



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Monday, May 11, 2015

10:00 A.M. Session

NGUYEN ET AL. V. SOUTHWESTERN EMERGENCY PHYSICIANS, P.C., ET AL. **(S15G0621)**

Parents who sued emergency medical providers after their baby suffered brain damage are appealing a Georgia Court of Appeals decision that was in favor of the medical providers. At issue in this case is what constitutes “emergency medical care.” Under Georgia law, those who provide such care are given a greater degree of protection from liability.

FACTS: On July 7, 2007, 6-month old Keira Pech fell off a bed at her babysitter’s home and hit her head on a suitcase. The baby’s mother – Thu Carey Nguyen – was called, and alarmed by a large, reddish purple swollen area on the right side of the baby’s head, she took the infant to Phoebe Putney Memorial Hospital emergency room in **Dougherty County**, where at 5:50 p.m., the baby was seen by a triage paramedic. After he noted a hematoma on the baby’s head, at 6:02 p.m., she was seen and examined by Michael Heyer, a physician’s assistant employed by Southwestern Emergency Physicians, P.C. Heyer diagnosed a “minor injury” consisting of a “scalp contusion.” He did not call in the attending emergency room doctor or order radiology studies. The baby was discharged at 6:10 p.m. Three days later, Keira was brought back to the hospital by ambulance after having trouble breathing while at her babysitter’s home. A CT scan revealed a large “subdural hematoma,” a collection of blood inside

her skull, which was putting substantial pressure on her brain. She was immediately taken to surgery where her skull was opened to remove the blood and relieve the pressure. But the baby suffered permanent damage and by the age of 3 had seizures daily and could not walk or talk.

Keira's parents sued the hospital, the emergency room physician, the physician's assistant and Southwestern Emergency Physicians. They alleged the medical providers breached the standard of care by failing to adequately examine the infant during her first visit to the emergency room and by failing to obtain the imaging necessary to reveal the developing subdural hematoma early enough to prevent catastrophic damage. Key to this case is the emergency medical care statute, Georgia Code § 51-1-29.5, which states that in a lawsuit involving the provision of emergency medical care, "immediately following the evaluation or treatment of a patient in a hospital emergency department, no physician or health care provider shall be held liable unless it is proven by clear and convincing evidence that the physician or health care provider's actions showed *gross negligence*." Gross negligence is commonly defined as the failure to exercise even the slightest amount of care, as opposed to ordinary negligence, which is the less serious failure to use ordinary care. This provision of the statute provides a measure of greater protection from lawsuits for those medical personnel who provide emergency medical care in a hospital setting. The same statute defines "emergency medical care" as "bona fide emergency services provided after the onset of a medical or traumatic condition manifesting itself by acute symptoms of sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in placing the patient's health in serious jeopardy...."

Keira's parents filed a motion for "summary judgment" on the ground that because emergency providers who saw Keira on July 7 did not believe her symptoms presented a medical emergency, she did not receive "emergency medical care" as defined in the statute, and therefore the medical providers can be held liable for ordinary negligence in the case. In other words, the protection of the gross negligence standard in the emergency medical care statute does not apply to them. The medical providers argued they did provide emergency medical care through examining, triaging, and diagnosing the baby and therefore they are liable only if there is clear and convincing evidence they were grossly negligent. The trial court ruled in the parents' favor, agreeing that the baby received no emergency medical care and granting their motion for partial summary judgment. (The granting of "summary judgment" means the judge determined there was no need for a jury trial because the facts of the case were undisputed by the parties, and the law clearly was on their side.) However, on appeal, the Georgia Court of Appeals reversed the trial court's ruling, finding that the Georgia Supreme Court has previously ruled that emergency room personnel provide "bona fide emergency services" to a patient when they examine and diagnose the patient. Furthermore, "nothing in the record before us suggests that the physician's assistant who evaluated Keira in the emergency room was not acting in good faith when he diagnosed her as suffering from a mere 'contusion,'" even if his diagnosis was eventually proved incorrect. As a result, the Court of Appeals ruled that a jury must determine whether or not Keira received emergency medical care when she first went to the emergency room. Keira's parents now appeal that ruling to the state Supreme Court.

ARGUMENTS: The parents' attorneys argue the trial court correctly interpreted the statute and the Court of Appeals erred by reversing its decision and ruling that a jury must decide the case. The trial court was right to grant their motion for partial summary judgment because

“there is no genuine issue of material fact to establish two essential elements under this statutory definition of ‘emergency medical care:’ 1) ‘bona fide emergency services,’ provided after 2) symptoms of sufficient severity,” the attorneys argue in briefs. The statute “plainly requires acute symptoms of sufficient severity, including severe pain, before any services can qualify as ‘emergency medical care,’” they contend. “The patient simply being present in a hospital emergency room is not enough by itself to qualify the care as ‘emergency medical care.’” While the bump on the baby’s head “should have prompted her medical providers to perform a CT scan, the trial court correctly held that there is no evidence that the bump was an ‘acute symptom of sufficient severity...,’ as the definition requires.” The Court of Appeals based its reversal of the trial court ruling on a “false standard, holding that Keira’s unmanifested subdural hematoma was an actual emergency.” The Court of Appeals also failed to strictly construe the statute by holding that *any* diagnosis, misdiagnosis, or examination in the ER is ‘emergency medical care,’” the parents’ attorneys argue. The state Supreme Court ruled in 2014 in *Abdel-Samed v. Dailey* that bona fide emergency services means “genuine or actual emergency services.” “Here, the record is clear that Keira had no severe symptoms, that her medical providers did not believe she had a medical emergency requiring emergency care, and that they provided none.” The protection of the gross negligence standard in the emergency care statute therefore does not apply to them, and there is no need for a trial.

