d at 186.

104. *Id.*

105. *Id.* at 427, 241 S.E.2d at 186. Since this was a contract action, the contract statute of limitations controlled. O.C.G.A. § 9-3-24 (1982). In *Benning*, the statute "commenced to run from the date that Benning [the builder] was notified by Lakeshore of the alleged defects in the construction." *Benning*, 240 Ga. at 430, 241 S.E.2d at 187. The architectural repose statute of limitations would place an additional eight-years-from-date-of-completion limit on bringing the cause of action. *Id.* at 428, 241 S.E.2d at 186. Since the cause of action was instituted before the eight-year limit, the repose statute would not have prevented the action. *Id.*

106. *Id.*

107. *Compare* Turner v. Marable-Pirkle, Inc., 238 Ga. 517, 233 S.E.2d 773 (1977) *with* Mullis v. Southern Co. Servs., 250 Ga. 90, 296 S.E.2d 579 (1982). *See also* Northbrook Excess & Surplus Ins. Co. v. J.G. Wilson Corp., 250 Ga. 691, 300 S.E.2d 507 (1983).

and personal property in *Turner v. Marable-Pirkle, Inc.*[108] meant the difference between a triable claim and one barred by the repose statute.[109]

The question in *Turner* was whether the replacement of a power pole was "improvement to real property."[110] The plaintiff was severely injured eight years after a faulty power pole was installed.[111] Because personal injury was involved, the court applied the discovery method to determine the accrual date.[112] Since the action was filed within two years of the plaintiff's injury, it would not have been barred by the personal injury statute of limitations.[113] If, however, the pole had been found to be an improvement to real property, the repose statute would have operated and barred the suit.[114] The court found that the replacement of the pole was not an improvement to real property and that the cause of action could be maintained.[115]

The court reached this conclusion by using the statutory definition of "substantial completion" to find that the improvement must be more than a mere addition.[116] According to the court, the improvement should have been of such importance that it allowed the owner to occupy and use the realty.[117] Section 6 of the statute requires that the project be at such a stage that the owner could use and occupy the realty.[118] The *Turner* court reasoned that since the property was already being used and occupied when the power pole was installed, that improvement, by itself, was not essential to the owner's occupation of the property.[119] Therefore, the improvement to the power pole was

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108. 238 Ga. 517, 233 S.E.2d 773 (1977).

109. Turner v. Marable-Pirkle, Inc., 238 Ga. 517, 233 S.E.2d 773 (1977).

110. *Id.* at 519, 233 S.E.2d at 775. The architectural repose statute does not apply unless an "improvement to real property" exists. O.C.G.A. § 9-3-51(a)(1) (1982).

111. *Turner*, 238 Ga. at 518, 233 S.E.2d at 774.

112. *Id.* at 519, 233 S.E.2d at 775. *See* King v. Seitzingers, Inc., 160 Ga. App. 318, 287 S.E.2d 252 (1981).

113. *Turner*, 238 Ga. at 518, 233 S.E.2d at 774.

114. *Id.*

115. *Id.* at 519, 233 S.E.2d at 775.

116. *Id.*

117. *Id.*

118. 1968 Ga. Laws 673. Section 6 reads as follows:

> As used in this Act the phrase "substantial completion" shall mean the day when construction was sufficiently completed, in accordance with the contract, as modified by any change order agreed to by the parties, so that the owner could occupy the project for the use for which it was intended.

Id.

119. *Turner*, 238 Ga. at 519, 233 S.E.2d at 775.

not "improvement to real property" and the statute did not apply.[120]

The court in *Mullis v. Southern Co. Services*[121] established a more definitive standard for determining whether an improvement to real property has been made.[122] In *Mullis*, the issue was whether the placement of a circuit breaker in a power plant's electrical system was an improvement to real or only to personal property.[123] A defective breaker design was the basis for the plaintiff's cause of action. The architectural repose statute would have prevented the suit because the injury occurred more than ten years after the breaker was installed.[124] The *Mullis* court established three factors to determine whether an improvement to real property had occurred: (1) the permanence of the improvement; (2) any added value to the realty; and (3) the owner's intent.[125]

Using these factors, the court held that the circuit breaker was an improvement to real property since it was essential to the operation of the plant, added value to the plant, and was intended to be an improvement to real property.[126] As a result, the eight-year repose limit applied, and the suit was barred.[127] In effect, the architectural repose statute barred the personal injury action because the circuit breaker was considered an improvement to real property.

