



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Tuesday, January 6, 2015

10:00 A.M. Session

CONSIDINE V. MURPHY ET AL. (S14G1202)

A woman is appealing the dismissal of her lawsuit against a man she says ruined her business and squandered her assets. Two lower courts said the man was automatically immune from the lawsuit because he was acting as a court-appointed receiver.

FACTS: In 2008, Cecily Considine sued Michael Affatato in **Cherokee County** Superior Court, seeking eviction from her home and claiming he had moved assets of her engineering and 3D modeling technology business, Model Master, to a new location without her consent. Affatato countersued, claiming he was a partner in her business and he held interest in the business and the real estate. To protect the business, Considine filed an emergency petition asking the court to appoint a receiver to preserve the company's assets. In their motion, her attorneys argued a receiver was necessary due to fraudulent conduct and imminent danger to her property. Affatato consented, and in September 2008, through a consent order, the court appointed George Murphy and his accounting firm, Murphy & McInvale, P.C., as receivers. The order detailed their duties and liabilities, stating they "shall not be liable to the parties hereto, for any losses, liabilities, expenses, claims, damages, or demands arising out of or in connection with said performance, except for gross negligence or willful misconduct, as determined by a court of competent jurisdiction." In October 2008, Murphy & McInvale drafted and signed an

engagement letter signed also by attorneys for Considine and Affatato and incorporating the consent order. In September 2010, Considine sued George Murphy and his firm, alleging that Murphy committed malpractice and claiming gross negligence, breach of fiduciary duty and willful and wanton misconduct. Murphy filed a motion to dismiss the case, arguing that as a court-appointed receiver, he was entitled to official immunity. The trial court granted the motion, stating that official immunity “protects those persons who are acting as government officials from personal liability for discretionary actions taken within the scope of their official authority, and done without willfulness, malice or corruption.” Considine appealed to the Georgia Court of Appeals, which upheld the trial court’s ruling, finding no evidence of malice. Considine then appealed to the state Supreme Court, which agreed to review the case to determine under what circumstances a court-appointed receiver is entitled to immunity and whether the Court of Appeals erred in affirming the trial court’s order dismissing the suit based on a failure to present evidence of actual malice.

ARGUMENTS: Representing herself “pro se,” Considine argues Murphy and his company “incorrectly place all court appointed receivers under the cloak of official immunity. Official immunity...is immunity for a public officer. An officer of the court is not automatically a public officer or entitled to a heightened state of official immunity.” Furthermore, a court appointed receiver “is not immune from negligence or neglect in the execution of the office,” she argues. Murphy was entrusted with all the incoming funds, which by his own 2009 statement totaled \$969,606.84, as well as Considine’s personal real estate. “All assets have been lost,” Considine writes in briefs. “George W. Murphy and Murphy & McInvale acted by gross negligence or willful misconduct, by failing to ensure payments necessary to the preservation of assets....This failure resulted in the loss to foreclosure in real property with equity.” Murphy “ran the company until there was nothing, then failed to pay the rent, causing...complete loss of every single asset belonging to Considine.” “Nothing, anywhere suggests that a receiver, an entrusted fiduciary, could or should duck under a veil for substandard performance and care requiring malice to be accountable. This is not the intent of statute or law.” The letter of engagement between the parties states that the receiver may be held liable for gross negligence or willful misconduct. The Court of Appeals also erred in its ruling by defining all of the receivers’ duties as “discretionary,” as opposed to “ministerial.” Under the doctrine of official immunity, state workers are more protected when performing discretionary acts, which require personal deliberation and judgment, as opposed to ministerial duties, which merely involve the execution of a specific duty. Under the consent order, Murphy had to “pay, from Model Master’s accounts and proceeds, the mortgage payments, taxes, insurance and association fee....” Such payments are clearly ministerial. Finally, any “reasonable person looking at the record would conclude that intent to injure existed,” Considine argues. Murphy stated in an email to her that, “it appears that some damage to your credit is inevitable.” Even if Murphy and his company are entitled to official immunity, based on the terms and conditions of both the appointing order and the engagement agreement, proof of malice is not necessary, Considine contends. Even if it is decided that malice was necessary to waive immunity for discretionary acts, the record is clear that ministerial acts existed which do not require immunity. And, “[e]ven if all the above did not apply, the record clearly indicates and is supported by evidence in the record of intent to injure (malice).” This case should be sent back to the Court of Appeals with instructions that Murphy and his company can be held liable for gross negligence.

Attorneys for Murphy argue the two lower courts ruled correctly. “Court-appointed receivers are immune from suit because they are the trial court’s servant – performing difficult duties under difficult circumstances,” they write in briefs. “In her brief, Appellant [Considine] plucks from secondary sources and glosses over the record to avoid Appellees’ [Murphy’s] right to immunity. Both the trial court and the Court of Appeals saw through the smoke and mirrors and dismissed her claims because Appellees are entitled to immunity.” At all times, Murphy and his firm, “served at the pleasure of the court, were held accountable by the court, and could be removed at any time by the court.” Also, the trial court properly found that Considine failed to present evidence of malice as required by state law. State officers “are subject to suit only when they negligently perform or fail to perform their ‘ministerial functions’ or when they act with actual malice or intent to cause injury in the performance of their official functions,” the attorneys argue. In her initial lawsuit, Considine failed to allege any willful action on Murphy’s part. Now, “[m]erely alleging ‘willful and wanton misconduct’ will not overcome the shield of official immunity,” the attorneys argue. Any failure by the receivers to make payments can be blamed on the bitter business dispute between Considine and her former business partner, Affatato. Their “perpetual conflict” made the receivership “untenable.” Both Considine and Affatato provided none of the information required under the receivership order, “making it impossible for Appellees to verify Model Master’s accounts and assets,” the attorneys argue. “As a result, Appellees could not make all requested payments to parties and third parties.” Furthermore, in 2009, when Affatato filed a motion to remove Murphy for failing to make payments, Considine “*defended* Appellees by acknowledging they were not provided the proper documentation and were unable to evaluate payments.” Six years after selecting Murphy and his firm as receivers, Considine “continues to second-guess every decision made by Appellees and blames Appellees for the difficulties of her business known as Model Master,” the lawyers argue.