“This appeal presents a clear case of a plaintiff attempting to have the best of both worlds,” the medical providers’ attorneys argue in briefs. To win a ruling in their favor by the trial court, the parents’ attorneys “took the unequivocal position that the patient did not require immediate medical attention on July 7, 2007.” At the same time, the evidence they will present at trial “is similarly unequivocal that the patient did not actually have a ‘minor scalp contusion,’ but had a subdural hematoma and skull fracture at the time of her care, and should have been triaged and treated as an emergency as a result.” “The Court of Appeals has given clear direction that the *actual condition* of the patient controls, and not the subjective beliefs of the healthcare providers,” the attorneys argue. “Therefore the trial court erred in granting the petitioners’ motion on the basis of [the medical providers’] diagnosis that Keira had a minor head injury. The trial court’s order granting the [parents’] motion for partial summary judgment was therefore properly reversed by the Court of Appeals in determining that a question of fact remained for the jury as to whether § 51-1-29.5 applied to Keira’s care by [the medical providers]. While the underlying story of this case undoubtedly is tragic, current Georgia law is clear, and [the Georgia Supreme Court] should affirm the Court of Appeals’ opinion.” For the purpose of keeping the case from going to trial, the parents’ attorneys argue that none of the medical providers believed Keira had an urgent condition and they therefore did not provide her bona fide emergency care services. But they “will be saying the exact opposite at trial: that Keira was not a ‘nonemergency’ case and did not have a ‘minor scalp contusion,’ but actually had a life-threatening condition, and the [providers] failed to detect a nearly lethal subdural hematoma and skull fracture,” the attorneys argue. Both of the baby’s parents were concerned enough by the large lump on her head to seek emergency medical care at the hospital. “This head injury undeniably constitutes a ‘medical or traumatic condition’ and the physical symptoms on Keira’s head and her behavior establish ‘acute symptoms of sufficient severity,’” the attorneys argue. Lawyers for the baby’s parents are incorrect in arguing that the Court of Appeals ruled that any emergency room diagnosis constitutes emergency medical care and automatically triggers the

application of the gross negligence standard. “To the contrary, the Court of Appeals specifically held that there was a question of fact for a jury as to whether Keira even received ‘emergency medical care’” on July 7, 2007. Also, subjective beliefs of the healthcare provider do not determine whether emergency medical care was provided. “The Court of Appeals has repeatedly rejected the argument that a healthcare provider’s failure to diagnose a patient with an emergency medical condition deprives the provider of the ability to claim the protection of § 51-1-29.5.” The Court of Appeals correctly interpreted the statute when it found a jury question existed as to whether Keira received emergency medical care, the hospital’s attorneys argue. It has in no way “confused” the law.

Attorneys for Appellants (Nguyen): Paul Phillips, Ralph Scoccimaro

Attorneys for Appellees (Southwestern): C. Richard Langley, Jeffrey Braintwain, Erica Jansen

FOSTER V. GEORGIA REGIONAL TRANSPORTATION AUTHORITY (S15G0321)

A woman is appealing a ruling by the Georgia Court of Appeals that bars her lawsuit from moving forward against the Georgia Regional Transportation Authority.

FACTS: On Aug. 16, 2011, Dana Foster fell while a passenger on a commuter bus that was owned and operated by the transportation authority. Foster alleged that the driver accelerated unexpectedly, causing her to fall and suffer injuries. On Feb. 10, 2012, Foster sent an “ante litem notice” to the transportation authority, which is the notification state law required her to send notifying the authority she intended to sue. There was no evidence that the State ever responded. On Sept. 18, 2013 – a little more than two years after the accident – Foster filed suit in **Fulton County**. Claiming the bus driver had been negligent, she sought compensation for her injuries and losses. The authority immediately filed a motion asking the judge to rule in its favor without a jury trial, based on Foster’s failure to file her suit within the 2-year statute of limitations.

At issue in this case are two Georgia statutes. Georgia Code § 50-2-27, which is part of the Georgia Tort Claims Act and relates to *State* Government, states in subsection (c) that “any tort action brought pursuant to this article is forever barred unless it is commenced within two years after the date the loss was or should have been discovered.” (“Tort” is a legal term for a wrongdoing that is subject to a civil lawsuit.) Foster was one month late and missed the deadline. Foster conceded that her complaint was outside the 2-year period, but she argued that under another statute, the running of the clock of the statute of limitations was temporarily halted pending the State’s response to her ante litem notice. Georgia Code § 36-33-5, which relates to *Local* Government, states in subsection (d): “The running of the statute of limitations shall be suspended during the time that the demand for payment is pending before such authorities without action on their part.” Although that statute is entitled, “Provisions Applicable to Municipal Corporations Only,” Foster claimed it applied to her case. And that’s because yet another provision in the State-related statute, § 50-2-27 (c) says: “All provisions relating to the tolling of limitations of actions, *as provided elsewhere in this Code*, shall apply to causes of action brought pursuant to this article.” (“Tolling” is a legal term that means suspending or interrupting.) The trial court denied the transportation authority’s motion.

