



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Wednesday, January 21, 2015

10:00 A.M. Session

FLEMING V. THE STATE (S14G1811)

A woman is appealing her sentence in this **Athens-Clarke County** case, arguing she should have been given credit toward her sentence for the time she participated in a drug court treatment program.

FACTS: Katherine Fleming was indicted in April 2010 on two counts of Financial Identity Fraud and two counts of Financial Transaction Card Fraud. In March 2011, she withdrew her not guilty plea and pleaded guilty as part of a plea agreement negotiated with the prosecutor. As part of the agreement, she enrolled in the Western Judicial Circuit Felony Drug Court Program and her sentence was deferred. Under the terms of the agreement, if she successfully completed the program, she would be sentenced to eight years on probation. However, if she failed to complete the program she agreed to a sentence of 10 years with the first four in confinement. Under either scenario, she would be required to pay \$1,750 in restitution to the victim. Fleming enrolled in the drug program, but she failed to comply with the terms and conditions of the program, and on April 25, 2013, the trial court terminated Fleming from the program. On May 8, 2013, the trial court sentenced Fleming under the terms of the agreement to 10 years with the first four in confinement and ordered her to pay restitution. The trial court declined her request for credit for time served in the drug program which she failed to complete,

ruling that since the plea agreement was silent about the issue of credit for time served, the agreement contemplated that whatever sentence was imposed would begin as of the date of sentencing. Fleming appealed to the Georgia Court of Appeals, which in June 2014 upheld the lower court's ruling, citing its 2006 decision in *Stinson v. State*. Fleming then asked to appeal to the state Supreme Court, which agreed to review the case, asking the parties to address under what circumstances a defendant may receive credit for participation in a drug court program.

ARGUMENTS: Fleming's attorney urges the state Supreme Court to "institute as a general rule that all participants in a drug court program receive full credit for the time they spent in that program toward their eventual sentence." Under Georgia Code § 15-1-15, a defendant can participate in drug court in three ways: prior to the entry of the sentence, as a condition of the sentence, or as part of a probation revocation. If a defendant enters such a program as part of her sentence or as the result of a probation revocation, the defendant would be entitled to time served in the drug court program because she would be participating as prescribed by her sentence or probation revocation. "However, those participants who have their formal sentencing withheld until their participation in drug court is at an end (either through graduation or termination) should likewise receive credit toward their sentences for the time spent in court," the attorney argues. Fleming's attorney argues that although participants in this category are not technically serving a sentence, "their behavior is strictly controlled and monitored, just as if they were on probation." They must comply with the terms and conditions of the program, and are supervised closely by the drug court judge. They are subject to random drug testing and a high level of supervision by drug court staff. They are also subject to sanctions if they violate the rules of the drug court. "Thus, when an individual elects to participate in a program which carries with it such a high level of supervision, that individual should be entitled to credit for the time spent under that supervision toward any eventual sentence," the attorney argues. Ms. Fleming's case has one additional factor: She began paying restitution shortly after her plea, so it was at that point that her sentence began to run. "The trial court was therefore obligated to give her credit for this time toward the sentence she ultimately received in this case," her attorney argues. Other states, including Alaska and Minnesota, give defendants credit toward their sentences for participating in drug rehabilitation programs. The Supreme Court of Alaska ruled that time spent "in custody" meant "more than time spent in traditional penal institutions, and should be read broadly to include other types of restrictive environments such as certain therapeutic programs and halfway houses." "These decisions, although not binding on this Court, show an important policy reason for giving defendants in Ms. Fleming's circumstances credit for time spent in treatment. Courts should be working to encourage participation in programs designed to rehabilitate habitual drug offenders, in order to reduce recidivism. It is fundamentally unfair to defendants such as Ms. Fleming, who are not receiving the benefit of an eventual dismissal (or even reduction) of charges, to not receive some credit for their efforts in addressing their addiction issues." Fleming's attorney argues the *Stinson* decision is inapplicable to Fleming's case, was "wrongly decided," and should be overruled "to the extent that it holds that a defendant participating in a drug court program is not entitled to credit for time she spent in that program prior to formal sentencing."

The District Attorney argues on behalf of the State that the Court of Appeals was correct to uphold the trial court's decline of Fleming's request for time served toward her final sentence. Any agreement for credit in the drug court program toward a future sentence should be set out in

writing and signed by the parties, the State argues. “The automatic rule espoused by Petitioner would serve to undermine the benefit structure contained within drug court programs. There would be less of an incentive to successfully complete the drug court program because credit would come automatically.” In general, a criminal defendant is only entitled to time served when confined while awaiting trial or sentencing. “While it is true that drug court participants are subject to rules and various levels of supervision by drug court staff, the rules and supervision flow from the drug court program and not under a judicially imposed sentence,” the State argues. Because the parties agreed to defer Fleming’s sentence and the agreement did not contemplate credit, “Petitioner is simply not entitled to credit for time in the drug court program toward her agreed upon sentence.” Furthermore, the *Stinson* decision is “clearly on point despite Petitioner’s attempts to distinguish it.” The Court of Appeals in that decision ruled that the defendant was not entitled to credit for time served after he was terminated from the drug court program, as that would undermine the purpose of the program. In Fleming’s case, had she completed the program, she would have received a benefit of a reduction in sentencing from 10 years with the first four in confinement to eight years of probation with no confinement. “If credit was to be given for her time in the drug court, she could have used the program as a means to avoid a period of confinement,” the State contends. *Stinson* is applicable in this case. “Petitioner is not entitled to credit,” the State contends.

