



## Supreme Court of Georgia

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## CASES DUE FOR ORAL ARGUMENT

### Summaries of Facts and Issues

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**Monday, March 2, 2015**

### **10:00 A.M. Session**

#### **DUBOIS ET AL. V. BRANTLEY ET AL. (S14G1192)**

In this medical malpractice case from **Glynn County**, a man is appealing a Georgia Court of Appeals decision. The appellate court ruled the man's medical expert witness was not legally qualified to conclude that the man's surgeon was negligent when he pierced the man's pancreas during a simple hernia repair.

**FACTS:** In January 2012, David Dubois and his wife, Janet, sued Damon Brantley, M.D., a general surgeon, and Glynn-Brunswick Memorial Hospital for medical malpractice. In their complaint, they alleged that on March 31, 2011, Brantley negligently injured Dubois' pancreas while performing a laparoscopic umbilical hernia repair. They claimed the surgeon struck Dubois' pancreas with a tube-like instrument called a "trocar" that is used to facilitate the procedure. The injury was undetected until the next day when Dubois started running a fever and went to the emergency room. He was eventually transferred to the Southeast Health System in Brunswick, where he was diagnosed with pancreatitis, complicated by respiratory failure, acute renal failure and sepsis. According to Dubois, he subsequently underwent 11 surgical procedures, was in an out of hospitals, was out of work for six months, and incurred more than \$480,000 in medical bills. Attached to Dubois' complaint was an affidavit by Dr. Steven E. Swartz, a general surgeon in Richmond, VA. Swartz agreed that Brantley had deviated from the

applicable standard of care by injuring Dubois' pancreas, resulting in pancreatitis and other illnesses.

Georgia Code § 24-7-702 (c) (2) (A) states that in a medical malpractice case, the opinion of an expert is admissible only if the expert "had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in: (A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure... which is alleged to have been performed or rendered negligently." During deposition, Swartz testified that he had performed "maybe one" laparoscopic umbilical hernia repair in the five-year period before Dubois' procedure, and possibly none. However, he also testified that he does "lots and lots of laparoscopy for other things and I do umbilical hernia repairs and I'm intimately familiar with the techniques for laparoscopic umbilical hernia repair." Based on his testimony, Dubois filed a motion asking the court to dismiss the lawsuit, or at the very least, issue a "summary" judgment in his favor. (A judge issues a summary judgment upon deciding a trial is unnecessary because the facts of the case are not disputed and the law falls squarely on the side of one of the parties.) The trial court denied the motion, but on appeal, the Court of Appeals reversed the decision, ruling in Dubois' favor. The appellate court ruled that Swartz had not performed the procedure at issue with sufficient frequency to be qualified to testify as an expert under the statute. In this pre-trial appeal, Brantley and the hospital now appeal to the state Supreme Court. The high court has agreed to review the case to determine whether the Court of Appeals correctly ruled that the trial court abused its discretion in finding that the expert affidavit submitted by Dubois met the requirements of Georgia Code § 24-7-702 (c) (2) (A).

**ARGUMENTS:** Attorneys for Dubois argue the Court of Appeals was incorrect in reversing the trial court's decision. Brantley and the hospital are arguing they "should not be legally responsible for the harm he admittedly caused" simply because, they contend, Swartz is not legally qualified to provide an opinion. Swartz was "more than well-qualified to render an expert opinion," the attorneys argue in briefs. "Given the nature of the injury – an injury caused by inappropriate and forceful use of a trocar – and Dr. Swartz' extensive experience in performing laparoscopic procedures and his intimate knowledge of human anatomy gained through over 20 years of surgical practice – it is well within the bounds of reasonableness and logic to determine that Dr. Swartz's opinion is both reliable and informative to a jury." Different laparoscopic surgeries may involve similar techniques and concerns, the attorneys argue. "To reverse a trial court's decision on the simple ground that the testifying physician performed only one laparoscopic umbilical hernia repair in the five years preceding the patient's injury when the same expert has performed hundreds of laparoscopic surgeries deprives the trial court of its ability to exercise its own judgment." That argument "would hold more water if the act complained of was one uniquely involved in the laparoscopic repair of an umbilical hernia, as opposed to a surgical technique involved in laparoscopic surgeries in general. Such is not the case." "The decision of the Court of Appeals impermissibly grafts an additional legal requirement into the Qualifications Statute," Dubois' attorneys argue. "It essentially interprets § 24-7-702 (c) (2) (A) to require that the testifying physician have performed the identical surgical procedure within the five years preceding the incident complained of in order to demonstrate a 'significant familiarity' with the procedure in question." But that's not what the statute says.

“Had the legislature intended that the testifying expert be qualified only if he had performed a procedure identical in all respects to the one in which the plaintiff sustained harm, it would have so stated.” The trial court was within the bounds of its discretion in finding Swartz qualified, Dubois’ attorneys contend.