On appeal, however, the Court of Appeals reversed the trial court’s ruling, concluding that the provision which suspends the statute of limitations applies to municipal corporations only, not to state government entities. “In construing language in any one part of a statute, a court should consider the entire scheme of the statute and attempt to gather the legislative intent

from the statute as a whole,” the appellate court’s opinion says. “Different parts of a statutory scheme should be read in a manner that renders them consistent and harmonious.” Applying the municipal tolling provision to § 50-2-27 would “thwart the legislature’s intent that tort claims be filed against the State within two years or they are ‘forever barred,’” the appellate court said. Because the municipal polling provision does not apply, Foster’s lawsuit was not filed in time and cannot go forward. Foster now appeals to the state Supreme Court.

ARGUMENTS: Foster’s attorney argues the Court of Appeals was wrong that the tolling provision of § 36-33-5 does not apply to lawsuits brought under the Georgia Tort Claims Act. That Act “is a single, unified whole and, clearly, subsection (c)’s 2-year statute of limitations is modified by subsection (e)’s mandate that ‘all provisions relating to the tolling of limitations of actions, as provided elsewhere in this Code, shall apply to claims and actions brought pursuant to this article,’” the attorney argues in briefs. Under two previous decisions – *Greene v. Team Properties, Inc.* (2001) and *Howard v. State of Georgia* (1997) – the Court of Appeals “regarded the tolling provision in the so-called ‘municipal’ statute as applying to claims under the Georgia Tort Claims Act.” And provision (e) of § 50-2-27 “could not be any clearer in making the tolling provisions ‘elsewhere in this Code’ applicable to actions against state authorities. Certainly the Legislature could have limited the applicable tolling provisions to those in a certain Title or Article had it not meant to include the entire Code.” “If it had not been intended by the Legislature that there be a remedy for the State’s failure to act, subsection (e) could easily have been omitted, or limited,” Foster’s attorney argues. “Nor can we presume that the Legislature was not aware it was incorporating § 36-33-5 (d)’s tolling provision into the Georgia Tort Claims Act, since the General Assembly is presumed to enact all statutes with full knowledge of the existing condition of the law and with reference to it.” “It is within the Legislature’s province, and not the Courts’, to extend the provisions of a statute, if they so desire, and ‘until such time as they see fit to do so, ‘the Courts’ must construe the statute as [the Courts] find it,’” the attorney argues. “Any other course of action by the Courts would undermine the separation of powers between legislative and judiciary which is one of the foundational principals upon which our government is structured. It is axiomatic that whenever the language of a statute is plain and unequivocal, then the intent of the legislature is apparent on the face of the statute, and it is unnecessary, in fact forbidden, to go behind the words of the statute to extraneous sources to ferret out a construction contrary to those words.”

The Attorney General and Solicitor General, representing the transportation authority, argue that the “tolling provision found in the *municipal* ante litem notice statute governing claims brought against a municipal corporation does not apply to claims brought against the *State*, which includes the Georgia Regional Transportation Authority, an instrumentality of the State, under the Georgia Tort Claims Act.” “Here, by its express provisions, the municipal tolling provision applies only to claims brought against a *municipal corporation*.” Foster’s claim is governed by the Georgia Tort Claims Act’s 2-year statute of limitations, “which she failed to meet in this case.” Engrafting the municipal tolling provision onto the State’s statute of limitations “would also impose on the State a uniform duty to act when the Georgia Tort Claims Act does not set forth such a duty.” Under the municipal statute, the governing authority must act upon the claim within 30 days. Under the Tort Claims Act, the State has “no duty to act.” Instead, unlike the municipal ante litem notice statute, the Tort Claims Act’s entire timetable is controlled by the claimant’s date of loss. Foster’s reliance on the *Greene* and *Howard* decisions

“is perplexing,” the State contends, as contrary to her argument, neither decision considered “whether giving ante litem notice under the Georgia Tort Claims Act tolled the Act’s statute of limitations.” Neither the plain language of the municipal tolling provision nor the Georgia Tort Claims Act supports the application of the municipal tolling provision to the Act’s statute of limitations, the State contends. “The basic rules of statutory construction do not allow for express terms of a particular statute to be considered in a vacuum.” The state Supreme Court “has previously noted that when ‘we consider the meaning of a statutory provision, we do not read it in isolation, but rather, we read it in the context of the other statutory provisions of which it is a part. All statutes relating to the same subject matter are to be construed together and harmonized wherever possible.’” “The Court of Appeals correctly held that the open-ended nature of the municipal ante litem notice statute cannot be reconciled or ‘harmonized’ with the Georgia Tort Claims Act’s fixed 2-year statute of limitations.”

Attorney for Appellant (Foster): Joyce Bergman

Attorneys for Appellee (Authority): Samuel Olens, Attorney General, Britt Grant, Solicitor General, Kathleen Pacious, Dep. A.G., Loretta Pinkston, Sr. Asst. A.G., Kirsten Daughdril, Sr. Asst. A.G.

BORDERS ET AL. V. CITY OF ATLANTA ET AL. (S15A0816)

Firefighters and City of Atlanta employees are appealing a **Fulton County** court ruling that dismissed their class action lawsuit against the City over pension reform. They claim that a 2011 ordinance increasing their contribution to their pension plans is unconstitutional.