The *Mullis* test for whether an improvement to real property has occurred was used by the court in *Northbrook Excess & Surplus Insurance Co. v. J.G. Wilson Corp.*[128] to include manufacturers who custom design their products.[129] In *Northbrook*

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120. *Id.*

121. 250 Ga. 90, 296 S.E.2d 579 (1982).

122. Mullis v. Southern Co. Servs., 250 Ga. at 90, 296 S.E.2d at 579 (1982).

123. *Id.* at 90, 296 S.E.2d at 581.

124. *Id.* at 90—91, 296 S.E.2d at 581.

125. *Id.* at 94, 296 S.E.2d at 583. The court outlined the following factors for courts to consider when determining whether an improvement to real property exists:

> (1) [I]s the improvement permanent in nature; (2) does it add to the value of the realty, for the purposes for which it was intended to be used; (3) was it intended by the contracting parties that the "improvement" in question be an improvement to real property or did they intend for it to remain personalty.

Id.

126. *Id.* at 94, 296 S.E.2d at 583—84.

127. *Id.* at 94, 296 S.E.2d at 584.

128. 250 Ga. 691, 300 S.E.2d 507 (1983).

129. Northbrook Excess & Surplus Ins. Co. v. J.G. Wilson Corp., 250 Ga. 691, 693, 300 S.E.2d 507, 509 (1983).

the court held that fire doors installed in the plaintiff's building were improvements to real property and were covered by the architectural repose statute because they were "custom designed and made for the space in the hotel."[130]

The repose statute, as the previous decisions show, can bar a suit based on injury to personalty, although the suit would be viable under the limitations applied to real or personal property damage. Georgia courts opine that a repose statute is meant to impose such an additional limitation.[131] The court's conclusion is possible when the date of injury is not used for determining the accrual date for damage to personalty. When, however, the injury is to real property, the repose statute has no effect since accrual starts at the time of substantial completion of the project and runs four years; therefore, a claim involving damage to real property could never reach the eight-year repose limit.[132] The repose statute does place an additional limit on claims based in personal injury.[133]

D. Application of the Discovery Rule to Real Property Cases in Georgia

In *Lumbermen's Mutual Casualty Co. v. Pattillo Construction Co.*,[134] the Georgia Supreme Court recognized the anomaly in applying the repose statute to causes of action based on damage to real property. It reasoned that the essential purpose of a repose statute would be defeated in real property cases unless the discovery method were used to determine the accrual date.[135]

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130. *Id.* The court clearly stated, however, "that the statute [O.C.G.A. § 9-3-51] should not be construed to immunize manufacturers." *Id.* at 693, 300 S.E.2d at 508. *See also* Broadfoot v. Aaron Rents, Inc., 195 Ga. App. 297, 393 S.E.2d 39 (1990) (repairs to brick veneer wall considered an improvement to realty because the work done extended the life of the wall, improved the wall's performance, and changed the wall's design).

131. Benning Constr. v. Lakeshore Plaza Enters., Inc., 240 Ga. 426, 428, 241 S.E.2d 184, 186 (1977).

132. *But see* Lumbermen's Mut. Cas. Co. v. Pattillo Constr. Co., 254 Ga. 461, 330 S.E.2d 344 (1985), which applied the discovery rule to avoid this anomaly. *Id.* at 465, 330 S.E.2d at 347–48.

133. *See* Nelms v. Georgian Manor Condominium Ass'n., Inc., 253 Ga. 410, 321 S.E.2d 330 (1984).

134. 254 Ga. 461, 330 S.E.2d 344 (1985).

135. Lumbermen's Mut. Cas. Co. v. Pattillo Constr. Co., 254 Ga. at 465, 330 S.E.2d at 347. The court reasoned that the purpose of the repose statute was to foreclose any action brought later than eight years after substantial completion of the project. It also pointed out that the Legislature intended for the statute to affect both real and personal property damage cases. Both of these objectives would be defeated if the discovery method were not used in computing the starting date in cases where damage to real property existed. *Id.*

In *Lumbermen's*, the plaintiff's structure was completed in 1972.[136] High winds severely damaged it on March 7, 1975, and the plaintiff filed suit against the builders on March 3, 1979.[137] The cause of action was based on negligent design and construction of the building, as well as breach of contract and warranties.[138] Under the traditional method used by the Georgia courts in applying O.C.G.A. section 9-3-30, damages to real property would not have been recoverable because the action would have accrued at the time the building was completed, and suit was not brought within the mandatory four years.[139]