Attorney for Appellant (Considine): Cecily Considine, pro se
Attorneys for Appellees (Murphy): Johannes Kingma, Brian Spitler, C. Joseph Hoffman

CALLAWAY ET AL. V. GARNER ET AL. (S14G1184)

The children of the man who founded Callaway Gardens are appealing a ruling by the Georgia Court of Appeals, which requires them to pay \$462,000 in interest because they reneged on a promise to purchase stock their father had agreed to buy.

FACTS: Beginning in the 1980s, Larry Garner, Sr., and his son, Larry Garner, Jr., who owned a family construction business, worked on various construction projects for Cason J. Callaway, Jr., who founded Callaway Gardens in 1952 in **Harris County**. Throughout their 20-year business history, nearly all the projects involved oral agreements, with no written contracts, that were sealed by a handshake. The Callaway property contained a natural spring, and in the late 1990s, the Garners and Cason Callaway decided to start a commercial spring water bottling business, which they named Callaway Blue Springs Water Company. Garner, Jr. was Chief Operating Officer and President of the company; Callaway was Chief Executive Officer and Chairman of the Board of Directors, which included his wife and four children. Initially, the Garners owned 45 percent of Callaway Blue and Callaway owned 55 percent. As Callaway grew older (he was 76 when he and the Garners started Callaway Blue), he executed a power of attorney authorizing his children to manage his business affairs. While Callaway remained involved in Callaway Blue, his son, Kenneth Callaway, began taking a more active role in the

business. Kenneth Callaway and the Garners did not get along, and in 2006, the Callaway family made a written offer to purchase Larry Garner, Jr.'s shares in Callaway Blue for \$55 per share. Garner rejected the offer as too low. At Cason Callaway's request, on Jan. 31, 2007, the Garners met with Callaway and his son, to try to agree on the stock price. While the Callaway children reiterated the price had been appraised at \$55 per share, the Garners contended their appraiser had said the stock was worth \$253 a share. According to the Garners, Callaway on his own then suggested a compromise and offered to buy the Garners' 7,500 shares for \$160 per share, or \$1.2 million. The Garners accepted Callaway's offer and at the end of the meeting, shook Callaway's hand and thanked him for concluding the deal. In March 2007, Ken Callaway and his three siblings sent a letter to the Garners canceling the deal due to an inventory error and stating that a "revised offer" would need to be considered. Callaway himself did not sign that letter.

Soon after, the Garners sent a written demand to Callaway insisting he go through with his agreement to purchase their shares for \$1.2 million. When the Garners learned the demand was being refused, they sued, seeking "specific performance" of their agreement. They also sought "prejudgment interest" and attorney's fees. Callaway died during the litigation, and Ken Callaway and his siblings, who were executors of their father's estate, were substituted as parties. Following a "bench" trial (before a judge with no jury), the judge ruled in the Garners' favor and ordered the Callaways to "perform" the agreement reached on Jan. 31, 2007 by purchasing the stock for \$1.2 million. The judge also awarded the Garners prejudgment interest that had accrued and attorney's fees. The family appealed to the Court of Appeals, which upheld the ruling requiring the family to purchase the stock and to pay prejudgment interest, but it reversed the requirement to pay attorney's fees. The Callaway's now appeal only one issue – the prejudgment interest – to the state Supreme Court, which has agreed to review the case to determine whether under state law, interest may be required when the judgment does not award financial damages but rather awards the completion of a contract.

ARGUMENTS: Attorneys for the Callaway family argue that Georgia Code § 13-6-13 "authorizes awards of prejudgment interest only in actions...to recover monetary 'damages' for breach of contract." Specifically, the statute says: "In all cases where the amount ascertained would be *damages* at the time of breach, it may be increased by the addition of legal interest from that time until the recovery." In this case, the \$1.2 million "represented the face amount of the agreement, not the amount of any 'damages' to the Garners resulting from Mr. Callaway's refusal to perform the agreement," the attorneys argue. Second, damages and specific performance are "mutually exclusive" legal remedies, they contend; "only one or the other is available." "Had the General Assembly intended to make prejudgment interest available on awards of specific performance, it would have said so, and it would not have chosen the word 'damages' in the statute." Third, awarding prejudgment interest was improper because the Garners were awarded no monetary damages. The Garners introduced expert testimony and other evidence at trial that showed their shares were worth *more* than the \$1.2 million offered by Callaway and that they therefore suffered no "damages" as a result of the Callaways' refusal to perform. Fourth, because the Garners had no damages, the award of prejudgment interest would overcompensate them. "The purpose of prejudgment interest is to compensate the injured party for the delay in receiving money *damages*." Here, the Garners retained ownership of their asset, enjoying all of its rights and benefits throughout the litigation. Finally, no legal precedent allows the recovery of prejudgment interest in an action for specific performance, attorneys for the

Callaways argue. Until this decision, neither the state Supreme Court nor the Court of Appeals held that prejudgment interest was available under § 13-6-13 in a case in which the trial court awards no damages.