Attorneys for Brantley and the hospital authority argue the Court of Appeals correctly reversed the trial court because there is no demonstration that Swartz had a significant familiarity with the performance of the procedure at issue: laparoscopic umbilical hernia repair. Georgia Code § 24-7-702 (c) (2) (A) “plainly provides that an expert in a medical malpractice action must have actively practiced his area of specialty with ‘sufficient frequency to establish an appropriate level of knowledge’ in ‘performing the procedure’ which is alleged to have been performed negligently.” Here, Swartz testified he had performed “maybe one” laparoscopic umbilical hernia repair and possibly none during the five-year timeframe. “The Dubois belabor Dr. Swartz’s ‘knowledge and experience...in [other] laparoscopic procedures,” the attorneys argue in briefs. “What is conspicuously ignored by the Dubois, however, is Dr. Swartz’s dearth of ‘knowledge and experience’ in performing laparoscopic umbilical hernia repairs. It is, after all, required that an expert have actively practiced his specialty, with sufficient frequency, to obtain the appropriate level of knowledge to opine *as a result* of having been regularly engaged in performing the procedure that is alleged to have been performed negligently.” Furthermore, the intent of the legislature should not be overlooked, Brantley’s attorneys argue. “The purpose of the expert witness statute is to ensure expert testimony is only given by those with ‘significant familiarity’ with the subject at issue,” the attorneys argue. In enacting § 24-7-702 (c) (2) (A), the General Assembly intended to require a plaintiff to obtain an expert who has significant familiarity with the area of practice in which the expert opinion is to be given.” The Court of Appeals correctly decided the trial court abused its discretion. Swartz does not meet the requirements of § 24-7-702 (c) (2) (A) because he has not performed the procedure which is alleged to have been performed negligently with sufficient frequency to render him qualified to testify against Brantley. “The text of subsection (c) (2) (A) is the law, and the text must therefore be followed,” the attorneys contend.

**Attorney for Appellants (Dubois):** Brent Savage, Kathryn Pinckney

**Attorneys for Appellees (Brantley):** N. Daniel Lovein, William Mann

### **BOWDEN V. THE MEDICAL CENTER, INC. (S14G1632)**

An uninsured woman who was injured in a car wreck is appealing a Georgia Court of Appeals ruling that she is not entitled to detailed records from the hospital that treated her. She argues she needs those records to show that the hospital’s charges were unreasonable.

**FACTS:** On July 1, 2011, Danielle Bowden was in a collision in Columbus, GA in **Muscogee County** and taken by ambulance to The Medical Center Hospital where she received emergency medical treatment and was hospitalized for three days. Bowden, 21, did not have health insurance. She had been riding as a passenger in a rental car which was owned and self-insured by Enterprise Leasing Company South Central, LLC. The hospital billed Bowden \$21,409.59 for her treatment, which included emergency surgery, two CT scans and physical therapy during the three days she was hospitalized. While Bowden was in the hospital, her mother signed a document entitled, “Patient Acknowledgment, Assignment of Benefits and Consent Agreement.” Bowden presented her medical bills to Enterprise, which had insured the

rental car up to \$25,000. The hospital, meanwhile, filed a hospital lien to recover the costs of Bowden's care. The hospital offered to settle its near \$21,500 lien for \$8,333, but Bowden refused. When Bowden and the hospital could not reach a settlement, Enterprise filed an action against both of them and paid the \$25,000 into the registry of the court for the court to settle the distribution. In a "cross-claim" against the hospital, Bowden then alleged that the hospital's charges were unreasonable and excessive because she was charged more than an insured patient, there was no valid contract between her and the hospital, the hospital had engaged in deceptive trade practices, and it would be unjustly enriched if it collected the full amount. The hospital filed a counterclaim seeking a judgment from the court that its hospital lien was valid.

To support her claim that the hospital's charges were not reasonable, Bowden sought during the discovery process – when the parties share information prior to trial – the hospital's pricing agreements with various insurance companies, the number of uninsured patients it treated, and information about the hospital's revenue. Among the documents her attorneys sought were rate-setting agreements for three years between the hospital and Medicaid, Medicare, Blue Cross/Blue Shield of Georgia, Tri-Care, and the indigent patient program, as well as specific, itemized bills of what she would have been charged if covered by any of those programs. The hospital's lawyers objected to her requests, arguing they were irrelevant, involved confidential and proprietary information, and were overly broad and burdensome. Bowden responded by filing a Motion to Compel the hospital to turn over the documents. The Muscogee County Superior Court granted her motion. But the Court of Appeals reversed the trial court ruling. It found that the hospital had already provided Bowden with information required under state law, including a summary of standard charges, and that her discovery requests seeking information about negotiated insurance rates was not relevant to her claim that the hospital's charges were unreasonable. The Court of Appeals based its decision on the facts that Georgia hospitals are free to contract with insurance companies to set preferred rates and that none of those negotiated rates applied to Bowden because she is uninsured. Also, the appellate court determined that even if she had been insured, the hospital is "entitled to collect the full amount of its bill under the lien statute, not merely the lower reimbursement rate contracted between the insurance company and the hospital." And her claims are foreclosed under the Georgia Court of Appeals' 2006 decision in *Cox v. Athens Regional Medical Center*, the appellate court ruled. In this pre-trial, or "interlocutory," appeal, Bowden now appeals to the state Supreme Court, which has agreed to review the case to determine whether the Court of Appeals erred.