Attorney for Appellant (Fleming): Benjamin Pearlman

Attorneys for Appellee (State): Kenneth Mauldin, District Attorney, Brian Patterson, Chief Asst. D.A.

THE STATE V. FROST (S14G1767)

The State is appealing a decision by the Georgia Court of Appeals, which ruled that when a man is retried in **Cobb County** for Driving Under the Influence, his two prior DUI convictions cannot be admitted as evidence.

FACTS: According to State prosecutors, in the early morning hours of June 24, 2012, the concierge at the condo complex where Gary Glen Frost lived heard a loud bang, which he suspected was caused by a car running into one of the entrance. He saw on the security monitor that the gate was damaged and a vehicle was leaving the scene. The concierge then called police. Each condominium resident’s vehicle is equipped with an electronic identification decal, and the concierge identified the car as belonging to Frost. When the concierge went to investigate, he found Frost in the residents’ parking deck, sitting in his car with the engine and lights still on, and music blaring. Frost appeared to be asleep. When the responding officer arrived, he also observed the damaged gate and Frost in the driver’s seat with his head slumped over his chest. Noting that Frost smelled of alcohol, had glassy and bloodshot eyes, and had urinated on himself, the officer asked to perform an Alco-Sensor test. Frost refused, and he also refused to perform any field sobriety tests, after which he was arrested and later charged by accusation with DUI, Striking a Fixture and Open Container.

In February 2013, the State filed its “Notice of Intent to Introduce Prior Bad Acts,” based on the recently enacted Georgia law, § 24-4-417, which authorizes the introduction of “prior bad acts,” formerly known as “similar transactions,” under certain circumstances in DUI cases. The new law states that in a DUI criminal proceeding, evidence of another DUI violation “on a different occasion by the same accused shall be admissible when: (1) The accused refused in the

current case to take the state administered test...and such evidence is relevant to prove knowledge, plan, or absence of mistake or accident.” Here, Frost refused to take the state-administered test in the current case and in the two prior incidents. Frost’s attorney filed an objection to introducing the prior bad acts, but following a hearing, the trial court ruled against him and said the prior DUIs were admissible under Georgia Code § 24-4-417 to show knowledge.

The case proceeded to trial in June 2013, and the jury heard evidence of the two earlier incidents, which occurred in January and March 2009. Frost refused to be tested in both incidents but later pleaded guilty to both DUIs.

The jury reached a verdict on the Striking a Fixture and Open Container charges, but it could not reach a verdict on the DUI charge, which is called “Driving Under the Influence of Alcohol Less Safe.” As a result, in June 2013, the judge declared a mistrial on all counts. In August 2013, Frost’s attorney renewed their objection to the State’s motion to introduce evidence of the two prior DUIs at Frost’s retrial, but following a hearing, the trial court denied their motion. On appeal, however, the Court of Appeals reversed the trial court, concluding that the trial court abused its discretion in allowing in evidence of prior bad acts under § 24-4-417 because such evidence was not relevant to prove knowledge. The appellate court reasoned that because “Frost did not provide an explanation or excuse at trial for his refusal to take the state-administered tests in the present case,” and because he also refused to take the tests in the prior DUIs, § 24-4-417 “would not apply under the facts of this case to demonstrate knowledge, plan or absence of mistake or accident.” The appellate court went on to say that just as it ruled in 2014 in *Jones v. State*, DUI is a crime of “general,” not “specific” intent, meaning that the State does not need to prove *intent* to commit the crime, only that the act of drinking and driving was committed. Therefore, “no culpable mental state was required.” The State now appeals to the Georgia Supreme Court.

ARGUMENTS: The Cobb County Solicitor General argues for the State that the Court of Appeals has ignored the plain language and legislative intent behind the newly enacted law, § 24-4-417. With this decision, it has created requirements that a defendant must have consented to a state test for a case to be admissible as a prior bad act, which is a misinterpretation of the law. Under the new evidence code, the “legislature specifically authorized the use of prior bad acts” in DUI cases. The passage of 24-4-417 was intended for prosecutors to be able to show that the reason a defendant refused a test “may be because he learned his lesson in a prior DUI case with a prior conviction.” With this decision, “this new DUI-specific statute has been destroyed, leaving very little either legally or practically to allow prosecutors to present, and trial courts to admit, DUI prior bad acts,” the State argues. The Court of Appeals also erred by ruling that knowledge is never relevant in general intent crimes, eliminating evidence of purposeful acts that are allowable under § 24-4-417. “It is a general intention to commit the act, i.e. drive while impaired, that is at issue, not whether the defendant knew he was impaired or less safe,” the State argues. “That is what the State must prove beyond a reasonable doubt in its current case, but there is no logical or legal reason the State cannot go beyond the minimum and provide evidence relevant to prove the defendant *knew he was less safe* when he got behind the wheel.” “It is the job of the trial court, as finder of fact, to determine what is relevant evidence of knowledge the accused might have gained from a prior DUI. For example, if a defendant took the official state test in his prior case and now refuses, that can be knowledge: knowledge not to take a state test.”

