



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Monday, April 20, 2015

10:00 A.M. Session

VININGS BANK V. BRASFIELD & GORRIE, LLC (S14G1876)

A bank is appealing two lower court decisions that were in favor of a company the bank had sued to recover money from a defaulted loan.

FACTS: In August 2009, Vinings Bank in **Cobb County** made a \$1.4 million business loan to Wagener Enterprises, Inc., a drywall contractor. As collateral, Wagener granted the bank a security interest in all of Wagener's accounts and accounts receivables. The security interest obligated Wagener to deliver accounts that were "free and clear of any lien." In 2010 and 2011, Wagener entered into a dozen subcontracts with Brasfield & Gorrie, each to hang drywall in a number of Brasfield's construction projects. Wagener performed work under these contracts, submitted invoices throughout 2010 and 2011, and was regularly paid by Brasfield for its work.

In August 2011, Wagener went out of business and defaulted on its loan from Vinings Bank. While some of the construction projects had been completed, and Wagener's final bills had been submitted and paid by Brasfield, others were not yet complete. After Wagener defaulted on the loan, Vinings Bank froze Wagener's deposit accounts and applied the funds in those accounts toward the principal due on the loan. According to the bank, Brasfield owed Wagener about \$700,000 for work that had been completed and invoiced. In October 2011, the bank sent notice to Brasfield that it had an interest in Wagener's accounts and accounts

receivables. Brasfield's attorney responded in a letter that Wagener was "a subcontractor to Brasfield on several construction projects in the State of Georgia" and that it "is possible – indeed, likely – that some of the funds in Wagener's accounts, and which Vinings [Bank] intends to apply to various loan obligations of Wagener, are funds paid by Brasfield in connection with the Projects." The letter summarized the "constructive trust fund doctrine," warning that neither Wagener nor anyone else, had the right "to apply funds paid to Wagener on one of the Brasfield Projects to some other unrelated obligation of Wagener that does not constitute payment of subcontractors, suppliers and laborers of Wagener on those Projects." The letter concluded by inviting the bank to contact Brasfield to help "identify the funds in the Wagener accounts that are subject to this constructive trust." In the meantime, Brasfield refused to pay any of Wagener's outstanding invoices, arguing that at least some of the invoiced amounts, as well as some of the money it had already paid Wagener, might be owed to Wagener's subcontractors, laborers, and suppliers.

In September 2012, the bank sued Brasfield, claiming that it owed money to Wagener and therefore, under the security deed, to the bank. Brasfield countersued, claiming the bank had illegally converted the funds in Wagener's frozen accounts, some of which were due to Wagener's subcontractors and suppliers, to satisfy the loan. Both sides filed motions asking the court to grant "summary judgment," which a judge does after deciding a jury trial is unnecessary because the facts of the case are undisputed and the law falls squarely on one party's side. The Cobb County Superior Court ruled in Brasfield's favor, denying the bank's motion and granting partial summary judgment to Brasfield. Vinings Bank appealed to the Georgia Court of Appeals, but that court upheld the trial court's ruling, finding that under "the clear language of the subcontracts, Wagener was not entitled to final payment until all the work had been performed and until payment was made to laborers and suppliers.... Moreover, under Georgia law, contractors, including subcontractors like Wagener and master contractors like Brasfield, are required to pay their subcontractors and suppliers, who are otherwise entitled to a lien on the real estate or property on which they work." The bank now appeals to the Georgia Supreme Court.

ARGUMENTS: The bank's attorneys argue both the trial court and the Court of Appeals erred by denying the bank summary judgment on Brasfield's claim that the bank had illegally converted the funds. "Until now, the Court of Appeals has consistently applied what it has described as the 'well-settled rule' that unless an account is designated as a trust account, or the bank has actual knowledge that the funds are of the character of trust funds, the funds are to be treated general deposit funds and are subject" to being used to satisfy a debt due. "The right of a bank to set-off the balance of a deposit account against indebtedness owed by the owner of the account has been the law of this state for at least the past 120 years," the bank's attorneys argue in briefs. In this case, the lending bank did not have "actual knowledge that the funds deposited in a general account are intended to discharge a specific obligation or otherwise partake of the character of trust funds." Therefore, under the "well-settled rule," the funds "are treated as any other general deposit funds, are commingled with other funds on deposit with the bank, and are subject to set-off against any matured indebtedness for which the bank is creditor to the principal." In 2011, Brasfield wrote seven checks to Wagener, and they were commingled with all other funds on deposit at the bank. "The evidence established that the account was not designated as a trust account," the attorneys argue. Furthermore, the bank had no knowledge "that the seven checks represented specific funds deposited in the Operating Account but