**ARGUMENTS:** Bowden's attorneys argue the Court of Appeals was wrong in finding that the information they sought regarding the rates a hospital charged to insured patients (versus uninsured parties) was irrelevant to the issue of whether the charges underlying a hospital's lien were reasonable under the state's Hospital Lien Statute, Georgia Code § 44-14-470. First, the Court of Appeals failed to address the ramifications of the federal Affordable Care Act of 2010 ("Obamacare"), which she argues specifically prohibits non-profit hospitals from charging indigent/low-income patients like Bowden more than the amounts they bill people with insurance coverage for emergency treatment. They argue the Court of Appeals relied on the *Cox* decision and others which predate and directly conflict with the more recent federal law. "The Court of Appeals ruling effectively tells Georgia non-profit hospitals that they need not comply with the Affordable Care Act and the corresponding section of the Internal Revenue Code, but may follow *Cox et al.* instead," the attorneys argue in briefs. "Ignoring federal law does not make it

disappear.” The requested documents would provide evidence on whether the hospital complied with federal law when it charged Bowden for her treatment. Bowden would use the evidence to support her claim that the charges were unreasonable under the statute. “Bowden is entitled to present evidence disputing the reasonableness of the hospital’s charges and asserting the reasonable value of her medical treatment,” the attorneys argue. “The only way to determine whether the hospital’s charges comply with federal law is to obtain records of its rates and contracts.”

The hospital’s attorney argues the Court of Appeals correctly ruled that Bowden’s discovery requests were overbroad, not relevant, and not permissible under § 44-14-470. The state Supreme Court has previously addressed the purpose of the Georgia Hospital Lien Statute, which “allows the hospital to step into the shoes of the [injured person] for purposes of receiving payment” from the person or company that injured her or from the person’s/company’s insurance company. Bowden’s claims are not supported by Georgia statutory law or case law. In its *Cox* decision, the Court of Appeals specifically noted: “At the heart of this case is the notion that those who do not participate in an insurance policy do not benefit from the lower rates hospitals charge insured patients.” If the state Supreme Court “decides that the Court of Appeals erred, then it would overrule at least six appellate decisions in the state of Georgia; also it would permit a plaintiff in a personal injury case to submit medical bills at their gross amount to settle their claim, then later argue to a jury that those same bills were unreasonable.” The Court of Appeals correctly disregarded Bowden’s use of the Affordable Care Act because she failed to raise it in the trial court, and she is prohibited from raising the issue for the first time on appeal. Even if the Court of Appeals had considered the federal law’s limitation on rates to be relevant in determining whether the hospital’s charges were reasonable, Bowden has failed to show that she would have qualified for the rate limitations because she admittedly never applied for benefits under The Medical Center Hospital’s Financial Assistance Plan. Furthermore, the hospital’s lien secures a payment for Bowden’s medical charges against a third party, Enterprise, instead of Bowden.

**Attorneys for Appellant (Bowden):** Charles Gower, Austin Gower

**Attorney for Appellee (Hospital):** Bobby Scott

### **MCLEOD V. CLEMENTS (S14G1225)**

This appeal stems from a long-standing feud over a man’s claim that he is entitled, at no cost, to water from a well located on another man’s property.

**FACTS:** R. Jerry McLeod and Stan Clements are neighbors in rural Brooks County, located in South Georgia. Originally, H.E. McLeod, Sr. owned both properties, but decades ago, McLeod Sr. kept one property for himself and transferred the other to his son, H.E. McLeod, Jr. McLeod Sr. arranged for a well to be drilled on the transferred property and paid for the installation of the pipes from his son’s property to his. On Sept. 29, 1971, sometime after the land transfer, McLeod Jr. entered into a written agreement with McLeod Sr., Mike McLeod, and Jerry McLeod, granting them the right to water from the well “free from all charges” while they lived on the property. The pipes and water line connection have been visible at the well site and marked by a post since 1971. However, the 1971 agreement was not officially recorded with the county until sometime in 1996. Meanwhile, in 1992, McLeod, Jr. sold his property with the well to Michael and Sally McLeod who in August 1996 sold it to Ryan and Melissa Reeves. The

Reeves' warranty deed, which was recorded in September 1996, contained a "Special Agreement" in which the Reeves agreed to provide water to the property previously owned by McLeod, Sr. But unlike the 1971 agreement, in exchange for the water, the owner of the property previously owned by McLeod, Sr. would have to pay electricity and maintenance costs. At issue in this appeal are the two different water service agreements.