Attorneys for the Garners argue the Callaways have misstated “two important matters pertinent to this appeal.” First, Georgia law does allow for the recovery of damages, including prejudgment interest, in an action for specific performance. “Second, there is no evidence in the record to support [the Calloways’] contention that the Garners benefitted financially from holding stock in [Calloway Blue] during the pendency of the litigation,” the attorneys argue in briefs. “The Garners were put to considerable litigation expense and considerable delay in receiving payment for the stock; and in fairness they should be awarded interest for the Callaway estate’s breach of that agreement in the failure to perform the contract.” This case “falls squarely within the purpose of the award of prejudgment interest, *which is to compensate for the delay in receiving money*,” the attorneys argue. The Callaways argue that specific performance and damages are mutually exclusive legal remedies. “This is not a correct statement of Georgia law,” the Garners’ attorneys argue. The Georgia Supreme Court ruled in 1979 in *Golden v. Frazier* that “incidental damages awarded [plaintiff] in order to make them whole are not inconsistent with the decree of specific performance.” The Garners’ entitlement to prejudgment interest on the \$1.2 million was made an issue in this case from the outset, as they specifically asked for interest in their initial complaint. “The Georgia case law mandates the award of prejudgment interest in *all cases* where the amount due is fixed and plaintiff requests the award of interest before trial.” To deny interest would be an unjust outcome in this case and “would encourage the making of contracts with the intention of not performing so as to only have to pay the original amount years later,” the attorneys contend. “The trial court enforced the contract and awarded prejudgment interest for the five plus years that had passed by since [the Calloways] wrongfully refused to perform the contract.” Nothing in the history of § 13-6-13 suggests that reference to “damages” is intended to exclude application of the statute to the facts of this case. “The Callaway estate overly complicates the issue presented, suggesting that... ‘damages’ are something other than the \$1.2 million awarded in this case.”

Attorneys for Appellants (Callaways): Emmet Bondurant, Michael Terry, Alison Prout, Greg Ellington

Attorneys for Appellees (Garners): C. Morris Mullin, Joseph Waldrep

KAUTZ, MAYOR V. POWELL ET AL. (S14G1161)

The Mayor of the City of Snellville is appealing a split decision by the Georgia Court of Appeals, which ruled that while the Mayor has the authority to appoint the City Attorney, only the City Council has the authority to fire him.

FACTS: In November 2011, Kelly D. Kautz was elected as the first female mayor of Snellville in **Gwinnett County**. Anthony O. L. Powell was city attorney at the time, having been appointed by the previous mayor. Under the City Charter, the mayor is the Chief Executive Officer of the City and has certain appointment powers. Among them, the charter states: “The mayor shall appoint a city attorney, together with such assistant city attorneys as may be authorized, and shall provide for the payment of such attorney or attorneys for services rendered to the city.” The tenure of the city attorney is not defined, and the charter does not explicitly state what official has the authority to terminate the city attorney or any appointed officer. Two other

sections of the charter are at issue here. One, Section 5.16, states: “The mayor, council members, or other appointed officers provided for in this Charter shall be removed from office for any one or more of the causes provided in Official Code of Georgia Annotated Title 45 or such other applicable laws as are or may hereafter be enacted.” The second, Section 2.16 of the charter, states: “Except as otherwise provided by law or this Charter, the city council shall be vested with all the powers of government of this city.” The parties differ in their account of what happened to Powell. According to Kautz, following her election, she told Powell he would no longer be needed as she intended to appoint a new city attorney, which she did. However, the five-member city council voted to retain Powell as a separate attorney for themselves, according to Kautz, and in an attempt to compromise with them, she reappointed Powell. In December 2012, however, Kautz again informed Powell of her intent to appoint a new city attorney, citing his lack of communication and exorbitant bills. She appointed a new law firm and says Powell then refused to relinquish his position or files. According to city council members, after appointing a new city attorney in November 2011, Kautz fired him four months later. She appointed another attorney who lasted less than 60 days, after which she reappointed Powell in April 2012. In December 2012, she attempted to terminate Powell a second time. She appointed two women from a law firm and when they resigned in January 2013, she attempted to appoint another attorney. At that point, the city council insisted Powell continue to serve as city attorney.

On Jan. 9, 2013, Kautz sued Powell and four of the five city council members, asking the court to declare that as mayor, she had the sole power to appoint the city attorney and the sole power to terminate him. Following a hearing, in April 2014, the trial court ruled against her, stating that based on Section 5.16 of the charter, she did not have the authority to remove the city attorney without cause. Kautz then appealed, and in a 4-to-3 decision, the Court of Appeals upheld the trial court’s judgment, finding that while the charter “expressly authorizes the mayor to hire the city attorney,” Section 2.16 gave the city council all powers not expressly granted to the mayor, including the power to terminate the city attorney. Kautz now appeals to the state Supreme Court, which has agreed to review the case to determine whether the Court of Appeals erred in ruling that the Snellville City Council retains the sole power to remove the city attorney.

ARGUMENTS: Kautz’s attorneys argue that the Court of Appeals majority decision has upended more than a century of law in this state and “departs from well-established precedent.” Under the Georgia Supreme Court’s 1911 decision in *Wright v. Gamble*, as well as many decisions that followed, inherent in the power to appoint is the power to terminate. As the *Wright* decision stated, where “the tenure of the office is not prescribed by law, the power to remove is an incident to the power to appoint.” That means that where “a mayor has the power to appoint a city official for an undefined tenure, that mayor necessarily has the power to remove that official,” Kautz argues. “Notably, this universal rule applies regardless of whether the power of removal is explicitly provided for by statute or charter.” Not only does the court of Appeals decision conflict with principles set by the U.S. Supreme Court and the Georgia Supreme Court, it could also lead to a “dysfunctional government,” the mayor’s attorneys argue. As the dissenting judges pointed out in the Court of Appeals decision, the majority ruling creates a potential stalemate in which a mayor could appoint a city attorney one day, and the city council could fire him the next, followed over and over by the same scenario. Furthermore, like Snellville, many of the 535 municipal governments in Georgia have charters based on the Georgia Model Municipal Charter. “This decision could alter the balance of power and removal

procedures used throughout Georgia – at all levels of Georgia government,” they argue in briefs. The Court of Appeals majority misconstrued Section 2.16 of the charter, which states: “Except as *otherwise provided by law* or this Charter, the city council shall be vested with all the powers of government of this city.” As the dissenting opinion points out, the “otherwise provided by law” in Section 2.16 “includes the law established over 100 years ago in *Wright* – that the power to remove is an incident to the power to appoint.” Finally, the mayor’s attorneys argue, Section 5.16 applies only when an appointed officer is removed for cause. As the city council members conceded, “the position of the Snellville city attorney has never been, and ‘will never [be] one [that] can be terminated *only* for cause.’”