The Court of Appeals' interpretation of § 24-4-417 creates additional barriers to admission of prior bad acts that are not found within or contemplated by the statute. "The legislature intended to admit prior DUI cases under § 24-4-417," the State contends. "The statute was written solely and specifically for DUI admission and does not include the additional requirements read into it by the Court of Appeals, that is that the prior commission of DUI must have included a state chemical test." Rather than looking to the legislative history in construing the State's new evidence code, the appellate court "relied solely on one professor's editorial opinion and effectively rewrote § 24-4-417 to include additional requirements that are not part of the statute; misinterpreted 'relevant evidence'...; and effectively destroyed § 24-4-417 as a DUI-specific rule for the admission of prior bad act evidence without any constitutional basis for doing so." "To leave § 24-4-417 in the current condition would completely undermine the legislative intent behind a DUI-specific rule for prior bad act evidence," the State contends.

Frost's attorney argues the Court of Appeals correctly interpreted the plain language of § 24-4-417 and captured the legislative attempt. Under the law, the State "must show that a defendant refused the state administered test in the current case and that his refusal to take the state administered chemical test in the current case, makes a prior DUI case relevant to prove knowledge, plan or absence of mistake or accident in the current case," the attorney argues in briefs. "None of [Frost's] prior convictions for DUI involved any state administered chemical tests and therefore could not be relevant to prove knowledge, plan or absence of mistake or accident under § 24-4-417. There is simply no relevant knowledge that can be brought from the prior DUIs to the current case when there was no state administered tests given in the prior DUIs." The rules of evidence only allow for admission of relevant evidence. "Because DUI less safe is a general intent crime, whether or not the defendant knew he was less safe is not relevant and therefore inadmissible," Frost's attorney argues. "Also, the language contained in § 24-4-417 only allows for admission of prior convictions to prove knowledge, plan, or absence of mistake or accident, as they relate to refusal of the state administered chemical test in the current case." Frost refused the test in this case and the two prior DUIs, and he "therefore could not have gained any knowledge related to the state administered tests in his previous cases," the attorney contends.

Attorneys for Appellant (State): Barry Morgan, Solicitor General, Emily Keener, Asst. Sol. Gen., Melissa Tatum, Asst. Sol. Gen.

Attorney for Appellee (Frost): George Creal, Jr.

BHARADIA V. THE STATE (S14G1149)

A man convicted in **Chatham County** of Aggravated Sodomy and sentenced to life in prison with no chance of parole is appealing a lower court's refusal to grant him a new trial after new DNA testing of gloves tied to the crime matched that of his co-defendant, who had testified against him.

FACTS: According to the evidence at trial, on Sunday, Nov. 18, 2001, the victim, a school teacher, returned from church to her apartment in the town of Thunderbolt. Inside was a man she did not know. After making her take off her clothes, he blindfolded her, tied her to a chair, moved her to a bed where he bound her wrists to the bedposts and her ankles to the footboard, threatened to kill her with a knife, placed his mouth on her vagina, inserted his fingers and a Q-tip cotton swab into her vagina, and masturbated until he ejaculated on her stomach,

after which he wiped her stomach with a towel. During the assault, the man told the victim that he had a partner outside, and at some point the victim thought she heard him talking to someone in her living room. After the assault, the man left her apartment, taking her computer, suitcase, camera, jewelry, and compact discs with him. The victim subsequently contacted her parents, who in turn contacted police. Several days later, Savannah police found the stolen items, along with the knife and gloves used by the attacker, in a house owned by the girlfriend of Sterling Flint. The girlfriend told police Flint had brought the items to her house. Flint was subsequently arrested, and he told police he had received all of the items from Bharadia.

Police showed the victim a photographic lineup including a picture of Flint, but she could not positively identify Flint as her attacker. Police later showed the victim another photographic lineup including a picture of Bharadia, and she identified him as the man who had assaulted her. She testified at trial that she had no doubt Bharadia was the man who had attacked her. The victim testified that she saw Bharadia, whose face was uncovered, at close range when he forced her into a walk-in closet in her bedroom before forcing her to remove her clothing. When he tied her to a chair with a telephone cord, he covered her face, but she said that when she tilted her head, she could still see him, and she described what he was wearing. She also testified that he spoke with a Middle Eastern accent, claimed to be with Al Qaeda, and talked at one point in a language she could not understand. She testified that she heard Bharadia speak to a second person and heard that person laugh, but never actually saw anyone else. She also testified that when her blindfold shifted, she could see that Bharadia was wearing “blue and white golf gloves.” Bharadia claimed he was in Atlanta when the crimes were committed in Thunderbolt.