FACTS: The City of Atlanta provides retirement benefits through three plans: the General Employees’ Pension Plan, the Police Officers’ Pension Plan and the Firefighters’ Pension Plan. Each plan provides eligible members with a monthly income upon retirement for life. Prior to Nov. 1, 2011, employees contributed 7 percent of their annual salary to their pension plan or 8 percent if they designated a beneficiary. They agreed to the contribution when they enrolled in their plan by signing an enrollment card at the onset of their employment. The pension plans contained a provision that stated: “The receipt of an applicant’s executed enrollment or application card by the commissioner of finance or his agent shall constitute the irrevocable consent of the applicant to participate under the provisions of this act, as amended, or as may hereinafter be amended.”

In June 2011, the City enacted an ordinance that amended the three pension plans. Under the ordinance, beginning Nov. 1, 2011, plan members would contribute 12 percent of their annual salary to their pension plan or 13 percent if they had designated a beneficiary. The ordinance stated the contributions could eventually be increased up to 17 percent or 18 percent of their annual compensation – if the City’s required contribution to the pension plans ever reached 35 percent of the City’s total payroll cost. Mayor Kasim Reed has said this “pension reform” was necessary to preserve the sustainability of the pension system without layoffs, tax increases or a reduction in city services. The ordinance did not change the amount of pension benefits members would receive upon retiring but did shift some of the burden for paying for the plans from the City to employees.

On Nov. 14, 2013, employees filed a class action lawsuit against the City of Atlanta, claiming that by requiring them to pay more into their pension plans the City breached their employment contracts with the City and violated the clause in the Georgia Constitution, which

prohibits the passage of any law “impairing the obligation of contract.” Stephen Borders is president of the Atlanta Professional Firefighters Union and the main named plaintiff. The class certified by the Superior Court is made up of all police officers, firefighters and other City employees who became members of one of the City’s pension plans before Nov. 1, 2011 but who had not yet retired. The class included 6,079 employees.

In January 2014, the City filed a motion to dismiss the lawsuit or grant it “summary judgment,” which a judge does after deciding that a jury trial is not necessary because the facts are undisputed and the law falls fairly on the side of one of the parties. The employees also requested summary judgment. In November 2014, the trial court ruled in favor of the City, finding that “Home Rule” amendments to the Constitution, which delegated certain powers to cities and municipalities, authorized the City to modify the pension plans, including by increasing the employee contribution amount. It also found that the amendment did not breach employment contracts or violate the “impairment clause” of the Constitution. In February 2015, the employees filed an “extraordinary motion for new trial,” after finding newly discovered evidence. The motion was based on a 2009 letter from then Atlanta Mayor Shirley Franklin to the President of the City Council, which stated: “As you will recall from previous discussions on pensions, the City cannot legally decrease the benefits provide [*sic.*] to current City employees.” But the trial court denied the employees motion, finding that the letter was of no legal relevance. The employees now appeal to the Georgia Supreme Court.

ARGUMENTS: Attorneys for the employees argue the amendment requires them to pay 70 percent more to purchase the same amount of retirement benefits to which they already were entitled, and as of Oct. 3, 2014, had cost employees more than \$36 million. “Publicly available information indicates that the City could have afforded to pay its share of the plans’ cost without amending the plans to shift part of its share to employees,” they argue in briefs. The trial court erred by ruling that the plans’ enrollment provisions permitted the City to “impair,” or weaken, employees’ rights. In its 1936 decision, *Trotzier v. McElroy*, the Georgia Supreme Court became the first high court in the nation “to recognize that public employees have a constitutionally-protected contractual interest in the pensions they are promised by their employers,” the attorneys argue. “In *Trotzier*, this Court held that the City of Atlanta’s agreement to pay a fireman a pension in exchange for his services and a specified deduction from his salary constituted part of his employment contract with the City and was protected against impairment by the impairment clause of the United States Constitution.” The terms of the pension plans as they existed before the amending ordinance “became part of plaintiff’s employment contracts with the City, and the impairment clause prohibited the City from passing any ordinances impairing Plaintiffs’ contractual rights.” The wording, titles, and histories of Georgia statutes enacting enrollment provisions indicate they were not intended to permit the City to impair employees’ rights, the attorneys argue. Past amendments to the plans were not imposed on employees unilaterally, as they were here. Employees were provided the choice of opting in or out of the plans’ coverage under the amendments. The trial court also erred “by ruling that the City could impair the rights of plaintiffs who already had qualified for full benefits under the plans before the amendments.” Most of the plaintiffs and members of the class had worked for the City for more than 10 years, and had thereby qualified for full benefits under the plans, before the amendment was enacted in 2011. “The prospect that a public employer could pull the

financial rug out from under its employees in this manner at any time is patently unfair and should not be the law of this State,” attorneys for the employees argue.