Attorneys for the city council members argue the Court of Appeals majority correctly found that the city charter “expressly grants the city council the power to remove appointed officers.” This case merely reflects the “power struggle” initiated by Kautz, a lawyer, “in an attempt to single-handedly dominate and control the operation of the City of Snellville government.” “In the short span of her three-year term, Kautz has demonstrated a penchant for reflexively firing appointed city officials who voice disagreement with her,” they argue in briefs. “Kautz has unilaterally fired or attempted to fire multiple city attorneys, the city manager, the city clerk, the city municipal judge, and the city solicitor without consulting the other five elected members of the city council.” She’s forced out many officers, including the city clerk who served 24 years “with a stellar record of achievement.” While Section 3.12 grants the mayor specific powers, “the authority to terminate the city attorney is not among them,” the attorneys argue. “In the event power is not specifically delegated anywhere else in the charter, Section 2.16 delegates that authority to the city council.” And because the charter “expressly reserves the power to remove city officials to the city council,” the *Wright* decision is inapplicable to this case as it only applies “where no express power to terminate or limiting law exists.” The suggestion that the “other law” exception in the charter includes the *Wright* decision, “does violence to the language,” the attorneys argue, because *Wright* “applies only where the legislature has not otherwise allocated power.” In most cases in Georgia, the mayor appoints the city attorney and the city council confirms the appointment. Contrary to the assertion by Kautz and the Court of Appeals dissent, “this is not stalemate,” the attorneys argue. “This is balanced, good government.” Finally, the trial court properly ruled that Kautz was not authorized to terminate the city attorney without complying with Section 5.16 of the charter. “Georgia courts have held that no implied power of termination exists where a statute expressly provides a method by which to terminate an appointed officer and reasons to do so, e.g., for cause.”

Attorneys for Appellant (Kautz): S. Lester Tate, III, Phyllis Miller, Zahra Zarinshak, Christopher Adams

Attorneys for Appellees (Council): Anthony O.L. Powell, Robert Wilson, Nathan Powell

ZALDIVAR V. PRICKETT ET AL. (S14G1778)

A woman injured in a car wreck is appealing a Georgia Court of Appeals decision that upheld a **Cherokee County** judge’s refusal to let a jury decide whether the employer of the man who hit her is partially responsible for the accident that caused her injuries.

FACTS: On Oct. 9, 2009, Daniel Prickett and Imelda Zaldivar collided at an intersection controlled by a traffic light. Both were injured, and Zaldivar was taken to the hospital. Prickett, who worked for Overhead Door Company and was driving a company truck on his way to a

sales call, claimed he was clearing the intersection by turning left after the light turned red; Zaldivar claimed Prickett turned left in front of her as she entered the intersection on a green light. In September 2011, Prickett and his wife sued Zaldivar, seeking to recover damages for personal injuries. While Zaldivar did not file a counterclaim against Prickett, despite her injuries, she filed a “Notice of Fault of Non-Party,” claiming that Prickett’s employer, Overhead Door, was at least partially at fault by negligently entrusting a company vehicle to Prickett, who she alleged had a bad driving record. According to Overhead Door’s employment records, three anonymous calls had been made to the company during an eight-year period complaining of Prickett’s driving, although he received no traffic citations during his more than 13 years while driving a company vehicle. Zaldivar argued the company took no action to protect the public, and that under Georgia Code § 51-12-33 (c), the judge should consider the fault of Overhead Door when assessing percentages of fault for the accident, even though Overhead Door was not a party to the suit. The statute allows for the apportionment of civil damages based on the percentage of fault of parties and nonparties. Specifically it says: “In assessing percentages of fault, the trier of fact [i.e. the judge or jury] shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit.”

Prickett filed a motion for “summary judgment,” which a trial court grants only if the judge determines there is no need for a jury trial because there is no genuine debate over the facts and the law falls squarely on the side of one of the parties. Zaldivar opposed the motion, arguing the case should go to a jury to weigh the evidence and consider the fault of Overhead Door in assessing the percentages of fault. In June 2013, the judge ruled in favor of Prickett, stating that “Overhead Door cannot be liable to Mr. Prickett for injuries he sustained that may have been caused by the negligence of [Zaldivar] or Mr. Prickett’s own negligence, as Overhead Door was not in breach of any legal duty owed to Mr. Prickett, nor was it the proximate cause of his injuries under the facts of this case.” (Proximate cause is one that directly causes an event.) Zaldivar appealed to the Georgia Court of Appeals, which upheld the lower court’s judgment, finding that another section of the apportionment statute, § 51-12-33 (a) allows for assessing the percentages of fault of “all persons or entities *who contributed to the alleged injury or damages*” and reasoning that as a result of Prickett’s own negligence, any negligence by Overhead Door could not be said to have contributed to Prickett’s injuries. Zaldivar now appeals to the state Supreme Court.

ARGUMENTS: Zaldivar’s attorneys argue the Court of Appeals erred. Under the plain language of the apportionment statute, “a jury should be allowed to consider whether [Prickett’s] employer, Overhead Door, was negligent and contributed to the claimed damages because Overhead Door knew of [his] poor driving yet continued to allow him to drive its vehicles.” The statute allows a jury to consider fault “*regardless of whether the person or entity was, or could have been, named as a party to the suit...*” “When given its plain meaning this statute permits a jury to consider and apportion fault to Overhead Door,” the attorneys argue in briefs. As the dissent in the Court of Appeals decision pointed out, if Zaldivar had been the one who filed suit against Prickett, “Prickett could name Overhead Door – his own employer – as a non-party under the Georgia apportionment statute, and try to reduce his own liability for Zaldivar’s damages by attempting to assign a percentage of fault for Zaldivar’s injuries to Overhead Door by claiming that his own employer negligently entrusted him with the truck. Yet even though Prickett’s

injuries resulted from the same accident, the majority holds that because Prickett is the plaintiff, Zaldivar is prohibited from making the same assertion that Overhead Door was at least partially responsible for the accident that caused Prickett's injuries." Zaldivar's attorneys argue that the Court of Appeals decision is "inconsistent with existing law and, unless reversed, will lead to unintended and unfair results." "To prohibit a jury from considering the fault of Overhead Door would potentially make Ms. Zaldivar pay more than her fair share of damages, a result contrary to the plain and ordinary meaning of the statute." While Prickett's own negligence would prohibit him from filing an action against his employer, "this does not eliminate Ms. Zaldivar's statutory right to bear only her apportioned degree of fault." Furthermore, allowing apportionment in this case is consistent with the law in other states, the attorneys contend. "The fault of non-party Overhead Door should be considered by the jury because the evidence, viewed in a light most favorable to Ms. Zaldivar, presents an issue of fact as to whether Overhead Door was at fault for negligently entrusting the company vehicle to the Appellee, Daniel Prickett."