Prior to trial, the Georgia Bureau of Investigation tested towels from the victim’s home, but they did not show the presence of semen. That was the only evidence regarding DNA presented at trial. The gloves that the victim mentioned at trial were not tested for DNA until 2004, the year after the trial, when a new lawyer was appointed to represent Bharadia and he obtained funds from the trial court to conduct more testing. That test showed that the DNA did not match Bharadia’s DNA, but it did not identify the donor. In 2006, the Georgia Court of Appeals affirmed Bharadia’s convictions, and the state Supreme Court denied his petition to appeal further. Bharadia and his appeals attorney then contacted the Georgia Innocence Project, which has expertise in using DNA in post-conviction matters. In 2012, about eight years after the first DNA test, the Innocence Project filed an “extraordinary motion” for a new trial and also sought post-conviction DNA testing of the gloves the victim said her attacker was wearing. In April 2012, the trial court granted Bharadia’s motion for a comprehensive database search using the DNA profile created from the initial 2004 DNA test of the gloves. After the search, the GBI issued a report showing that the DNA on the gloves matched that of Flint, Bharadia’s co-defendant. At the hearing on his motion for a new trial, Bharadia’s original trial attorney testified he did not have the gloves tested because it did not occur to him that DNA testing of the gloves was possible. The trial court subsequently denied Bharadia’s extraordinary motion for a new trial, finding that he failed to satisfy the requirements set down in the Georgia Supreme Court’s 1980 decision in *Timberlake v. State*.

To grant an extraordinary motion for new trial based on newly discovered evidence, under *Timberlake*, a party must meet six requirements, including that the evidence has come to his knowledge since the trial and that it was not because of his lack of “due diligence” that he did not acquire it sooner. A third requirement is that the evidence is so material that it would

probably produce a different verdict. While the trial court stated the DNA evidence probably would have produced a different verdict and that Bharadia met that requirement as well three others, the court ruled that his trial attorney had failed to exercise due diligence because he did not get the gloves tested, and Bharadia had failed to show that the gloves were newly discovered evidence because they were available to the defense for testing at the time of trial. The Court of Appeals affirmed the ruling, and Bharadia now appeals to the state Supreme Court, which has agreed to review the case to determine whether the Court of Appeals erred in its analysis of the “due diligence” requirement under *Timberlake*.

ARGUMENTS: Bharadia’s attorneys argue the Court of Appeals did not properly analyze the due diligence requirement under *Timberlake*. “This is an appeal by an innocent person,” the attorneys argue in briefs. “Even the judge who sentenced Bharadia to spend the rest of his life in prison has concluded that a jury probably would have found him not guilty had it been provided the information at issue here.” To determine whether the due diligence requirement was properly analyzed, it is necessary to first determine what the new evidence was. Here, “the trial court was wrong in finding that the gloves themselves was the evidence being offered up as newly discovered, when the DNA identification of Sterling Flint is what Bharadia contends is the newly discovered evidence.” The Georgia Supreme Court has defined “due diligence” as “that degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances.” Other states’ courts have ruled that due diligence “does not require perfect vigilance and punctilious care, but rather a showing...that a reasonable effort has been put forth.” In this case, “it is clear that Bharadia need not prove that he did *everything possible* in seeking the DNA testing or [database] search to support his innocence claim. Rather, he must show that he acted reasonably given his circumstances. Bharadi contends that he did.” He has been in prison since his arrest in November 2001 – more than 14 years. During that time, he and his attorney contacted the Georgia Innocence Project, which sought retesting of the gloves, but the District Attorney opposed the retest. Bharadia’s failure to get the retesting sooner was not as a result of a lack of due diligence. “To suggest that having finally secured the DNA identification was not the result of reasonable efforts by Bharadia, especially considered that he is indigent and incarcerated, is preposterous,” his attorneys argue. If this decision is allowed to stand, “we are left with the unseemly spectacle of someone who (even the court says) probably should not have been convicted...but who must, alas, be denied relief for ‘procedural regularity’ concerns. No such miscarriage of justice should be a tolerable sacrifice on the altar of ‘due diligence.’”

The Assistant District Attorney argues for the State that the Court of Appeals properly analyzed the due diligence requirement under *Timberlake*. The trial court correctly concluded that Bharadia failed to meet all six of the *Timberlake* requirements for the granting of an “extraordinary motion” for new trial. It properly concluded that the evidence was not newly discovered as the gloves had been available for DNA testing at the time of trial. And it concluded there was a lack of diligence on Bharadia’s part for not testing the gloves at the time of trial. The gloves in fact were tested in 2004. Yet even though the results did not match Bharadia’s DNA, he “did nothing further with this known DNA sample until 2012,” the State argues. He could have requested the national database search at that time, but he did not. “There was a lack of due diligence on the part of [Bharadia] for not requesting the database search during the motion for new trial in 2004.” Bharadia claims that the DNA results showing that the DNA from the gloves

belongs to Flint makes him innocent. “However that is far from the facts,” the State argues. The evidence showed the gloves were found at Flint’s girlfriend’s house 10 days after the assault. During that time, Flint had access to the gloves and may have worn them. The victim positively identified Bharadia in a photographic lineup and at trial. The jury heard all the evidence and observed the significant differences in appearance between Flint, who is African American, and Bharadia, who is of Asian descent. “They look nothing alike,” the State contends. Bharadia “had a fair trial. He was convicted by a jury who heard the evidence and saw the witnesses....It would be a miscarriage of justice not to hold [Bharadia] to the requirements of *Timberlake*. Litigation must come to an end.” The due diligence requirement “ensures that cases are litigated when the evidence is more readily available to both the defendant and the State, which fosters the truth-seeking process,” the State contends.