Lumbermen's, however, also involved personal property damage[140] that was actionable since the action under the statute covering personal property does not accrue until the injury occurs and the suit was filed within four years of that injury.[141] The plaintiff argued that being barred from an action on real property was an inequity because the same factors would have to be proved in either a real or personal property damage case.[142] The court changed the controlling law by making the discovery method the rule in all tort actions, limited only by the appropriate statutes.[143]

First, the court attacked the traditional rule, citing Georgia cases which used the discovery rule in determining when the appropriate statute of limitations accrued.[144] These cases, however, involved bodily injury, *not* real property damage.[145]

The court then turned to the case law of other jurisdictions to support its application of the discovery rule to cases involving real property damage.[146] To support changing Georgia's rule, the court pointed out the unreasonableness of requiring that building

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136. *Id.* at 461, 330 S.E.2d at 345.

137. *Id.*

138. *Id.*

139. *See, e.g.*, Wellston Co. v. Sam N. Hodges, Jr. & Co., 114 Ga. App. 424, 151 S.E.2d 481 (1966).

140. *Lumbermen's*, 254 Ga. at 462, 330 S.E.2d at 345.

141. *Id.*

142. *Id.*

143. *Id.* at 465, 330 S.E.2d at 348.

144. *Id.* at 462–63, 330 S.E.2d at 345–46.

145. *Id.*

146. *Id.* at 464, 330 S.E.2d at 346–47 (citing Lee v. Morin, 469 A.2d 358 (R.I. 1983); City of Aurora, Colorado v. Bechtel Corp., 599 F.2d 382 (10th Cir. 1979)). The *Lumbermen's* court relied on the holding in King v. Seitzingers, Inc., 160 Ga. App. 318, 287 S.E.2d 252 (1981), which used the discovery rule to allow an action based on *personal injury* to proceed. *Id.*

owners discover latent defects themselves or employ experts to certify the structure to be free of design and engineering defects.[147]

The court reasoned that the passage of the architectural repose statute was a direct result of the Legislature's intent to protect contractors and architects from stale claims. In order for the repose statute to protect them in actions based on real property damage, however, the discovery rule must be used to determine the accrual date; otherwise "the statute of repose would be meaningless as between owners and contractors."[148]

Under the regular statute of limitations, a claim based on injury to real property must be brought within four years of the substantial completion of the project.[149] Such claims would be barred before reaching the eight-year architectural limit, unless, as the *Lumbermen's* court held, the discovery rule applied. Under the discovery rule, both the regular and repose statutes of limitations would have effect. A claim filed more than four years after discovery would be barred by the regular statute; and a claim filed more than eight years after the project's substantial completion would be barred regardless of when the damage was discovered.

Georgia courts have wrestled in the past with the harsh consequences of allowing the statute to run before the plaintiff is even aware she has a claim.[150] They recognized the potential for unfairness when applying any statute of limitations, but they were never persuaded to change the rule until the *Lumbermen's* decision. *Lumbermen's*, however, was affected by the architectural repose statute of limitations, which the court used to change the law. The court instituted discovery as the method to be used in future cases based on damage to *all* property.[151]

E. Rejection of the Discovery Method: The Mercer Realignment

Corporation of Mercer University v. National Gypsum Co.[152] was decided two years after *Lumbermen's*.[153] The *Mercer* court

147. *Lumbermen's*, 254 Ga. at 464, 330 S.E.2d at 347.

148. *Id.* at 465, 330 S.E.2d at 348.

149. *See* U-Haul Co. v. Abreu & Robeson, Inc., 247 Ga. 565, 277 S.E.2d 497 (1981).

150. *See id.*; Davis v. Boyett, 120 Ga. 649, 48 S.E. 185 (1904); Atlanta Gas Light Co. v. City of Atlanta, 160 Ga. App. 396, 287 S.E.2d 229 (1981).

151. *Lumbermen's*, 254 Ga. at 465, 330 S.E.2d at 347–48.

152. 258 Ga. 365, 368 S.E.2d 732 (1988).