The Reeves deed made no reference to the 1971 water agreement. By this time, Jerry McLeod owned the property previously owned by McLeod, Sr. In the ensuing years, the property with the well changed hands several times and in August 2007, Clements purchased it through a "Special Warranty Deed." The deed stated it was subject to the "Special Agreement" that had been recorded in 1996. While Clements was aware that under the 1996 water agreement he was required to provide water to Jerry McLeod, he denied that he had ever heard of the 1971 agreement requiring him to provide the water for free. Furthermore, he claimed that Jerry McLeod had failed to reimburse him for electricity and maintenance as required by the 1996 agreement. At some point, the well broke and McLeod demanded that Clements repair it and provide him free water as dictated by the 1971 agreement. When Clements refused, McLeod sued. Clements countersued, asking the judge to rule that he was not bound by either the 1971 agreement or the 1996 agreement. The trial court ruled that while Clements was still bound by the 1996 "Special Agreement," he was not bound by the 1971 agreement. McLeod then appealed to the Court of Appeals, but the appellate court upheld the trial court's ruling, finding that the law has long been that a person who purchases real property is not bound by a covenant outside of his "chain of title" unless he has notice of that covenant. (The "chain of title" is simply the history of ownership of a particular piece of property, telling who bought it, sold it, and when.) And the Court of Appeals found no evidence that Clements had any knowledge of the 1971 agreement when he purchased the property with the well that was once owned by H.E. McLeod, Jr.. Jerry McLeod now appeals to the state Supreme Court.

**ARGUMENTS:** Jerry McLeod, representing himself "pro se," argues that the Court of Appeals erred in disregarding the 1971 agreement that was recorded with the county prior to Clements' purchase of the well property. "H.E. McLeod Jr. and his successors in title continuously and without interruption supplied water to McLeod Sr. and his successors under the terms and conditions imposed by this water agreement for more than 40 years," he argues in briefs. He claims that when Clements acquired the property, he disconnected the water pipeline and refused to supply him water to facilitate his attempted sale of the property at a higher price and to ease the approval of the loan process for the prospective buyer. "The water agreement executed by H.E. McLeod, Jr. is a covenant running with the land," as in the Georgia Supreme Court's 1945 ruling in *Wardlaw v. Southern Railway*, and it "binds a subsequent purchaser with or without notice," McLeod argues. "A covenant is said to run with the land in the event that the covenant is attached to the estate and cannot be separated from the land or the land transferred without it." Agreements to supply water are considered to be covenants running with the land, McLeod contends. "Clements had actual and constructive notice of the water agreement. Although he alleges the water agreement was recorded outside the chain of title, it is undisputed the water agreement was recorded years prior to his purchase, and he was a subsequent purchaser to it recording, binding him as a subsequent purchaser with constructive notice." Clements also had actual notice due to the presence of pipes and the well and a post at the roadway marking the pipeline. "Clements had sufficient notice to put him on notice to make inquiry as to the terms of

the water agreement,” McLeod argues. “The requirement of supplying water free of all charges clearly affects the value of the well property just as the right to receive this water supply affects the nature, quality and value of the retained parcel of property now owned and occupied by R. Jerry McLeod.” The Court of Appeals ignored the fact that Clements failed to perform a title search which would have revealed the 1971 agreement – or at least given sufficient notice to create a duty to inquire further, McLeod argues.

Clements’ attorneys argue the trial court and Court of Appeals correctly ruled that Clements is not bound by the 1971 “Free Water Agreement.” Because the second agreement was properly recorded in the well property’s chain of title, Clements has never challenged its validity. “However, [McLeod] isn’t satisfied because the second water service agreement requires [McLeod] to share with [Clements] the costs to maintain the well and requires [McLeod] to pay for the electrical service required to pump water out of the ground and to [McLeod’s] home,” the attorneys argue in briefs. “[McLeod] prefers to impose this burden on [Clements].” Because the second agreement was properly recorded in the well property’s “chain of title,” it was the only agreement of which Clements was aware until McLeod sued him seeking free water service. Until then, Clements assumed the water lines to McLeod’s house were associated with that second agreement. McLeod claims that under the *Wardlaw* decision, his right to receive unlimited free water service from Clements was a covenant running with the land, binding on Clements regardless of the fact that Clements had no notice of it. But McLeod’s reliance on *Wardlaw* “is misplaced,” the attorneys argue. Unrecorded covenants are “personal contracts,” not covenants running with the land. The Free Water Agreement was not officially recorded until 1996 – some four years after H.E. McLeod deeded away his land interest in the well property. Therefore, any obligation to provide free water service to McLeod was a personal contract between H.E. McLeod and Jerry McLeod. “Because personal contracts are not binding on subsequent owners, i.e. do not ‘run with the land,’ the Free Water Agreement is not binding on [Clements],” the attorneys argue. Furthermore, the *Wardlaw* case was factually different from this case and does not apply.