Attorneys for Appellant (Bharadia): Aimee Maxwell, Alissa Jones, Steven Sparger

Attorney for Appellee (State): Nancy Smith, Assistant District Attorney

OLIVER ET AL. V. MCDADE ET AL. (S14G1775)

A truck driver who swerved on the highway, striking and killing a man, is appealing two lower courts’ rulings that pave the way for the victim’s friend to go forward with his claim that he should be awarded damages for emotional distress.

FACTS: According to the evidence, in October 2010, John David McDade was riding as a passenger in his own Dodge Ram truck, which was being driven by his close friend Matthew Wood on I-16 in Dublin, GA in **Laurens County**. McDade, Wood, and others were returning home to Gray, GA late at night from a dirt car race in which Wood had competed, and Wood was towing his race car on a trailer behind McDade’s truck. Just after driving the truck down the on-ramp onto the interstate, Wood noticed that something on the trailer was not secured, and he pulled over to the shoulder and got out of the truck to check. As he was walking back toward the trailer, a tractor-trailer driven by Jerome Clifford Oliver and owned by Crider Transportation, LLC swerved onto the shoulder and struck Wood’s trailer and McDade’s truck. Wood was crushed between the trailer and the truck and killed instantly. The impact threw McDade against the interior of his truck, shattered the glass in the rear of the truck’s cab, and propelled blood and tissue from Wood’s body onto McDade. McDade then got out of his truck, discovered Wood’s mangled body lying partially in the road, and tried to protect it from passing vehicles until emergency personnel arrived. As a result of the wreck, McDade suffered neck, back and knee injuries, as well as headaches, insomnia, flashbacks, anxiety, depression and suicidal thoughts. He sought psychiatric help, was diagnosed as suffering from major depression as a result of the collision, and was prescribed various medications.

McDade sued Oliver, Crider Transportation, and Crider’s liability insurance carrier, Travelers Property Casualty Co. of America, for negligence, seeking damages for his physical injuries as well as for emotional distress. Oliver and the other defendants filed a motion asking the court to grant “summary judgment” on McDade’s emotional distress claims as related to having witnessed the injuries and death of his friend. (A judge grants summary judgment after concluding a jury trial is unnecessary because the facts are undisputed and the law clearly falls on the side of one of the parties.) Initially, the trial court ruled against McDade and granted Oliver’s and Crider’s motion, noting that under Georgia’s “impact rule,” bystanders may not recover damages for emotional distress as a result of witnessing another person’s injuries. The

purpose of that rule is to prevent a flood of litigation from every bystander who witnesses a gory crash. Specifically the impact rule prohibits a person from seeking damages for emotional stress if there was no physical impact to the person. But after granting McDade's motion asking the court to reconsider, the judge ruled that McDade could pursue a claim for emotional distress under the state's "pecuniary loss rule." Under this theory of recovery, a person may obtain emotional damages resulting from an injury that is not physical, such as mental problems, which results in monetary loss. The trial court concluded that evidence of McDade's non-physical injuries, his depression, as well as the monetary loss he suffered as a result of seeking medical treatment for his depression, were sufficient for him to seek emotional distress damages under Georgia's pecuniary loss rule. The Georgia Court of Appeals upheld the ruling, finding that "we have evidence of identifiable nonphysical injuries (including an episode of depression) as well as pecuniary loss (the cost of medical treatment arising from the depression)." Furthermore, the appellate court determined that McDade's lawsuit did not seek to separately recover for the emotional distress he experienced based solely on witnessing his friend's violent death. When he was asked during his deposition whether his emotional problems were a result of "what you saw that night or... your own injuries," McDade replied, "I guess you'd say both." In elaborating, McDade explained his distress stemmed from being hurt, not being able to work, and eventually no longer earning income. "At the very least, there is a question of fact on this issue, therefore partial summary judgment is not appropriate at this time," the Appeals Court ruled, meaning the case should go before a jury. Oliver and the others now appeal to the state Supreme Court.

ARGUMENTS: Oliver's attorneys argue that for more than 100 years, Georgia's courts have rejected attempts to award damages for the infliction of emotional distress that is not accompanied by physical injury. In its motion for summary judgment, Oliver's attorneys acknowledged that "McDade can recover from emotional distress... caused by his own physical injuries..., but the distress by seeing and experiencing the aftermath of [his friend's] death is nonrecoverable." However, the Court of Appeals' decision has improperly expanded the pecuniary loss rule and eviscerated the impact rule by permitting litigants to routinely obtain damages for emotional distress without physical injury. "Under the impact rule, a victim of a negligent act may seek recovery for emotional distress, but only to the extent that it flows from physical injuries caused by the negligence; any other emotional distress that might be connected in some way to the negligent act is *not* recoverable," the attorneys argue in briefs. "The pecuniary loss rule *does* allow for the recovery of emotional distress damages – even in the absence of physical impact or injury – in a case that might also involve negligence." However, under the Georgia Supreme Court's 1892 decision in *Chapman v. W. Union Telephone Co.* and its 2000 decision in *Lee v. State Farm Mutual Insurance Co.*, emotional damages for a non-physical injury can only be recovered if the injury is caused by a negligent act that results in a financial loss and that is separate from the negligent act at issue. "The bottom line is that because Mr. McDade did not experience any compensable loss from the commission of [a negligent act] other than Crider Transportation's alleged negligence, he may not recover emotional distress damages that have no relation to his alleged negligence-related physical injuries," the attorneys argue. The Court of Appeals improperly blurred the distinction between recovery under the impact rule and recovery under the pecuniary loss rule, the lawyers argue.