The City argues “that the State of Georgia grants municipalities the power to amend their employee pension plans so long as such amendments do not reduce the benefits payable at retirement.” Furthermore, the plaintiffs “never obtained a contractual right to unchanged pension plans because the plans’ express terms allow for amendment by the City.” The trial court properly ruled that Georgia is “abundantly clear” that “where the terms of a government pension plan provide that they may be subject to modification or amendment, the participant does not acquire a vested right to an unchanged plan.” The employees’ attorneys misstate the trial court’s ruling by contending “the court ruled that the City was permitted ‘to impair plaintiffs’ rights.’ The court found no such impairment.” Also the Georgia Constitution “explicitly authorizes municipalities to modify their pension plans,” the City’s attorneys argue. Listed among the powers the Constitution gives to municipalities is the “power to maintain and modify heretofore existing retirement or pension systems.” The amendment did not impair the employment contracts because it did not reduce the pension benefits payable at retirement. The employees are wrong in claiming that any modification of the plan which is adverse to their interests constitutes a contract breach. The clear and unambiguous plan terms authorize the amendment, the City argues. “The terms of the enrollment provision provide Atlanta with the authority needed to make fiscally responsible decisions that will ensure the viability of its pension plans for current and future employees.”

Attorneys for Appellants (Borders): John Bell, Jr., Lee Brigham

Attorneys for Appellees (City): Cathy Hampton, Robin Shahar, Seth Eisenberg

2:00 P.M. Session

COCHRAN V. KENDRICK ET AL. (S15A0833)

A woman whose job was eliminated is appealing a trial court decision rejecting her claim that the elected Tax Commissioner discriminated against her because she’s white.

FACTS: Nancy Mims Cochran had worked 26 years for Augusta-**Richmond County**, with the bulk of her career in the Tax Commissioner’s Office. Steven Kendrick was elected and sworn in as Tax Commissioner in January 2009. In August 2009, he met with his staff to present the Employee Handbook that he determined would be used by his office. It stated that while “this office is not a part of the merit system of Augusta-Richmond County,” the rules and policies in the handbook were in keeping with “established human resource requirements currently implemented by Augusta-Richmond County Government.” The handbook further said that for any subject it did not cover, “the Tax Commissioner’s Office will refer to the Augusta, GA Employee Handbook for guidance.” In March 2011, Augusta adopted a new Personnel Policies and Procedures Manual which applied to city and county employees and employees of elected officials who opted into it. The manual set forth procedures to be followed in the event of a layoff or reduction in force caused by a “shortage of funds or work, abolishment of the position, material changes in the duties or organization, or related reasons beyond the employee’s control which do not reflect dissatisfaction with the service of the employee.” The manual described involuntary discharge or dismissal as “termination of a regular employee by Augusta, Georgia

for just cause.” Kendrick claims he did not opt into the city’s new Personnel Policies and Procedures Manual. In 2010, Kendrick decided to reorganize the Tax Commissioner’s Office. As part of the reorganization, he eliminated 10 positions, created three new positions and restructured eight others. Those whose positions were eliminated were encouraged to apply for other positions within the office, including the new positions.

At the time of the reorganization, Cochran was Director of Motor Vehicles; Takiyah Douse was Deputy Director of Motor Vehicles. Both positions were eliminated and combined into the single position of Division Manager of Motor Vehicles. Posting of the position required a Bachelor’s Degree in business, accounting or a related field. Both women applied for the job, both were interviewed, and Douse was chosen. Cochran, who is white and has a high school education, applied for no other job. Douse, who is black and has a college education, was first hired by Kendrick in 2008, shortly after his election. Cochran was terminated in May 2011. Douse had worked in the Tax Commissioner’s Office less than three years.

In December 2011, Cochran sued Kendrick. She alleged that her position was eliminated in violation of the policies and procedures Kendrick had adopted for his office, and she sought a writ of mandamus to compel him to follow those procedures and reinstate her. She also alleged that “her termination by Defendant Kendrick was motivated by racial prejudice.” She claimed the discrimination began the first time they met in September of 2008. Cochran said he was speaking and laughing with a couple of clerks, when she walked up and introduced herself. His “whole demeanor changed” and “became serious business,” she said. In February 2014, the Richmond County judge ruled in Kendrick’s favor and granted him “summary judgment,” which a judge does after determining that a jury trial is unnecessary because the facts of the case are not disputed by the parties and the law falls squarely on one side or the other. The judge ruled that Kendrick was immune from the lawsuit and that Cochran’s claim failed because Douse’s education alone was a legitimate, non-discriminating reason to select Douse over Cochran. He found that the record was devoid of “any evidence that the decision was based upon racial preference.” Cochran now appeals to the state Supreme Court.

ARGUMENTS: Cochran’s attorney argues that Kendrick’s “so-called reorganization” was merely “a pretext that attempted to mask a discriminatory motivation.” Although he argued that it was for the purpose of making his office more efficient, “after effectively terminating [Cochran] without cause, he simply arranged for a person from the unprotected class to occupy the same position performing the same duties,” the attorney argues in briefs. “Nothing was reorganized and the office salary costs went up, instead of down.” The trial court erred by refusing to grant mandamus relief to force Kendrick to follow his own personnel policies and procedures. Because he did not follow his own policies, Cochran was denied specific “layoff” rights, including the right to be given priority for the newly created position. Kendrick specifically incorporated the “County Employee Handbook” into his policies to supplement them. That handbook states that when “it becomes necessary to reduce the number of employees within a given class in any department, such employees shall be laid off on the basis of the following three factors weighted equally: length of service in class, length of service with the government, and performance evaluation for the last three years. “Had [Kendrick] followed the procedure required by his own policies, there is little or no doubt [Cochran] would have been selected for retention and Douse would have been laid off,” Cochran’s attorney argues. The trial court also erred by granting summary judgment on the issue of discrimination. In a reduction in