intended to discharge specific debts to specific subcontractors.” Even if the funds should have been held in a constructive trust for anyone claiming a lien, “the undisputed facts” are that Brasfield “is not a lien claimant and does not claim to be,” the attorneys contend. “Rather, [Brasfield] is a debtor of Wagener that owed Wagener money, and for which the seven checks had been tendered (and negotiated) as payment.” A constructive trust is not appropriate in this case, the attorneys argue, because such a trust is a remedy for unjust enrichment, and there is no evidence the bank has been unjustly enriched. Rather, the bank had “clear and established rights to the funds on deposit in the Operating Account by the terms of a contract with Wagener, by virtue of the security interest...” And under Georgia law, the security interest had priority over creditors of Wagener, including Brasfield, the bank’s attorneys contend.

Brasfield’s attorney argues that both courts ruled correctly because the bank is not entitled to summary judgment on the claim that it had improperly converted funds. “In short, where an entity misappropriates funds that rightfully belong to someone else, as Vinings did in this action, conversion is the proper remedy. Brasfield was specifically damaged by Vinings’ conversion of these funds, as Georgia law required that these funds be properly distributed, and when there were not Brasfield had to settle the lien claims under its contract with the project owners.” Brasfield suffered a loss of more than \$300,000 after the bank “wrongfully converted the funds belonging to Wagener’s subcontractors and suppliers,” and Brasfield “became legally responsible for making sure that those subcontractors and suppliers were paid.” “Georgia law has established numerous protections for these subcontractors and suppliers that makes Vinings’ action a conversion of funds,” the attorney argues. To protect subcontractors and suppliers, Georgia courts have applied the constructive trust doctrine, “which requires funds due to them be held in trust while they are in the hands of any third party.” “That in fact is the strong public policy of this state. However, Vinings would have this Court obliterate these protections and hold that banks have a ‘super right’ to all construction funds in their accounts, regardless of their knowledge of the character of those funds, and that subcontractors and suppliers should get in line behind any bank that offers a corporate loan to a construction contractor.” Contrary to the bank’s claim that it should be excused for its conversion of funds because it was ignorant they were subject to a constructive trust, “Vinings had actual knowledge that a large portion of the funds in Wagener’s accounts were required to be held in trust to pay Wagener’s subcontractors and suppliers.” The October 2011 letter plainly put the bank on notice of this. “Accordingly, any claim that Vinings lacked actual knowledge that a portion of the funds were to be held in trust for payment to Wagener’s subcontractors and suppliers is patently false,” Brasfield’s attorney argues. Finally, “even assuming that unjust enrichment were a prerequisite to a conversion claim – which it is not – the record demonstrates that Vinings was unjustly enriched at Brasfield’s expense by improperly setting off funds in Wagener’s accounts that were not Wagener’s property.” A large portion of Wagener’s funds at Vinings Bank “did not belong to Wagener, but were actually the property of Wagener’s subcontractors and suppliers.”

Attorneys for Appellant (Bank): C. Lee Davis, Emma Burke

Attorney for Appellee (Brasfield): Robert Crewdson

WATSON V. THE STATE (S15G0385)

A man is appealing a Georgia Court of Appeals decision that upholds his conviction for sexual battery against his young daughter. He argues that under Georgia law, state prosecutors were required to prove his daughter did not consent to his touching intimate parts of her body.