**Attorney for Appellant (McLeod):** R. Jerry McLeod, pro se

**Attorneys for Appellee (Clements):** Bree Sullivan, Stephen Sullivan

## **2:00 P.M. Session**

**BURTON ET AL. V. GLYNN COUNTY, GEORGIA ET AL. (S15A0082)**

**GLYNN COUNTY ET AL. V. BURTON ET AL. (S15X0083)**

**GLYNN COUNTY ET AL. V. BURTON ET AL. (S15A0626)**

**BURTON ET AL. V. GLYNN COUNTY, GEORGIA ET AL. (S15X0627)**

A couple is appealing a **Glynn County** court ruling that they are violating the local zoning ordinance by using their St. Simons oceanfront home primarily as rental property for weddings and social events.

**FACTS:** In 1999, Lee R. and Thomas “Jeff” Burton purchased a home in the East Beach neighborhood of St. Simons Island. The Burtons, who lived in Atlanta, used the home as a vacation home once or twice a year, renting it out the rest of the year. In 2006, the Burtons demolished the house and built a new larger one on their two and a half lot parcel. The current

house, known as the “Villa de Sueños,” has eight bedrooms and eight bathrooms in two buildings, plus a pool, spa, large patio and carport. In the summer of 2008, after the couple had divorced, Lee moved into the house full-time. However, financial troubles made it impossible for her to remain there and eventually, she moved out and offered the property as a vacation rental. At the rental company’s suggestion, she and her ex-husband instituted a \$2,000 “event fee” for any renters planning to hold a wedding or other large party at the Villa de Sueños during their stay. In 2010, the first full year the property was rented, at least 21 weddings or large events were held there. The following year there were 29, and in 2012, 25. By the time this case went to trial in May 2013, there had been at least 79 events since the Burtons had started offering the property for short-term rentals in 2009.

Neighbors complained of loud music, heavy traffic congestion, and inebriated party guests. In February 2013, the Glynn County attorney mailed a cease and desist letter to the Burtons, demanding they immediately cease the “unauthorized and impermissible use” of their property. Under section 701.2 of the county zoning ordinance, the permitted uses of property in their zoning district include a “one-family dwelling,” and “accessory uses,” which are “clearly incidental and subordinate to the principal use or structure.” In April 2013, the Burtons sued the County, asking the court to declare their use of the property in compliance with the zoning ordinance and they asked to be treated the same as others who rented out their homes to people who held weddings and parties. In response, the County countersued, asking the court to declare the use of the Burtons’ property in violation of Section 701.2.

In December 2013, the trial court ruled that a property owner in the zoning district where the Burtons’ property was had the “right to host parties and weddings attended by large numbers of family and friends...even though doing so may – and often does – involve noise and traffic disruptions to neighbors.” The court went on to say, however that there can be “too much of a good thing” and that the Burtons’ “permissible accessory use of their property to host a wedding or social event has become the primary use of their property, and the magnitude, frequency, and cumulative impact thereof has moved beyond that expected of or customary for a one family dwelling.” Therefore, the trial court ruled the Burtons’ use of their property violated the zoning ordinance. The Burtons now appeal to the state Supreme Court, and in a “cross-appeal,” the County appeals the trial court’s refusal to issue a permanent injunction, arguing in a motion for contempt that despite the trial court’s order, the Burtons were continuing the improper use of their property. The trial court denied the County’s motion for contempt.

**ARGUMENTS (S14A2259):** The Burtons’ attorneys argue the trial court erred in ruling that the Burtons violated the ordinance. “Georgia law is clear that the exercise of police power in regulating the use of land infringes upon the landowner’s constitutional right to unfettered use of the land and therefore, such regulation requires strict construction against the county and liberal construction in favor of the landowner,” they argue in briefs. Here, the plain language of the ordinance is that a homeowner in the particular zoning district may host weddings and parties attended by large numbers and a homeowner may rent to persons who might engage in their activities. The trial court, however, wrongly determined that there’s a limit on the frequency of these activities and that the Burtons exceed this “implicit limit.” In doing so, the trial court made three errors of law, the attorneys contend. First, there is “absolutely nothing in Section 701 of the Zoning Ordinance which imposes any restriction on the frequency or magnitude of any events.” Second, the court improperly expanded the ordinance beyond its terms. And third, it applied an

interpretation of the ordinance that rendered it unconstitutionally vague by finding that the use of the property is illegal because there can be “too much of a good thing,” while failing to “define the parameters of such a restriction.” As a result, the trial court also erred in denying the Burtons’ claim that they were denied their constitutional right to equal protection under the laws. Here, “there was evidence that homes on Sea Island, zoned for residential use, are advertised and marketed for short-term rental, including rental for weddings and other events,” the Burtons’ attorneys argue. “Still, [the Burtons] are the only Glynn County property owners to be singled out for the treatment as set forth herein.”