Attorneys for McDade argue the pecuniary loss rule allows recovery for mental pain and suffering entirely independent from the impact rule. The pecuniary loss rule allows recovery,

“because Mr. McDade suffered a pecuniary loss and non-physical personal injury, in addition to his physical injuries,” the attorneys argue in briefs. “In this case, the tractor-trailer wreck caused by Defendant-Appellants’ negligence caused John David McDade pecuniary loss in the form of damage to his vehicle, medical bills, and lost wages, and also caused him to suffer severe physical injuries as well as the diagnosed psychiatric disorders of major depression and post-traumatic stress disorder. Therefore, Mr. McDade can recover damages for mental pain and suffering caused by the wreck, including mental pain and suffering due to being splattered with pieces of his friend Matthew Wood and seeing Matt’s mangled body lying in the roadway in the aftermath of the wreck.” As a result, both the Court of Appeals and trial court correctly ruled that McDade’s claim for emotional damages should go forward under the pecuniary loss award.

Attorneys for Appellants (Oliver): Scott McMickle, Stephanie Brown, John Train, IV, Robert Marcovitch, Joshua Wood

Attorneys for Appellees (McDade): Katherine McArthur, Caleb Walker

2:00 P.M. Session

DANFORTH, WARDEN V. CHAPMAN (S15A0147)

CHAPMAN V. DANFORTH, WARDEN (S15X0148)

The State Attorney General is appealing a lower court’s ruling that threw out the murder and arson convictions a man received in **Haralson County** for setting his family’s rental home on fire, which killed his elderly neighbor.

FACTS: According to the State’s case, in the early morning hours of June 20, 2006, a fire erupted at a duplex on Sharp Street in Bremen, GA that resulted in the death from smoke inhalation of one of the residents, Alice Jackson. Jackson lived in half of the duplex while the other half was occupied by Justin W. Chapman, his then-girlfriend, and four children. The State contended the relationship between Chapman and Jackson was “probably more bad than good.” Shortly before the fire, the owner of the duplex informed Chapman that there were too many people living in his apartment, that it was “getting torn up,” and that they would have to move. Chapman routinely paid his rent on the Monday of each week, but no rent payment was postmarked on the Monday before the Tuesday fire. Also, just prior to the fire, Chapman’s son was seen crying, and when asked by a neighbor why, responded that “his dad was going to burn the house down.”

The night before the fire, a gang member named Paul Chieves went to Chapman’s home where, according to the defense, Chieves confronted Chapman about a perceived insult Chapman had made to a member of Chieves’ family. A fight broke out, police were called and Chieves was arrested. According to the State, Chapman and his girlfriend then began to argue, and in the middle of the night, Chapman left. According to the defense, Chapman and his whole family left and drove about 15 minutes away to stay with friends after fearing retaliation from Chieves’ fellow gang members. In the early morning hours of June 20, a neighbor who was outside smoking said he saw Chapman in the area of the duplex. Soon after, at about 3:00 a.m., a neighbor smelled smoke. Minutes later, the duplex was fully engulfed in flames. Responding firefighters discovered Jackson’s body.

Fire investigators concluded that the fire was intentionally set. Following Chapman's arrest the next day, prosecutors said he told fellow inmates that he had been angry with the landlord, and had gotten even with the landlord by setting the fire. In June 2007, a jury found Chapman guilty of murder and arson, and he was sentenced to life in prison. In February 2012, the state Supreme Court upheld his convictions and sentence. Chapman then filed a petition for a "writ of habeas corpus," challenging his murder conviction on six grounds. (Habeas corpus is a civil proceeding that allows already convicted prisoners to challenge their conviction on constitutional grounds in the county where they're incarcerated, which in this case was Telfair County. The action is generally filed against the prison warden, which here was William M. Danforth.) In January 2014 after a three-day hearing, the habeas court threw out Chapman's murder conviction by granting him habeas relief on three of his six claims. In one, the habeas court ruled that in three instances, State prosecutors suppressed evidence that would have been favorable to Chapman's case in violation of the U.S. Supreme Court's ruling in *Brady v. Maryland*. Specifically, the habeas court found that State prosecutors withheld their own pre-trial interview of Joseph White, one of the State's two key witnesses, who testified at trial that Chapman had confessed to the crime while the two were incarcerated together. The earlier interview contradicted White's trial testimony, the habeas court found. The State also withheld part of a letter White had written to his pastor, as well as statements the prosecutor had obtained from another inmate incarcerated with White and Chapman that could have been used at trial to attack White's credibility. The State now appeals to the Georgia Supreme Court. And in a cross-appeal, Chapman argues the habeas court should have granted him relief on three other grounds as well.