force case, such as this, Cochran proved what was required: 1) she was in a protected group (here a white employee); 2) she was adversely affected by the decision (job elimination); 3) she was qualified for her current position (clearly qualified under the policies); and 4) there was evidence by which a fact finder could reasonably conclude that the employer intended to discriminate on the basis of race. “Here, [Cochran] testified that Appellee Kendrick treated her differently from black employees,” her attorney argues. “He tended to ignore her managerial input and kept her away from important meetings of the managerial staff. She and other white employees were punished with little or no evidence.” This testimony was corroborated by the affidavit of Crystal Bales, another white employee who was terminated by Kendrick. Bales noted the office had become very hostile for most of the white employees. While an employer may exercise its business judgment to eliminate positions as part of a reduction in force, no employer may use “layoff as a convenient excuse for terminating an employee on a discriminatory or retaliatory basis,” the attorney argues, quoting other court opinions. “Appellant Cochran has offered sufficient circumstantial evidence that Kendrick was generally motivated by race.” The court erred in ruling that sovereign immunity prohibited Cochran’s claims against Kendrick because sovereign immunity “does not provide protection against claims for a writ of mandamus,” the attorney contends. And the trial court erred by failing to accept the affidavit from Bales which detailed “a consistent discriminatory intent by [Kendrick] toward his white employees.”

Kendrick’s attorneys argue that the trial court properly denied mandamus relief, which historically has been a remedy for government inaction – “the failure of a public official to perform a clear legal duty.” Kendrick was never bound by Augusta’s Personnel Policies and Procedures Manual, and even if he had been, the record is devoid of any evidence that the manual was not followed. The trial court properly granted summary judgment, finding Kendrick had a legitimate, non-discriminatory reason for selecting Douse over Cochran. “As the trial court held, the record is devoid of any admissible, credible evidence that Kendrick’s decision was based upon racial preference,” his attorneys argue. As a result of the reorganization, his top management team consisted of a white Chief Deputy Tax Commissioner, a white Assistant Tax Commissioner, a white Financial Manager, and two black Division Managers, including Douse. The trial court also correctly ruled that Kendrick was protected by sovereign and official immunity as a constitutional state official. “The decision whether to discharge an employee is a discretionary one and, thus, is subject to the defense of official immunity.” Finally, Cochran waited until it was too late to file the Bales affidavit. Furthermore, even if the court had considered it, “it would not have changed the outcome of this matter,” the attorneys argue, calling Bales a “disgruntled employee.” “The affidavit is replete with conclusions without any foundation and would not be admissible to create a genuine issue of fact for the jury.”

Attorney for Appellant (Cochran): John Brown

Attorneys for Appellee (Kendrick): James Overstreet, Jr., Jody Smitherman

WILLIAMS V. THE STATE (S15A0939)

A father convicted of murder after his 14-month-old baby girl died from ingesting crack-cocaine, is appealing his conviction and life prison sentence.

FACTS: Anthony Tawon Williams and Stephanie Stephens lived in a rental home on Hattie Street in Cartersville with their toddler daughter, Jewel Williams, and four other children. According to witnesses, the couple sold crack-cocaine and “loose” cocaine from their **Bartow**

County home, typically keeping it under an arm of the living room couch or in Stephens' purse. One witness testified that while Stephens sometimes ordered the children out of the room during a drug deal, Jewel, an inquisitive toddler, would typically come back into the room before the drug deal was done.

According to state prosecutors, the night of June 15, 2007, Gwendolyn Wheeler came to the couple's home to purchase crack cocaine, as she had done many times before. She and other witnesses said Williams typically served as the "lookout man" while Stephens made the transaction. Later that night, Jewel apparently found the drug and ate it. Early the next morning, emergency personnel responded to a 911 call to the home where they found Jewel in severe distress. According to the medical personnel, the baby had a very weak pulse and an irregular, gasping breathing pattern that is often related to cardiac arrest and death. Jewel was transported to the local hospital where she was pronounced dead. An autopsy showed the toddler had died from acute cocaine toxicity. Back at the home, Williams showed an officer with the Cartersville-Bartow County Drug Task Force the exact spot where he said Jewel had ingested the drug. He claimed that earlier that day, a woman had brought the drug into their home and mistakenly left it behind. The officer noticed a crystal substance on the floor in front of the couch, and the contents of a vacuum cleaner plugged into the wall nearby later tested positive for cocaine.

In September 2008, a Bartow County grand jury indicted Williams and Stephens for felony murder, cruelty to children, contributing to the deprivation of a minor, possession of cocaine and possession with the intent to distribute cocaine. In October 2008, a fugitive task force arrested the couple in Atlanta. At a joint trial in 2009, Williams' attorney argued there was no evidence Williams was inside the home or knew that cocaine was being sold inside the night Jewel ate the drug. Rather he said he was outside on the front porch visiting with a friend. Following a hearing, the trial court allowed four women to testify they had visited the home numerous times to buy cocaine, most often from Stephens but sometimes from Williams. After prosecutors presented their case, the defense made a motion for a directed verdict by the judge in Williams' favor, arguing that the "similar transaction evidence" from the four witnesses was insufficient to make him a party to the crime. Following a four-day trial, the jury found both Williams and Stephens guilty of all charges. Williams, who was sentenced to life in prison, now appeals to the state Supreme Court.