FACTS: In 2008, Patrick Watson was tried in **Camden County** for molesting his daughter, K.P., and her friend, M.S. Watson's daughter, who was 14 years old at the time of trial, testified that she had been living with her father since she was 11. She said that on several occasions, when she told him she needed a larger bra, he examined her breasts by touching them under her clothing. She said he did this even though she told him it made her feel uncomfortable. On several other occasions, K.P. said he touched her pubic area to see if she was shaving it. Again, she told him that made her feel uncomfortable. Once, as she was leaving the shower wrapped in a towel, she had to lie down in front of him, and he lifted the bottom of the towel and touched her pubic area to see if she had shaved. K.P. testified that on Nov. 11, 2007, when her friend, M.S. was spending the night, Watson entered her bedroom wearing a towel and asked if the girls were sexually aroused. She said he then sat on the bed and touched K.P.'s upper thigh. K.P. told this to police the following day. M.S., who was 15 at the time of trial, also testified about that night. She said that when he came into the bedroom wearing only a towel, she was lying on her stomach on the bed. She said Watson lay across her legs, touched her breasts, and then placed his hand on her buttocks. M.S. testified that she jumped off the bed and Watson then put his hand down her pants, touching her vagina. When she moved his hand away, he again placed his hand over her clothing on her pubic area. The next day, M.S. reported the incident to a friend, relative and police.

A special agent for the U.S. Naval Criminal Investigative Services testified at trial that he became involved in the case because Watson was employed by the Navy. He said Watson gave several different accounts about Nov. 11, 2007. The special agent said that during a recorded interview, Watson stated he had asked the girls if they were sexually aroused; touched M.S.'s vagina, which he said was accidental; talked to both girls about shaving their pubic regions; pulled M.S.'s shorts to the side, exposed and touched her pubic area, and used two fingers to rub the hair next to her vagina; made sexually explicit comments to the girls; previously told M.S. he wanted to perform oral sex on her; and showed K.P. how to check her breasts for lumps after she complained of breast pain. The jury heard a recording of the interview.

At issue in this appeal is the sexual battery statute and the instruction the trial judge gave to jurors about the law before their deliberations. Georgia Code § 16-6-22.1 states that "a person commits the offense of sexual battery when he or she intentionally makes physical contact with the intimate body parts of another person without the consent of that person." At the request of Watson's attorney, the judge read to jurors what the statute said, then added that "under Georgia law a person under the age of 16 lacks legal capacity to consent to sexual conduct."

Following the trial, the jury convicted Watson of two counts of sexual battery against his daughter K.P., as the less serious offense included in child molestation, with which Watson was originally charged. The jury, however, found Watson guilty of the more serious offense of child molestation against M.S., his daughter's friend. Watson was sentenced to 20 years to serve 15 in prison for the conviction of child molestation. He was sentenced to another 10 years on probation for the two sexual battery convictions. On appeal to the Georgia Court of Appeals, Watson argued a number of points, but the appellate court rejected all his arguments and upheld his

convictions and sentence. Watson now appeals to the state Supreme Court, which has agreed to review the case to determine whether the Court of Appeals erred by characterizing Watson's challenge of the statute as a constitutional challenge which he failed to raise for the first time at trial, thereby forfeiting his right to raise it on appeal. Also, the high court has asked the parties that if Watson did not waive his right to challenge the statute, are prosecutors required under the statute to show a lack of consent to prove a sexual battery charge against an alleged victim who is under the age of 16.