153. The Georgia Supreme Court decided *Lumbermen's* on June 27, 1985. *Lumberman's*, 254 Ga. at 461, 330 S.E.2d at 344. *Mercer* was decided on June 9, 1988. Corporation of Mercer Univ. v. National Gypsum Co., 258 Ga. 365, 368 S.E.2d 732 (1988) [hereinafter *Mercer 1*].

overruled the innovations of *Lumbermen's* by again rejecting application of the discovery method in real property cases.[154]

In *Mercer*,[155] the defendants[156] sold asbestos construction products, which the plaintiff installed between 1906 and 1972 to renovate buildings.[157] Mercer University instituted suit in federal district court to recover its cost for removing the asbestos hazard, as well as for punitive damages.[158] The defendant sought summary judgment, arguing that the plaintiff's action was barred by O.C.G.A. section 9-3-30.[159]

The district court applied Georgia's discovery rule and found that the statute of limitations time period commenced when the university discovered or should have discovered the defect.[160] Application of the discovery rule allowed Mercer to prosecute its claim since the action was brought within four years of discovery of the defects. The court awarded Mercer University both compensatory and punitive damages.[161]

On appeal, the defendants argued that Georgia's discovery rule applied only to personal injury cases, not to property damage cases.[162] The Eleventh Circuit examined the question, decided that the issue was unsettled in Georgia, and certified the question to the Georgia Supreme Court.[163]

The Georgia Supreme Court found that O.C.G.A. section 9-3-30 controlled because no personal injury was involved.[164] The court held that the discovery rule is inapplicable when only property damage exists.[165] The case expressly overruled the *Lumbermen's* decision, which had established the discovery method

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154. *Mercer 1*, *supra* note 153. The *Mercer* court expressly adopted the dissent by Justice Weltner in *Lumbermen's*. *Id.* at 366, 368 S.E.2d at 733 (citing *Lumbermen's*, 254 Ga. at 466, 330 S.E.2d at 348 (Weltner, J., dissenting)).

155. *Mercer 1*, *supra* note 153, 258 Ga. at 365, 368 S.E.2d at 733.

156. The original suit involved a bifurcated trial with National Gypsum and W. R. Grace & Company as defendants. Both defendants filed appeals, which were consolidated. Mercer Univ. v. National Gypsum Co., 832 F.2d 1233, 1234 (11th Cir. 1987) [hereinafter *Mercer 2*].

157. *Mercer 1*, *supra* note 153, 258 Ga. at 365, 368 S.E.2d at 733.

158. *Mercer 2*, *supra* note 156, 832 F.2d at 1234.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 1236.

164. *Mercer 1*, *supra* note 153, 258 Ga. at 366, 368 S.E.2d at 733.

165. *Id.*

as the applicable rule in cases involving real and personal property.[166]

The *Mercer* decision appeared to be limited to cases in which the architectural repose statute of limitations did not apply and to cases governed by O.C.G.A. section 9-3-30, the statute of limitations for injury to realty.[167] The court did not mention the personalty statute of limitations, and the repose statute was mentioned only in a special concurrence.[168] *Boyd v. Orkin Exterminating Co.*,[169] however, subsequently interpreted *Mercer* as requiring that claims based on either real or personal property damage be brought within four years of the project's completion.[170]

F. Georgia's Current Application of the Statute of Limitations

The recent decisions of *Mercer* and *Boyd* restricted the ability of plaintiffs to bring suits based on construction defects. The discovery method was rejected by *Mercer* as a means to determine the accrual date in claims based on damage to real property.[171] Instead, the four-year time limit begins when the project is substantially completed.[172]

When personalty is damaged, the application of the various methods depends on the interpretations of the ruling in *Mercer*. A strict reading of *Mercer*, as implied by *Boyd*, would mean that a four-year statute of limitations applies, with the time running from the substantial completion of the project.[173] This

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166. *Id.*

167. According to the court, Georgia's eight-year architectural repose statute of limitations did not apply in *Mercer*, because the supplying of asbestos alone did not cause the statute to operate. *Mercer 2*, *supra* note 156, 832 F.2d at 1235, n.2. Here the makers of asbestos were considered manufacturers. *Id. Cf.* Northbrook Excess & Surplus Ins. Co. v. J.G. Wilson Corp., 250 Ga. 691, 693, 300 S.E.2d 507, 509 (1983) (fire doors were considered custom designed and, therefore, an "improvement to realty," thus causing the architectural repose statute to apply).

Presumably, if the initial decision in *Mercer* had established that the asbestos was an "improvement to realty," the issue would not have been referred to the Georgia Supreme Court since the federal district court would have applied the controlling law set forth by *Lumbermen's* and upheld the lower court's decision to allow the cause of action.