ARGUMENTS: Williams' attorney argues the trial court made up to nine errors. Among them, the judge erred by refusing to separate Williams' trial from Stephens'. He also argued that his trial attorney was ineffective in violation of his constitutional rights, and that the evidence was insufficient to support his convictions and the lower court should have granted Williams' motion for a directed verdict. Williams' attorney argues there was substantial evidence that was admitted against his co-defendant that should not have been admitted against him. "Here, Appellant Williams was highly prejudiced by the evidence which was introduced showing that Ms. Stephens obviously had possession of some crack cocaine during the early morning hours of June 16, 2007, while there was no evidence that Appellant Williams was involved in any way with possession of the cocaine on that evening," Williams' attorney argues in briefs. "Ms. Stephens was alone with the baby when the crack was ingested, and Appellant Williams was implicated by the jury simply because he was there outside the house." The trial court also erred in admitting the testimony from the four witnesses who said they'd purchased drugs at the couple's home. This evidence "impermissibly" placed Williams' character at issue and

ultimately “contributed to his convictions on insufficient evidence,” his attorney contends. “Most of the similar transaction testimony that came into evidence was the result of Ms. Stephens’ prior sales...,” the attorney argues. “Since that evidence existed directly involving Ms. Stephens, and because there was no such evidence pertaining to Mr. Williams on the night of the incident, the similar transaction evidence was admissible in her trial, whereas it should not have been admissible if Mr. Williams was tried alone.” Williams also argued that his trial attorney was incompetent and rendered “ineffective assistance of counsel” for failing to ask the judge to instruct jurors they could consider Williams guilty of the less serious crime of involuntary manslaughter rather than murder; for failing to object to the admission of the similar transaction evidence based on the State’s failure to provide notice within the required time period; and for failing to instruct the jury that it could not return verdicts that were inconsistent and mutually exclusive of one another. The remaining issues raised by Williams deal with allegations that the judge failed to give proper instructions to the jury on various matters.

The State disputes all of Williams’ contentions. For one thing, “the trial court’s jury instructions were not erroneous,” the Attorney General’s office argues in briefs. Also, the evidence was “sufficient to support Appellant’s felony murder conviction and was not derived solely from similar transaction evidence.” While that evidence showed Williams and Stephens consistently sold cocaine out of their home while the children were present, it was only part of the evidence against him at trial. Direct evidence included that he told first responders someone had come to the house and left some cocaine; there was white residue on the victim’s lips; the autopsy showed the baby died from cocaine poisoning; the contents of the vacuum cleaner revealed the presence of cocaine; and Williams showed law enforcement officers the night Jewel died where she had ingested the cocaine. “It was reasonable for the jury to conclude, based in part on Appellant’s active participation in numerous drug transactions at his home in the presence of the victim, that Appellant actively participated and/or aided and abetted in maintaining and distributing cocaine inside his home on the night in question, creating an inherently dangerous situation for the 1-year-old victim,” the State argues. “Selling dangerous controlled substances that amount to poison if ingested by a young child created an inherently dangerous situation inside the home on the night Jewel died.” The State also argues the verdicts were not mutually exclusive, the trial judge properly denied Williams’ motion to sever his trial from Stephens’ trial and the trial attorney was effective. Trial counsel had no reason to request a jury charge on involuntary manslaughter because given Williams’ defense strategy, which was that he had no knowledge of Stephens’ drug activities, such an instruction had no valid basis. Trial counsel did not object to any notice violations because they believed it would be without merit, and they vigorously objected to the admissibility of similar transaction evidence on other grounds. Finally, because the verdicts were not mutually exclusive, the trial attorney did not err by not challenging them, the State contends.

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GONZALEZ V. HART, WARDEN (S15A0884)

A man is appealing a lower court's refusal to throw out his conviction and life prison sentence that he received for kidnapping his ex-girlfriend during a violent assault. He argues that after his conviction, the state Supreme Court substantially changed the law on kidnapping and under its precedent-setting decision, he could no longer be found guilty of that crime.

FACTS: The evidence showed that Arquimides Gonzalez had a violent relationship with his former girlfriend, Christina Deleon-Lopez. On one occasion, Gonzalez threw her against a wall and choked her. Another time, Gonzalez followed Lopez to her friend's house and demanded that she leave with him. While he was driving Lopez toward her apartment, she told him she no longer wanted to be with him, and he pushed her out of the moving vehicle. As a result, she was left in a coma with broken bones and her internal organs damaged.

Based on separate incidents that occurred on April 9 and June 4, 2005, a **Gwinnett County** grand jury formally charged Gonzalez with aggravated assault and kidnapping with bodily injury related to April 9, and aggravated battery and aggravated assault related to June 4. At a 2007 trial, the jury found him guilty of kidnapping and family violence battery for the April 9 incident and guilty of all the charges stemming from the June 4 incident. (Family violence battery is a less serious misdemeanor crime than the aggravated assault with which he was originally charged for the April 9 incident.) Gonzalez was sentenced to life in prison for kidnapping and an additional 81 years for the other charges. On appeal, the Georgia Court of Appeals upheld his convictions but sent the case back to the trial court for resentencing with direction to merge two of the crimes. As a result, his sentence was changed to life plus 41 years.