Prickett's attorneys argue the Court of Appeals and Cherokee County court made the correct decision. The plain meaning of the apportionment statute "requires that a non-party be potentially 'responsible or answerable in law' for a plaintiff's damages before they can be assessed fault for the same." Here Prickett is the plaintiff, and as the Court of Appeals concluded, under the law, Prickett's own negligence would break the causal connection between any negligent act of Overhead Door in entrusting a vehicle to him. "The plain language of the statute, and how this Court has previously construed 'fault,' also significantly undermines it," the attorneys argue. Under Georgia law, non-party "fault" is identical to the concept of "legal fault" and means legally responsible or liable based on proof of proximate cause. Under its 2012 opinion in *McReynolds v. Krebs*, the state Supreme Court rejected an attempt to apportion fault to a non-party where there was no evidence that the non-party could be liable to the plaintiff. Prickett argues that Zaldivar failed to present any admissible evidence to support her claim of "negligent entrustment" that Overhead Door had entrusted the vehicle to Prickett, knowing he was likely to use it in a risky manner. Under *Couch v. Red Roof Inns, Inc.*, the Georgia Supreme Court stated that the "purpose of the apportionment statute is to have the jury consider all of the tortfeasors [i.e. wrongdoers] who may be liable to the plaintiff together, so their respective responsibilities for the harm can be determined." Prickett's attorneys argue that the intent of § 51-12-33 (c) "was to ensure non-parties were no longer omitted from a jury's consideration of 'all of the tortfeasors who may be liable to the plaintiff together,' as they had previously been." Zaldivar has cited no Georgia authority – "none whatsoever" – to support the premise that a non-party does not have to be 'responsible or answerable in law to the plaintiff...for damages caused to that plaintiff,'" the attorneys argue. Zaldivar's claim fails under the law because Overhead Door did not proximately cause Prickett's damages or breach any duty to him. And a non-party's negligent act cannot be said to have "contributed" to a plaintiff's injury or damages unless there is a causal connection between them.

Attorneys for Appellant (Zaldivar): Sean Hynes, J. Colby Jones

Attorneys for Appellees (Prickett): James Sadd, Edward Wynn

2:00 P.M. Session

OASIS GOODTIME EMPORIUM I, INC. ET AL. V. CITY OF DORAVILLE ET AL. (S15A0146)

The appeal in this **DeKalb County** case is similar to the recent case involving the Pink Pony strip club and the City of Brookhaven. Here, the Oasis Goodtime Emporium is appealing a judge’s dismissal of its lawsuit challenging as unconstitutional Doraville’s sexually oriented business ordinance that bans nude dancing where alcohol is served.

FACTS: For more than 22 years, the Oasis has operated as a restaurant featuring nude dance entertainment and alcohol service on Peachtree Industrial Boulevard. Barbara Holcomb owns the business and the land, which is co-owned by Harold Oden. Beginning in 1991, a number of adult entertainment businesses filed lawsuits against DeKalb County for enacting ordinances that prohibit nudity and liquor together. Eventually a number of the establishments entered into an agreement with the County in which they dismissed their pending lawsuits in exchange for the right to continue operations. The establishments also agreed to pay the County a graduated licensing fee. For several years, Oasis paid DeKalb County \$100,000 a year. In March 2012, the Georgia Legislature adopted a bill that expanded the boundaries of Doraville to include Oasis. In October 2012, following a presentation on the negative secondary effects of sexually oriented businesses, the Doraville City Council adopted Ordinance No. 2012-18, the “Sexually Oriented Business Code.” It stated the code was based on “evidence of the adverse secondary effects, which the Council determined included “personal and property crimes, prostitution, potential spread of disease, lewdness, public indecency, obscenity, illicit drug use and drug trafficking, negative impacts on surrounding properties, urban blight, litter, and sexual assault and exploitation.” The City relied on Georgia Supreme Court decisions in saying that its desire to reduce crime by separating alcohol from adult entertainment was an important government interest. The code requires sexually oriented businesses and their employees to be licensed by the City. Like the Brookhaven ordinance in the Pink Pony case, as well as the DeKalb County code, Doraville’s code allows semi-nude dancing (i.e. pasties and a G-string), but prohibits full nudity and on-premises alcohol consumption. The Doraville Alcohol Code also contains provisions that prohibit and regulate adult nude entertainment at establishments that allow drinking. In 2013, Oasis applied to DeKalb County for a liquor license and received its renewal. In 2014, Doraville denied it a liquor license. That denial is currently on appeal in DeKalb County court.

Three months after passing the ordinance, Oasis – represented by the same attorney who represented the Pink Pony – sued the City, its mayor and city council, claiming that the DeKalb County Agreement binds the City and that Oasis’ ordinances are an unconstitutional violation of free speech. The City filed a motion asking the court to dismiss the case or rule in its favor based on the “pleadings,” i.e. the documents filed in the case. After a hearing, the trial court issued a 28-page order granting the motion in favor of the City. The trial court upheld the Sexually Oriented Business Code as constitutional and it upheld the Alcohol Code. It rejected all other arguments made by Oasis’ attorneys. Oasis now appeals to the state Supreme Court.