ARGUMENTS (S15A0147): The State argues the habeas court made four errors, including ruling in Chapman's favor without giving the State an opportunity to address his claims. "It was not fair for the court to indicate at the hearing that it would hear argument from the parties before making a final ruling and then abruptly announce, after the fact, that it was granting relief," the State argues in briefs. The State had specifically requested that it be permitted to file briefs in the case after receiving a transcript of the habeas court. Instead, in eight weeks, the court "abruptly" announced in a letter it would grant relief on three of the six grounds presented by Chapman. The habeas court also erred in finding three violations of *Brady v. Maryland*, the State contends. And it was wrong to conclude that Chapman's constitutional right to confront the witnesses against him was violated by the five-page written statement of White's that was allowed to be admitted at trial. Finally, the habeas court erred in granting relief on the ground that Chapman's attorney for his appeal provided "ineffective assistance of counsel" in violation of his constitutional rights.

Chapman's attorneys argue that "the suggestion that the warden had a due-process right to post-hearing briefing in the Superior Court is objectively frivolous, a point underscored by the warden's failure to cite any authority in support of that purported right." Each of the three *Brady* violations involved "material" evidence, meaning that had it been disclosed, the result of the proceeding would have been different. Here, the habeas court correctly ruled that had the jury had the evidence the State improperly withheld, "a reasonable probability exists that the jury would not have found Chapman guilty," the attorneys argue. In the 45-minute videotaped interview of White, which had been conducted by the trial prosecutor, White stated he had very little personal knowledge about Chapman's alleged crimes. Most importantly, the video included

statements by White and the trial prosecutor concerning potential favorable treatment for White on child molestation charges he was facing if White offered information about Chapman to the prosecution. By the time Chapman was tried, White had been acquitted of all the charges. The missing page from Chapman's letter to his pastor also suggested his statement was conditioned on a deal regarding the charges against White. "The suppressed page of the letter went directly to White's pre-acquittal motive to falsely testify against Chapman to save his own skin, and is thus material..." the attorneys argue. The habeas court also ruled correctly that Chapman's appeals attorney was ineffective. Among his deficiencies, the attorney failed to interview a woman who was available to testify that the man who testified for the State was severely intoxicated the night of the fire when he claimed he saw Chapman near the duplex. He also had poor eyesight and had made repeated references to reward money he'd receive for testifying against Chapman. Furthermore, she was with that man the night of the fire, and while she saw a man near the duplex, she said it was not Chapman. "The State deprived Chapman of due process by committing *Brady* violations in the underlying prosecution, by appointing Chapman ineffective appellate counsel, and by denying Chapman the opportunity to confront a witness in violation of the Sixth Amendment," his attorneys argue. The state Supreme Court should uphold the habeas court, "and order his immediate release."

ARGUMENTS (S15X0148): In the cross-appeal, Chapman's attorneys argue that if the state Supreme Court decides not to uphold the habeas court on the three grounds it relied on, the high court should still affirm the grant of relief on the other three grounds the habeas court chose not to address. In a separate set of briefs, the attorneys argue that in addition to Chapman's appeals attorney, his trial attorneys also were incompetent, ineffective and damaged his case. They failed to interview or call as a witness a man who would have supported one of the central defense themes at trial: that the fire was started by fellow gang members of William Paul Chieves, who had been in a fight with Chapman and was arrested shortly before the fire was set. "Chieves was involved in a virtually identical retaliatory arson in neighboring Carroll County one month prior to the Haralson County arson at issue in this case," the attorneys argue. Also, the trial prosecutor committed misconduct that violated Chapman's rights to a fair and reliable determination of his guilt as required by the Constitution. "The Court should also affirm the grant of habeas relief because Chapman is actually innocent," his attorneys argue. In addition to his statement and those of witnesses who were not called, "Chapman has passed two polygraph examinations administered by a renowned and experienced polygraph examiner who concluded with 99.9 percent certainty that Chapman did not commit the crimes for which he is imprisoned."

The State argues that Chapman's case should be sent back to the habeas court to address the remaining three grounds it did not address. These three grounds "cannot serve as a basis" on which the state Supreme Court grants relief because they have not been resolved by the lower court. "At the outset, the habeas court did not 'err' when it did not resolve all claims," the State argues. "To the best that [the State] can determine, there appears to be no rule which required the court to do so." The state Supreme Court, however, "should decline to reach the undecided claims," the State argues. "Instead, the Court should remand the case for the habeas corpus court to resolve the outstanding issues."

Attorneys for Appellant (State): Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Crowder, Asst. A.G.

Attorneys for Appellee (Chapman): Emmet Bondurant, John Rains, IV, Michael Caplan

STUBBLEFIELD ET AL. V. STUBBLEFIELD ET AL. (S14A1908 and S14A1910)

In this family dispute between two sisters and two brothers, the sisters are appealing a ruling by a **Forsyth County** judge that reinstated the brothers as officers and directors of three family-owned corporations after the sisters removed them.