168. *Mercer 1*, *supra* note 153, 258 Ga. at 366, 368 S.E.2d at 733 (Bell, J., concurring).

169. 191 Ga. App. 38, 381 S.E.2d 295 (1989).

170. *Id.* The "completion" of the project in the *Orkin* case was the last application of the termite treatment. *Id.* at 40, 381 S.E.2d at 298.

171. *Mercer 1*, *supra* note 153, 258 Ga. at 366, 368 S.E.2d at 733.

172. *Id.*

173. *Boyd*, 191 Ga. App. at 40, 381 S.E.2d at 298. The *Boyd* court did not distinguish between real and personal property when it stated "that any claim for property damage was barred because it had not been brought within four years following Orkin's final termite treatment." *Id.* at 41, 381 S.E.2d at 298.

interpretation would bar previously allowed claims based on personal property damage such as the ones in *Millard*.[174] On the other hand, an interpretation consistent with past cases would bar only those claims brought later than four years from the time of damage.[175] The architectural statute of limitations would further limit actions by barring those brought later than eight years after substantial completion of the project.[176]

These decisions did not change the method employed when bodily injury results from defective construction. The discovery rule applies, and the claim must be brought within two years of *discovery* of the injury.[177] The architectural statute of limitations, however, would also apply if the defect were a result of an improvement to real property and would place the additional requirement that the claim be filed within eight years after substantial completion of the project.[178]

CONCLUSION

The argument in *Lumbermen's*, that the intent of the Legislature is defeated when the architectural repose statute has no effect on real property cases, is still valid after *Mercer*. A contractor or architect cannot be held liable for damages to the building he built when it collapses more than four years after completion.

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174. Millard Matthews Builders v. Plant Improvement Co., 167 Ga. App. 855, 307 S.E.2d 739 (1983).

175. *Id.*

176. *See* Mullis v. Southern Co. Servs., 250 Ga. 90, 296 S.E.2d 579 (1982).

177. *See* King v. Seitzingers, Inc., 160 Ga. App. 318, 287 S.E.2d 252 (1981).

178. Following is an outline of the current interpretation of the statute of limitations affecting the construction industry:

1) *Damage to Realty (O.C.G.A. § 9-3-30)*: A four-year statute of limitations applies, with the time running from the substantial completion of the project.

2) *Injuries to Personalty (O.C.G.A. § 9-3-31)*:

a) A strict reading of *Mercer* as implied by *Orkin* means that a four-year statute of limitations applies, with the time running from the substantial completion of the project. This interpretation bars previously allowed claims such as the ones in *Millard;*

b) A viewpoint consistent with past case history bars claims brought more than four years after the time of injury. The architectural statute of limitations further limits actions by barring those brought more than eight years after substantial completion of the project.

3) *Bodily Injury Caused by Defective Construction (O.C.G.A. § 9-3-33)*: A two-year statute of limitations applies, with the time running from the *discovery* of the injury *and*, in addition, the repose statute of limitations requires that the claim be filed within eight years after substantial completion of the project regardless of when the injury is discovered.

The architectural repose statute cannot be applied in such a case. When, however, the building destroys a car or other personal property inside the building, the builder or architect will be liable if the claim is brought within four years of occurrence and a strict interpretation of *Mercer* is not used. Of course, if the action is brought later than eight years after substantial completion of the project it will be barred by the repose statute. The architectural repose statute has a clear and definite limiting effect in the personal property or personal injury case and none in a real property case. This anomaly leads to confusion in application of the law, and the result in individual cases can be inequitable.

Georgia's architectural statute of limitations can effectively bar stale claims. It limits actions based on damage to personal property or personal injury when the damage is caused by defective design or construction. As written, it is clearly intended to help designers and contractors avoid an inference of guilt when their project causes an injury and so much time has passed that evidence to refute that inference is unavailable. The implied legislative intent, however, was to create a statute of limitations that controls all actions involving real property. This intent requires that the discovery rule be used in determining when the claim first accrues. Use of the discovery rule would not only allow the repose statute to limit all actions; it would allow plaintiffs a fair chance to pursue their claims. The current law imposes on plaintiffs the risk that no claims are discoverable within the four-year limit. An eight-year limit, as the repose statute creates, is more equitable. A combination of the discovery method and the architectural statute would protect the construction industry from stale claims while allowing plaintiffs a fair chance to pursue their claims.

Robert Jandrlich