The County argues the trial court did not err in its ruling as the plain language of the zoning ordinance “prohibits the Burtons’ use of their property.” The Burtons are “not using their home as a ‘one-family dwelling,’” they contend. “Because the Burtons use their property exclusively to house short-term renters, the home cannot be considered a ‘dwelling’ of any sort.” Section 701 of the ordinance specifically states that its intent is to “encourage the formation and continuance of a stable, healthy environment for one-family dwellings...and to discourage any encroachment by commercial, industrial, high density residential, or other uses capable of adversely affecting the single-family residential character of the district.” Clearly, the Burtons’ use of their home is “adversely affecting the single-family residential character of the district,” lawyers for the County argue. Furthermore, the use of their home is not an accessory use in compliance with the ordinance. “For a use to be ‘accessory,’ it must be ‘customarily accessory’ and clearly incidental and subordinate to the principal use.” While one or two parties or large weddings may be incidental to the use of the home as a single-family dwelling, an annual average of 25 weddings or other large events makes it “an event venue first, and a vacation home second.” The trial court did not expand the zoning ordinance beyond its express terms. Finally, the ordinance is not unconstitutionally vague, the County contends, and the trial court properly rejected the Burtons’ equal protection claim. “All evidence in the record supports the trial court’s holding that the Burtons have failed to identify a ‘similarly situated’ property owner who was treated differently,” the County’s attorneys contend.

**ARGUMENTS (S15X0083):** In its cross-appeal, however, the County argues the trial court erred by only awarding “declaratory” relief by declaring that the Burtons had indeed violated the ordinance. It should have made clear that its order also provides injunctive relief by issuing a permanent injunction forbidding the Burtons from “engaging in the commercial activity of operating an event venue in a single-family residential neighborhood,” as the County requested. The County has subsequently filed a separate appeal (S15A0626), urging the Supreme Court to rule that the trial court’s original order provided a permanent injunction against the Burtons and that the trial court was required to rule on the County’s motion for contempt.

Burtons’ attorneys argue that while the trial court’s final order was erroneous in other respects, “the denial of the injunctive relief sought by [the Burtons] was proper because the Burtons’ use of the subject property does not violate the express terms of the zoning ordinance.” Indeed, since the final order, the trial court has clarified this in its denial of the County’s motion for contempt, “explicitly holding that the final order constitutes only declaratory, and not injunctive relief.” The state Supreme Court should not accede to the County’s request to remand this case to the trial court with instructions that it fashion some kind of injunctive relief against the Burtons, as that would “necessarily require the trial court to impermissibly ‘zone from the bench,’” the Burtons’ attorneys contend. The Burtons have subsequently filed a separate cross-

appeal (S15X0627), arguing that the trial court properly held that its final order did not grant the County's request for permanent injunctive relief against the Burtons.

**Attorneys for the Burtons:** Jason Tate, James Roberts, IV, Lacey Houghton

**Attorneys for the County:** G. Todd Carter, Bradley Watkins, Emily Hancock

### **GOLDMAN V. JOHNSON, JUDGE (S15A0532)**

A woman is appealing a **DeKalb County** judge's order against her in her attempts to get another judge disqualified from her case.