FACTS: Holly L. Stubblefield and Polly A. Stubblefield are the sisters; Loxley Parnell Stubblefield and William Hugh Stubblefield, III are the brothers. The Stubblefields have owned and managed three family-held corporations: Scarlett & Associates, Inc., PJ & Associates, Inc., and Parnell & Associates, Inc. Together the companies, which are involved primarily in the ownership and management of substantial real estate interests and commercial leasing operations, are worth millions of dollars. Ninety percent of the companies' asset value and income is represented by Scarlett & Associates, whose tenants include high rents from such commercial tenants as Target, Lens Crafters and Arby's restaurant located in DeKalb County near the intersection of Briarcliff Road NE and North Druid Hills Road. Each of the siblings owns 25 percent of the shares of the corporations. Each is a member of the board of directors of the companies and each is an officer of the corporations with Holly and Polly serving as vice president and secretary and "Bill" and "Parnell" serving as president and treasurer.

The appeal in this case stems from a dispute between the sisters and the brothers over the legitimacy of a joint board of directors' meeting held May 1, 2013 in Mississippi. At the meeting, the sisters voted to remove the brothers from their positions as officers of the corporations, and as members of their boards of directors. The sisters claim that in March 2013, each brother withdrew more than \$24,000 from Scarlett's corporate account without board approval. In September 2013, the brothers, who were not at the meeting, sued the sisters in Forsyth County. In their complaint, they sought a pre-trial injunction stopping the sisters from any actions and charging that the sisters had violated the company by-laws by ignoring their requests to attend the May 1 meeting by teleconference. In addition, they alleged the sisters attempted a take-over of the businesses by seizing all corporate documents maintained at the offices of the bookkeeper, Ten Key, located in Forsyth County; by emptying the three corporate bank accounts at Wells Fargo Bank in Cumming (Forsyth County) and transferring about \$700,000 into accounts in Florida near the sisters' home; by taking \$47,000 in corporate money to fund their legal expenses in defense of their brothers' lawsuit; by firing the Forsyth County bookkeeper, Ten Key, and the Forsyth County accounting firm which had also been used on behalf of the three corporations; and by hiring a new bookkeeping firm near their home in Florida. The brothers also asked the court to appoint a "receiver" to protect the properties while the case was being litigated. After a two-day hearing in October 2013, the trial judge ruled against the sisters and issued three orders, granting an "interlocutory" or pretrial injunction against them. He stated he did not find Polly Stubblefield's testimony credible and he found that the sisters had violated the company bylaws by removing the brothers, thereby rendering their actions legally void. In one of the orders, the judge stated the brothers "have been frozen out of the control of corporations in which they have equal ownership." The court ordered the sisters to return the brothers to the positions they held prior to the May 1 meeting and ruled that all of their acts, including the firings, the seizing of the records, and the firing of Ten Key were unauthorized. In May 2014, the judge entered an order appointing a receiver and holding the sisters in contempt, while reserving a ruling on the appropriate remedy for the contempt. The sisters now appeal to the Georgia Supreme Court.

ARGUMENTS: Former attorneys for the sisters argue the trial court made four errors, all relating to their contention that the Forsyth County court lacked authority to rule in the case. The sisters are residents of Florida, which is where they were served with legal papers. The sole basis for the brothers' lawsuit was a May meeting that occurred in Mississippi. Although the sisters had conducted some business in Georgia on behalf of the corporations, none of the business transactions were connected to the May 1 meeting. Georgia's "long-arm statute," Georgia Code § 9-10-91, does not authorize personal jurisdiction by the court over the sisters because their alleged wrongdoing did not occur in Georgia but rather in Mississippi, the attorneys argue. In addition to the absence of personal jurisdiction, the trial court did not prove it had authority over two of the three corporations – PJ Associates and Parnell Associates – which are both based in Mississippi. And while those two companies maintained registered agents in Georgia, they were in Fulton County, rather than Forsyth. Because the trial court lacked authority over the sisters, it erred in granting a pre-trial injunction against them, the attorneys argue. For the same reason, the trial court was wrong to appoint a receiver. "A trial court without personal jurisdiction or venue lacks authority to appoint a receiver," the sisters' lawyers contend. (Since the attorneys filed their brief, the sisters have terminated them.)

The brothers' attorneys argue that all three corporations are "businesses operating in Georgia and authorized to do so." Scarlett is incorporated in Georgia and maintains a registered agent, Ten Key, in Forsyth County. Ten Key was the receiver for rents and payment of bills, as well as the repository of all corporate documents. The corporate banking accounts for all three corporations were also maintained at the Wells Fargo Bank in Forsyth County. And as the trial judge found in determining that his court had legal authority over the case, PJ & Associates and Parnell Associates were formed as Mississippi corporations but both were authorized and registered with the Georgia Secretary of State to conduct business in Georgia. "All three are subject to the general jurisdiction of the state," the attorneys argue. The sisters are subject to the court's jurisdiction under the "long-arm statute," based on their "attempted take-over of these Georgia businesses, in violation of the by-laws of the corporations." The statute applies because it was the sisters' "wrongful takeover attempt, raiding of the Forsyth County bank accounts, firing of the Forsyth County bookkeeper and accountants, and removal of substantial operations to Florida, which is the basis for this lawsuit." And since Scarlett & Associates can be sued in Forsyth County, "so can the Stubblefield sisters," the brothers' attorneys argue.

Attorneys for Appellants (Sisters): Polly Stubblefield and Holly Stubblefield, representing themselves "pro se"

Attorneys for Appellees (Brothers): Allen Willingham, Thomas Wamsley, Jr.