ARGUMENTS: Attorneys for Oasis argue the trial court erred in a number of ways, including by deciding the case based only on the pleadings. The documents alone did not prove facts that entitled the City of Doraville to relief. The judgment “wrongly assumes that the secondary effects identified in the record are problems that need addressing in Doraville,

although no such evidence has been offered by [the City],” the attorneys argue in briefs. Oasis and its owners “strongly contest the strength, reliability, and appropriate inferences from the studies allegedly considered by Doraville,” the attorneys argue. But because the trial court dismissed all their claims, they were never afforded an opportunity to present evidence casting doubt on the city’s rationale. The trial court also erred in its analysis of Oasis’s free speech challenges. A local ordinance may limit speech only if it: (1) furthers an important governmental interest; (2) is unrelated to the suppression of speech; and (3) the restriction is essential to furthering the governmental interest. “Nude dancing is protected expressive conduct,” the attorneys argue. “Oasis has been in business with nude dance entertainment and alcohol service for over 22 years. Neither Doraville nor DeKalb County has ever issued a citation to the business. The city has offered no evidence of any adverse effects resulting from Oasis’ operation. Yet, Doraville insists that the regulations it has imposed on Oasis, the sole adult club in the city, are narrowly tailored to achieve its interests.” Among other arguments, Oasis’ attorneys also contend the trial court was wrong in dismissing their zoning challenges. Under Doraville’s zoning ordinance, when Oasis was annexed into Doraville, it was entitled to “grandfathered” status. The zoning ordinance “expressly provides for the continuance of uses which were lawful when commenced but prohibited under the current code.” Under the ordinance, Oasis is “entitled to the issuance of the required licenses from Doraville for continued operation of the adult entertainment use,” the attorneys argue. “The combination of alcohol consumption and adult nude dancing is crucial to profitability for Oasis; the loss of either component would not be a mere inconvenience, but would destroy Oasis’ business.”

Attorneys for the City of Doraville begin their arguments referring to the Supreme Court’s Pink Pony decision, called *Trop, Inc. d/b/a Pink Pony et al. v. City of Brookhaven et al.* “The most striking aspect of Oasis Goodtime Emporium’s brief is what it does *not* say,” the attorneys write. “Although *Trop, Inc. v. City of Brookhaven* was decided just last month, is directly on point and governs almost every issue herein, and was argued by the same attorney who represents Oasis in this Court, Oasis’ opening brief never mentions that controlling decision.” In the Pink Pony case, the Supreme Court of Georgia ruled Oct. 6 that Brookhaven had the right to ban adult entertainment businesses that sell alcohol. “The case forecloses them, as it is on all fours: it affirmed judgment on the pleadings against a former DeKalb County nude dancing club making the same constitutional challenges to substantively identical ordinances.” This case is “interesting,” the attorneys concede, because it asks the question of whether nude dancing “is protected *at all* as ‘speech’” under Georgia’s constitution. “Nude conduct in sexually oriented businesses is not protected speech under...the Georgia Constitution,” the attorneys state. Nudity in public places was illegal both before and after the Constitution’s adoption; it was not considered protected speech at the time of the Constitution’s adoption by the framers or the people of Georgia; and the plain language of the Georgia Constitution does not support a right to nude dancing in a public place. Should the state Supreme Court interpret the state’s constitution as protecting nude dancing, however, it should still affirm the trial court’s ruling based on this Court’s recent Pink Pony decision. The City’s attorneys argue the trial court correctly granted judgment on the pleadings because even taking Oasis’ assertions as true, the City was entitled to judgment as a matter of law. The *Trop* decision alone “forecloses Oasis’ challenge to the prohibition of alcohol and nudity in sexually oriented businesses,” the attorneys argue. “The interests advanced here are the same important governmental interests advanced there.” The trial

court also properly rejected Oasis' zoning challenges. "Oasis' grandfathering claim rests on the oft-repudiated argument that a city cannot enforce new *licensing* regulations against a sexually oriented business," the City's attorneys argue. "That contention fails."

Attorneys for Appellants (Oasis): Alan Begner, Linda Dunlavy, G. Brian Spears

Attorneys for Appellees (City): Scott Bergthold, Bryan Dykes

TAFEL V. LION ANTIQUE CARS & INVESTMENTS, INC. (S15A0183)

A racecar driver is appealing a **Fulton County** court ruling against him involving two Ferraris he had agreed to buy from Lion Antique Cars worth more than \$1.5 million.

FACTS: Jim Tafel races cars. In December 2007, Tafel signed a Race Car Loan Agreement in which he agreed to buy two Ferrari F430 GT racecars from Antique Lion Cars. When Tafel defaulted on his payments, Lion sued and won a judgment against him in Sonoma County, California for the cost of the race cars, which the parties agreed was \$1,545,446.38. Shortly after Lion obtained the judgment, it petitioned the Fulton County Superior Court for a "writ of ne exeat," requiring Tafel to return the race cars to Lion. The trial court issued the writ and Tafel complied and turned over the Ferraris to Lion. The same court order required Lion to "immediately market and sell the vehicles" and to report the sales to the trial court so that it could deduct the amounts from the purchase-price judgment against Tafel. Tafel claimed that while he complied with the order and promptly returned the cars to Lion, Lion did not comply with the order and instead shipped one of the Ferraris to Europe to race in the 2009 European LeMans races for a lucrative race sponsorship, while shipping the other to Nevada. Lion claimed it was unable to sell the cars. In April 2010, Tafel filed a "Motion for Satisfaction of Judgment," arguing that Lion's decision to keep the Ferraris satisfied the purchase-price judgment against him and Lion was therefore not entitled to any recovery. The trial court denied the motion and instead ordered a jury trial to determine the fair market value of the Ferraris as of the date Tafel turned them over to Lion. That value would then be deducted from the judgment. In June 2013, a jury determined the combined fair market value of the Ferraris was \$693,000. Following a second hearing in June 2014, where the trial court considered evidence in Tafel's other claims, including his claim that Lion violated the court's order to sell the cars, the court issued its final order, finding that "as of the date of the Turnover Order the fair market value of the racecars was...\$900,000.00." Therefore, the trial court ruled, "the total fair market value of the racecars should be offset from the judgment thus reducing the same from \$1,545,446.39 to \$645,446.38 plus applicable interest." The court denied Tafel's motion to be reimbursed for his legal costs, based on insufficient documentation, and stated it was precluded from holding Lion in contempt of the ne exeat order because Tafel had not filed a contempt motion. Tafel now appeals to the state Supreme Court, and in a cross-appeal, Lion argues the trial court had no authority to modify from \$693,000 to \$900,000 what the jury determined was the fair market value of the cars, thereby reducing the amount owed by Tafel.