**FACTS:** In October 2012, Sylvia Goldman, filed a lawsuit against the Greenforest Community Baptist Church, its pastor, Rev. Dennis Mitchell, and others, alleging a misuse of funds. The church has more than 4,000 members and is located on 94 acres in unincorporated Decatur. Goldman's lawsuit claimed the pastor violated church bylaws, and she sought a temporary restraining order against Mitchell and the other defendants to stop them from making any decisions regarding church assets and to keep Mitchell from functioning as pastor pending a decision by the court. DeKalb Superior Court Judge Courtney Johnson presided over the case. In February 2013, Goldman, an attorney, filed a "Motion for Default Judgment" against Mitchell and the church for their failure to file a response to Goldman's claims. In March 2013, Mitchell filed a response to Goldman's motion; the church did not file an answer. Mitchell also filed a motion to dismiss the lawsuit. Judge Johnson held a hearing in March and Goldman objected to the judge's allowing church representatives to participate in the hearing. On March 28, 2013, Judge Johnson signed an order granting Mitchell's motion to dismiss the case. Goldman then filed a Motion to Recuse Judge Johnson based on remarks the judge had made in the order that Goldman claimed "cast aspersions" upon her knowledge of the law, and based on Goldman's belief that the judge was biased and "has improperly assumed the role of advocate for the Defendants." She also filed a Motion to Disqualify the entire Stone Mountain Judicial Circuit. The judge held a hearing on the motion asking her to recuse herself and in a June 2013 order, denied the motion. In October 2013, Johnson entered an order recusing the entire DeKalb Superior Court bench for the purpose of hearing Goldman's Motion to Disqualify. The case was then assigned to a Rockdale County judge. While that motion was pending, Goldman filed a motion to set aside Judge Johnson's March 28, 2013 order, and in February 2014, she filed a motion asking the court to grant her "summary judgment" in her favor. Because Goldman had filed a motion to disqualify the entire DeKalb bench, there was no judge to consider any of the pending motions. In March 2014, the Rockdale judge denied Goldman's Motion to Disqualify, but there is no evidence that a copy of his order was forwarded to Johnson alerting her that the case had been returned to her.

In October 2014, Goldman filed a Petition for a Writ of Mandamus. A writ of mandamus is considered an "extraordinary" legal remedy to force public officials to do their jobs. Goldman claimed that Judge Johnson had unnecessarily delayed her case by five to seven months, and she sought a jury trial to consider the judge's failure to properly perform her duties and her bias and prejudice in the case. In October 2014, DeKalb Chief Judge Gregory Adams conducted a hearing on the mandamus petition in which Goldman alleged that Judge Johnson had failed "to perform her official duties without bias or prejudice" and that the "undue delay" in scheduling all her motions for a hearing had damaged her case against the church and pastor. On Oct. 27, 2014, Judge Adams denied Goldman's mandamus petition, stating in his order that "a mandamus

petition is generally not the proper method by which to seek to recuse a judge.” Goldman now appeals to the state Supreme Court.

**ARGUMENTS:** Goldman and her law partner argue the trial court erred in finding that Goldman’s petition for a writ of mandamus failed to allege any facts that support her claim. She was entitled to relief due to a number of Judge Johnson’s failures in performing her duties, such as her failure to schedule requested hearings on Goldman’s motion to set aside the March 28, 2013 order, as well as the judge’s “improperly sitting as the trier of fact on a Motion to Recuse herself.” The trial court also erred by conducting a hearing instead of a jury trial, after Goldman requested a jury trial consider her mandamus petition. The trial court was also wrong in ruling that Goldman had legal remedies other than a mandamus action for the judge’s improper conduct. And Judge Adams erred in denying Goldman attorney’s fees to pay for her legal fees, Goldman and her law partner argue.

The attorney general’s office, representing Judge Johnson, argue that the only remedy Goldman sought in her petition for mandamus was the recusal of Judge Johnson in the Greenforest case. “The law in Georgia is clearly established that Appellant may not seek to recuse Judge Johnson through a Petition for Mandamus,” the State’s attorneys argue. “The proper means by which to challenge a judge’s denial of a motion to recuse or disqualify is to file an appeal, not a mandamus petition.” The Georgia Supreme Court has stated in previous decisions that the writ of mandamus is “not the proper remedy to seek review of a ruling made by a trial court where there is a right of judicial review of the judge’s ruling, because the availability of judicial review is an adequate legal remedy that eliminates the availability of mandamus relief.” Goldman has the right to appeal any of the decisions Judge Johnson makes in the Greenforest case. But, “a litigant may not use a mandamus petition as a method of forcing a judge to change her mind or as a method of forum shopping,” the State argues. In its 2013 decision in *Trip Network, Inc. v. Dempsey*, the state Supreme Court stated that a writ of mandamus against a public official is proper only under two circumstances: “(1) where there is a clear legal right to the relief sought, and (2) where there has been a gross abuse of discretion.” “In this case, Appellant cannot satisfy either part of the two-part test articulated by this Court in *Dempsey*,” the State argues. Goldman failed to allege that her case was harmed in any way based on any delay in scheduling a hearing on the pending motions in the Greenforest case, once the Rockdale County judge sent it back to Judge Johnson. Until Goldman filed her mandamus petition, there is no evidence Judge Johnson was aware that the Rockdale judge had ruled on the Motion to Disqualify the entire DeKalb bench. Until then, “Judge Johnson had a reasonable basis to believe that she lacked jurisdiction to act in the Greenforest case.” The following day, she scheduled a hearing on all pending motions in the case. “A judge has the discretion to schedule hearings as she sees fit based on the docket that is pending before her.” As to Goldman’s claim that she is entitled to attorney’s fees because the judge has been “stubbornly litigious” and caused her “unnecessary trouble and expense in having to seek extraordinary remedy to exercise her due rights:” “Judges do not litigate; they decide,” the State argues. “Appellant’s assertion of this claim is beyond the pale.”