In May 2010, Gonzalez, representing himself "pro se," filed a petition for a "writ of habeas corpus," challenging his Gwinnett County convictions. (Habeas corpus is a civil proceeding that allows already convicted prisoners to challenge their conviction on constitutional grounds in the county where they're incarcerated, which in this case was Ware County. They generally file the action against the prison warden, who was Darrell Hart.) Among his claims, Gonzalez argued he received ineffective assistance from his appeal attorney for failing to challenge the evidence as insufficient to convict him of kidnapping. He also claimed his life sentence was unconstitutionally "cruel and unusual" because he received it for a charge that is no longer considered kidnapping. The habeas court ruled against him in August 2014, and he now appeals to the state Supreme Court.

The incident which forms the basis for Gonzalez's kidnapping with bodily injury conviction occurred April 9, 2005. According to the record, when Gonzalez arrived at Lopez's apartment, he became angry when he saw a man's shirt hanging up, and he and Lopez began to argue. While in her bedroom, Gonzalez hit her multiple times in the face, threw her onto the bed and choked her. She said at one point she lost consciousness. Lopez ran from the room and told Gonzalez she was going to call police. He grabbed her cell phone, and as she was moving toward the apartment door, he grabbed her by the hair and threw her against the door. Gonzalez then left the apartment with Lopez's phone. She used her neighbor's phone to ask a friend to call police. When the friend and police arrived at the apartment, they found Lopez cowering in the corner of her bedroom, trembling and crying and unable to speak to any of them. She was taken by ambulance to the hospital where a physician found bruising and significant swelling on her head and face, abrasions to her neck and throat, and a "big goose egg" on the back of her head. At trial, Gonzalez admitted he had assaulted Lopez but denied he had retained or kidnapped her.

At issue in this appeal is the kidnapping conviction and the law on “asportation” – a legal term that means the forced movement of another person without that person’s consent. Prior to 2008, only the slightest movement of an alleged victim had to be shown to satisfy the asportation element required to prove the crime of kidnapping. But in its November 2008 decision in *Garza v. State*, the state Supreme Court overruled prior law regarding the need for only slight movement and established four factors to determine whether the asportation element was met: the duration of the movement, whether it occurred during a separate offense, whether it was an inherent part of that separate offense, and whether the movement itself posed a significant danger to the victim independent of the danger caused by the separate offense.

ARGUMENTS: Gonzalez’s attorneys argue the habeas court erred in finding that the evidence at trial was sufficient to establish asportation under *Garza*. Although the state Supreme Court “has repeatedly held that it is not necessary to satisfy all four factors of the *Garza* test in order to establish asportation, the record in this case does not support a finding that any of the factors have been met,” his attorneys argue in briefs. Before *Garza*, “Georgia courts had arrived at a place where the expansive legal definition of the offense was unrecognizable to a citizen of ordinary intelligence.” The sole evidence on which the habeas court relied to establish asportation was Lopez’s statement that as she was going to the door, “he reached me and he grabbed me by the hair and he threw me against the door.” “For throwing the victim against the door, the jury convicted Gonzalez of misdemeanor family violence battery,” the attorneys argue. “For pulling the victim’s hair, the jury convicted Gonzalez of kidnapping with bodily injury.” Addressing each of the *Garza* factors, the attorneys argue the duration of the movement of Lopez was minimal. She ran out of the room, he chased her, grabbed her hair and threw her against the door. He then left and the attack was over. Yet the habeas court found that the grabbing of her hair was a separate event that constituted kidnapping. But the movement occurred during the commission of, and as an inherent part of, the family violence battery, the attorneys argue. “The attack in this case was violent, abhorrent, and unlawful, but there was no intent to kidnap the victim and no kidnapping occurred.” Lopez herself described what occurred “as one fluid act.” The movement of the victim also did not pose an independent danger; “it only served to slightly prolong the ongoing attack.” “The facts of this appeal present a glaring example of the constitutional issues which this Court sought to ameliorate in *Garza*,” the attorneys argue. Grabbing the victim’s hair “is an act which no reasonable person of ordinary intelligence would ever associate with kidnapping or the evil sought to be forbidden by the kidnapping statute.”

The Attorney General’s office argues for the warden and State that the evidence does in fact meet the *Garza* standard. The habeas court correctly found “that the movement of grabbing her hair and pulling her from the door presented a significant danger to the victim independent of the separate offenses of aggravated assault as charged” in the indictment, the State contends. “The court also found that the movement of pulling the victim back further isolated her from protection or rescue, prevented her escape from the apartment, and enabled [Gonzalez] to exercise further control over her.” The movement itself “presented a significant danger to the victim because she was stripped of her phone, keys (both apartment and car), driver’s license, and wallet, before she was left isolated and beaten in her apartment.” In spite of the minimal duration, the grabbing of the victim’s hair was not “an inherent part” of any of the other offenses. Though close in time, it was separate from slamming her against the door. “In fact, the grabbing of her hair enabled him to commit the separate offense of family violence battery,” the State

argues. “The record shows that Petitioner beat the victim, strangled her to the point of unconsciousness, then forcibly grabbed her and slammed her against the wall to prevent her from seeking help.” The habeas court’s decision should be upheld, the State urges.

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