ARGUMENTS (S15A0183): Tafel's attorneys argue the trial court made several errors, including that it was wrong to use a "ne exeat" order to transfer property between parties. The Latin phrase, ne exeat, means "that he not depart," and the writ of ne exeat is used to prevent someone from leaving the state, not for transferring property between parties. "The trial court ignored that distinction," Tafel's attorneys argue in briefs. "Ne exeat is not a substitute for the normal process for collecting a debt – the creditor securing a judgment (as Lion did here), then

the debtor disposing of assets to satisfy the judgment (what the turnover order prevented Tafel from doing here). Even if the order was proper, the trial court incorrectly refused to hold that Lion's decision to keep the cars satisfied the underlying purchase-price judgment. "By keeping the cars, Lion accepted them as full satisfaction for its judgment against Tafel," the attorneys argue. "The trial court should have entered an order to that effect." The trial court also erred in concluding it was not authorized to hold Lion in contempt of the order because Tafel had not filed a motion for contempt. "A court can enter a contempt order on its own motion," the Georgia Court of Appeals ruled in 1960 in *Atlanta Newspapers, Inc. v. State*. Among other errors, the trial court erred in denying Tafel's motion for attorney's fees and costs on the ground that written summaries of the bills were "inadmissible hearsay." "That was wrong," the attorneys argue, citing a 2013 statute that allows "admissible voluminous writings" to be "presented in the form of a chart, summary or calculation." The Georgia Supreme Court should require Lion to turn over the Ferraris to Tafel and compensate him for the time he was wrongfully deprived of their possession, his attorneys conclude. "Alternatively, the Court should hold that Lion's decision to keep the cars fully satisfied the purchase-price judgment." It should throw out the trial court's order involving its contempt power and the admissibility of the attorneys' fees evidence because both reflect legal errors, Tafel's attorneys argue.

Lion's attorneys argue the ne exeat order was proper. "As Tafel admittedly could not pay the judgment, the writ was necessary to prevent Tafel from selling the Ferraris without compensating Lion," they argue in briefs. While Tafel claimed he owned the Ferraris and the trial court had no authority to compel him to turn them over to Lion, Tafel did not provide a transcript of the hearing. Therefore, the writ of ne exeat is presumed correct because Tafel has not shown any error in the record. Also he never asserted at trial that he owned the Ferraris, and he is prohibited from raising this issue for the first time on appeal. The loan agreement itself establishes that Tafel did not own the Ferraris. It specifically stated its purpose was for Lion to purchase the two cars and loan them to Tafel for use in the 2008 American Le Mans Series. "At the expiration of this Agreement, Tafel may either purchase the race cars or cause them to be sold," the agreement said. The trial court also properly concluded that Lion's inability to sell the Ferraris did not satisfy the judgment against Tafel, nor did it warrant a finding of contempt. Tafel is correct that a court on its own may sanction a party for contempt. "Here however, the trial court properly declined to make a finding of contempt because there was insufficient evidence to warrant such a finding." The trial court also properly excluded Tafel's evidence of attorney's fees because "Tafel offered no evidence or argument that the underlying invoices were too voluminous to be introduced at the hearing." The judgment was settled when the parties agreed to the amount in California. "The reduction of the judgment by the fair market value of the racecars as of the entry of the Turnover Order is a mere mathematical calculation from ascertained data in this case," Lion's attorney argue.

ARGUMENTS (S15X0184): Under the trial court's Turnover Order, directing Tafel to turn over the Ferraris to Lion, Lion was to immediately sell the cars for the highest price obtainable. The sales price of the Ferraris was then to be subtracted from the judgment. "During the hearing, the trial court was concerned with how to address the amount of credit due to Tafel because Lion held both the judgment and the Ferraris," Lion's attorneys argue. The court therefore scheduled a jury trial to determine the value of the cars. Following a three-day trial where evidence was presented, the jury set the fair market value at \$693,000. Once that issue

was settled, a second hearing was scheduled to deal with Tafel's other claims. Following that hearing, the trial court denied the entirety of Tafel's requested relief. But the trial court "nonetheless adjusted the jury verdict from \$693,000 to \$900,000." That was error because the issue was not within the jurisdiction of the Supreme Court but rather should have been appealed to the intermediate appellate court, the Georgia Court of Appeals. Furthermore, the jury was not impaneled to render merely an advisory verdict, and there was no basis for the trial court to modify the verdict.

Tafel's attorneys argue the issue is properly before the Georgia Supreme Court and not the Court of Appeals. "Lion's argument is pure revisionism (or the product of legal amnesia)," the attorneys argue. "This is not a case where the equitable issues are peripheral to a question of law." The trial court also did not err in adjusting the advisory jury's findings. "The jury was advisory – a fact that everyone understood from the beginning of the two-step valuation process." The value of the cars only became an issue "when Lion chose to disobey the ne exeat order and keep the cars instead of selling them," the attorneys argue. "Lion's arguments concerning the sanctity of jury verdicts are misplaced."

Attorneys for Appellant (Tafel): Brian Boone, William Hughes, Jr., Nowell Berreth

Attorneys for Appellee (Lion): Michael King, Andrew Capezzuto

EVANS V. GEORGIA BUREAU OF INVESTIGATION (S15A0103)

A man arrested for racketeering and stealing more than \$1 million before the charges against him were dismissed is appealing a **DeKalb County** court's refusal to force the GBI to turn over its investigative file to him under Georgia's Open Records Act.