**Attorneys for Appellant (Goldman):** Mary Ann Donnelly, Sylvia Goldman

**Attorneys for Appellee (Johnson):** Samuel Olens, Attorney General, Dennis Dunn, Dep. A.G., Stefan Ritter, Sr. Asst. A.G., Julia Anderson, Sr. Asst. A.G.

## **JONES V. BOONE (S15A0521)**

The appeal in this high-profile **Wilkinson County** case stems from a dispute over which of two men is the lawful city attorney for Gordon, GA – the man who held the position for more than 35 years or the man supported by Gordon’s controversial mayor.

**FACTS:** The Gordon City Charter states that the government’s authority “shall be vested in a city council to be composed of a mayor and six council members.” The mayor has the power to “appoint and remove, for cause,” all officers, department heads, and employees of the city “with confirmation of appointment or removal by the council.” The City Charter states that “the affirmative vote of four councilmembers shall be required for the adoption of any ordinance, resolution, or motion.” The mayor is permitted to vote in the case of a tie. At a May 21, 2014 city council meeting, Mayor Mary Ann Whipple Lue made a motion to remove Joseph A. Boone, who had served as city attorney for several decades. Three city council members voted in favor of the motion, two against, and one abstained. The mayor determined she had a vote and she voted in favor of terminating Boone, bringing the vote to the four affirmative votes required by the City Charter. Subsequently there was a motion to give the mayor the authority to appoint an interim attorney, and the vote was the same: three in favor, two against, and one abstention. Again the mayor determined she had a vote and cast a yes. The next day, the mayor sent out a letter announcing the appointment of Ronny E. Jones as the new interim city attorney.

In September 2014, Boone sued, filing a petition for what is called a “writ of quo warranto,” which is used to challenge the authority under which a public office is held. Boone argued he was still city attorney because Jones was never confirmed by the city council as required by the City Charter and the mayor did not have the authority to vote because there was no tie. Jones responded that Boone was no longer city attorney as he had resigned from that position at the May 21, 2014 city council meeting when he was voted out of office. Jones requested a jury trial. Following a hearing, the Jasper County trial judge ruled in favor of Boone, finding that Jones “is not the appropriately appointed city attorney of Gordon, Georgia.” The judge ruled that the question of whether Jones appropriately holds the appointment of City Attorney “is a question of law and, therefore, a jury trial is not required under the laws of the State of Georgia.” And, the judge stated: “It is the finding of this court that the City Attorney serves at the pleasure of the city council and the mayor’s vote was used inappropriately and was not valid under the Code of the City of Gordon.” Jones now appeals to the state Supreme Court.

**ARGUMENTS:** Jones argues that Boone did not have the authority to file a “quo warranto” proceeding. Under state law, only a person claiming the office at issue or who has interest in it has standing. Such a petition can be brought by a citizen to challenge a public official’s qualifications to hold office. But Boone argued only that he was the proper city attorney, yet as Jones responded, Boone resigned from that position. Boone offered no other ground for pursuing the writ and his case should be dismissed. The trial court also erred, Jones argues, in denying his request for a jury trial. A key factual issue in this case – whether or not Boone resigned – is in dispute and therefore must be resolved by a jury. “In a quo warranto proceeding, when the facts alleged are denied by the defendant, then the judge shall arrange a jury trial,” Jones argues. Boone did not go through the proper procedures in filing his writ and Jones was properly appointed to the position of city attorney, he argues. The mayor determined that she would count the one abstention as a no vote, resulting in a 3-to-3 tie, which authorized

her to cast the deciding vote. “This was a proper exercise of her authority under the charter,” Jones argues.

Boone’s attorney argues the trial court made the right decision. Based on the City Charter, Jones “has failed to cite any authority under the charter that the votes taken were lawful or to show how [Jones] could legally act as the city attorney when his initial appointment has of this date still not been confirmed by four affirmative votes of the council as required by the charter.” While Jones claims Boone resigned, “his claim is unsupported” by the record or transcript. The trial court correctly ruled that Boone had standing to bring his lawsuit, and the court correctly interpreted the City Charter in concluding that Jones “was never legally confirmed as city attorney by four affirmative votes,” the attorney contends. He points out that the invalid votes by the mayor to remove Boone as city attorney contributed to her suspension by a judge. The mayor’s suspension has since been lifted, but the court’s order prohibits her from voting illegally and further prohibits her from terminating any employees, including Boone, without court approval. The mayor’s appeal in that case is pending before the Georgia Supreme Court.

**Attorney for Appellant (Jones):** Ronny Jones, pro se

**Attorney for Appellee (Boone):** James Green