FACTS: On Sept. 24, 2010, the GBI took out arrest warrants against three Georgia Tech University employees, including Christopher A. Evans. All three worked in the same agency at the university, and the warrants were based on allegations that they were part of a racketeering scheme. The warrants against Evans charged him with two counts of racketeering and alleged he had committed nine acts of theft by taking, totaling \$1,089,668.37. The investigations related to all three suspects and their arrest warrants are contained in one case file, GBI Case Number 10-0239-08-10. In January 2012, a Fulton County Superior Court judge dismissed the warrants against Evans. The warrants against the other two people have not been dismissed, nor have they been presented to a grand jury for prosecution.

In July 2013, Evans made an "open records request" for the portion of the GBI investigative file that related to him. The GBI responded that part of the case file was "open and pending court" and it therefore could not be released. "Although some warrants for Mr. Evans were dismissed, it appears that the investigation of this matter is still an open and pending case," a Senior Assistant Attorney General wrote in a letter to Evans' lawyer. Both the GBI and Attorney General's Office determined that the requested documents were exempt under Georgia Code § 50-18-72, which states which documents are exempt from disclosure under the Open Records Act. Among the exemptions listed: "Records of law enforcement... in any pending investigation or prosecution of criminal or unlawful activity...; provided however, that an investigation or prosecution shall no longer be deemed to be pending when all direct litigation involving such investigation and prosecution has become final or otherwise terminated."

Evans sued the GBI in DeKalb County, seeking a Writ of Mandamus to force the agency to turn over the records. He argued the investigation against him was terminated once the State

dismissed the charges, and his records were therefore no longer exempt from disclosure. At a hearing Dec. 19, 2013, the GBI records custodian testified that GBI files remain open “as long as there have not been either an arrest or adjudicated [sic], prosecuted. They remain open until something is resolved.” She said the records pertaining to Evans could not be released because the allegations involved a racketeering scheme, and “all of the evidence in this case involved three people. And although these warrants have been dismissed against Mr. Evans, everything that relates to him directly relates to the other two defendants.” She said that when files contain evidence on more than one suspect, the files remain open until *all* suspects are either prosecuted or all warrants are dismissed and the investigation is closed. The trial court ruled in the GBI’s favor, finding that because the GBI file involved an open investigation and prosecution against two of the suspects, the entire file was exempt from disclosure. Evans now appeals to the state Supreme Court and is supported in an amicus brief by the Georgia Press Association.

ARGUMENTS: “To hold that a prosecutor may keep an investigative file open indefinitely by neither dismissing the arrest warrants nor presenting the case to a grand jury eviscerates the Open Records Act,” Evans’ attorney argues in briefs. The Open Records statute explicitly states “that there is a strong presumption that public records should be made available to the public without delay.” In Evans’ case, the GBI had the burden of proving that the parts of the file related to Evans were not subject to disclosure. While the GBI relied on the state Supreme Court’s 2008 decision in *Unified Government of Athens-Clarke County v. Athens Newspapers, LLC*, that case does not apply here. The facts are dissimilar because they involve the rape and murder of a student in which no suspect has ever been named and certain facts are known only to police and the murderer. Here, Evans and two others were arrested and their photos appeared on television. “The GBI’s legal position is that it will never have to disclose its investigative file to Chris Evans as long as the Attorney General neither dismisses the warrants against the other two persons nor presents the case to a grand jury,” the attorney argues. “Such a legal position guts a portion of the Open Records Act.” When Atlanta police refused to release the investigative file of Wayne Williams after his conviction for the Atlanta child murders was affirmed on appeal, the state Supreme Court rejected police arguments in *Williams v. State*. The high court ruled that “post-conviction proceedings are of an indeterminate duration. To hold that the pendency of such proceedings requires a blanket non-disclosure of the investigatory case files would...eviscerate the Public Records Act in this area.” The GBI and the Attorney General’s Office should have been required to produce evidence that the disposition of the outstanding warrants against the other two people was imminent and of finite duration. “Chris Evans is entitled to know – nearly four years after his arrest – why the GBI and the Attorney General charged him with stealing over one million dollars and then thought so little of their case against Mr. Evans that the Attorney General had the warrants against him dismissed.”

The GBI argues the trial court properly found that the requested records were part of an ongoing investigation and prosecution and were therefore exempt from disclosure under Georgia Code § 50-18-72. “Georgia has a long history of recognizing exemptions for pending investigations and pending prosecutions, and the Georgia Supreme Court has continued to hold that investigation files are not subject to disclosure until the investigation is closed and the prosecution is either dismissed or has resulted in a trial and a direct appeal.” In the *Unified Government v. Athens Newspapers* decision, this Court ruled that given the broad exemption under the statute, even though the investigation into a 13-year-old unsolved murder was

“seemingly inactive,” the case had not yet resulted in a prosecution and therefore remained “pending.” “The Court further held that the pending investigation exemption rule applies until the investigation ‘is concluded and the file is closed,’ regardless of the length of time, because in the absence of prosecution, only then does the decision reach a ‘high level of finality,’” the State argues. “Additionally, the Court explained that the exemption applies to the ‘entirety’ of the records because ‘segreat[ing] documents before a case is solved could result in the disclosure of sensitive information.’” Evans “is not entitled to *any* documents contained within GBI Case Number 10-230-08-10,” because the investigative file containing the documents he wants “remains open and both investigation and prosecution remain undecided.” The other two suspects, who were charged the same day as Evans, “have not yet been indicted, prosecuted, or dismissed from the matter, and the evidence against [Evans] directly relates to the evidence against the other two suspects,” the state argues. “Furthermore, a copy of GBI Case Number 10-230-08-10 has been turned over to the Attorney General’s Office and the defendants are awaiting indictment, which shows that the GBI is not just sitting on these investigative files, but that a prosecution is also pending.” Finally, Evans is wrong to state that the GBI “will never have to disclose its investigative file.” The “prosecution of the three suspects here *is* of a finite duration – the statute of limitations for RICO violations prevents the prosecution from dragging on indefinitely,” the State argues.

Attorney for Appellant (Evans): Harrison Kohler

Attorneys for Appellee (GBI): Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Joseph Drolet, Sr. Asst. A.G., Rebecca Dobras, Asst. A.G.