ARGUMENTS: Watson's attorney argues in briefs: "The clear, unambiguous, and plain wording of § 16-6-22.1 requires the State to prove lack of consent, regardless of the age of the alleged victim. However, in Appellant's [i.e. Watson's] case, the trial court instructed the jury, over objection, that the State did not need to prove lack of consent because 'under Georgia law a person under the age of 16 lacks the legal capacity to consent to sexual conduct.'" That instruction was erroneous, the attorney argues. If the Supreme Court accepts the Court of Appeals' interpretation of § 16-6-22.1, which does away with the statutory requirement that the State prove lack of consent, then there would never be a time that a person could intentionally touch the intimate body parts of a child under the age of 16 and not be guilty of felony sexual battery," the attorney argues. If lack of consent "is not an element of the offense of sexual battery, then absurd, unjust and contradictory results could be produced..." For instance, parents who put diaper cream on their child's buttocks, or a mall Santa Claus with a child in his lap, could be guilty of sexual battery. In this case, K. P. "never testified that the touching of her breasts or pubic area was done in any sexual context," the attorney argues. "Ms. Peters also never testified that the touching of her breasts and pubic area occurred without her consent." Indeed, "if the jury believed that Appellant was showing K. P. how to check for lumps in her breasts, as they may well have since they acquitted him of child molestation, Appellant would still be guilty of sexual battery since all the State would have to prove is that K.P. was under 16 and Appellant intentionally touched her breasts." The Court of Appeals also misperceived Watson's argument as a constitutional challenge instead of a question of statutory interpretation of § 16-6-22.1. The Court of Appeals stated in its opinion that Watson's challenge to the statute's potential overbreadth was a challenge to its constitutionality, and the Georgia appellate courts "will not pass upon the constitutionality of a statute when the challenge was not directly and properly made in the trial court and distinctly ruled on by the trial court." "To be clear, Appellant is not challenging the constitutionality of § 16-6-22.1 as he believes § 16-6-22.1 as written in constitutional," Watson's attorney argues. "Rather, he is challenging any judicial interpretation of § 16-6-22.1 which removes the statutory requirement that the State prove lack of consent, even if the alleged victim is under the age of 16."

In a one-page brief, the State says only that it agrees with Watson "that the trial court erred in instructing the jury that the prosecution did not need to prove lack of consent under § 16-6-22.1, because 'under Georgia law a person under the age of 16 lacks the legal capacity to consent to sexual conduct.' Accordingly, the State further submits that the Court of Appeals was incorrect in deciding that the trial court's [jury instruction] on sexual battery 'was an accurate statement of the law and was adjusted to the facts of this case.'"

Attorney for Appellant (Watson): Noah Pines

Attorneys for Appellee (State): Jackie Johnson, District Attorney, Andrew Ekonomou, Asst. D.A.

THE STATE V. ALLEN ET AL. (S14G1765)

The State is appealing a Georgia Court of Appeals ruling that when two men's case involving illegal drug possession goes to trial, the jury won't hear evidence that police found marijuana in their car because the officer illegally prolonged the traffic stop.

FACTS: On Sept. 13, 2012, **Henry County** Officer Nicholas Jackson was stationed on I-75 to monitor southbound traffic when he saw a 2012 Nissan Altima cross from the center lane into the "fast" left lane and then back, which constituted a "lane infraction." As the car passed, the officer saw the driver reach over and point his finger at the passenger's face as if in an argument. Concerned the driver was distracted, Jackson followed the car and initiated a traffic stop. He approached the car and noticed that the driver, Patrick Delroy Scott, and the passenger, Dorian Maurice Allen, seemed nervous, observing that each man's carotid artery was pulsating at a high rate, and Allen did not make eye contact. But Jackson saw no contraband in plain sight, nor did he detect any suspicious odors. Jackson told the men he'd stopped them for lane infractions and asked if they were fighting. Scott said no, and the officer told him he was writing him a courtesy warning for the lane infractions. He obtained Scott's driver's license and Allen's South Carolina identification card, then had Scott get out the car to "see how he was on his feet" and "make sure he wasn't intoxicated." He also conducted a pat-down search of Scott. Finding no signs of intoxication or impairment and no weapon, Jackson engaged in general conversation with Scott while he wrote the warning. But after completing the warning, Jackson did not hand it to Scott, nor did he return the men's identification cards. Rather he spoke into his shoulder-mounted radio and asked dispatch to run a computer check on the men's identification. By then, it was a little over nine minutes into the stop. While waiting to hear back from dispatch, Jackson asked Scott for consent to search the car. Scott gave an ambiguous answer, which Jackson took as a denial. So the officer retrieved his drug dog from the back of his car, and had him walk around the Altima, at which time the dog gave a positive odor response. Jackson then began a probable cause search of the car, and at about the same time, dispatch got back with the men's criminal and driver histories. In the next few minutes, Jackson found a large box wrapped in Christmas paper in the trunk. Inside he found several bundles of marijuana wrapped in plastic.

Allen and Scott were indicted for possession of more than an ounce of marijuana, punishable by up to 10 years in prison. Both men pleaded not guilty and their attorneys filed identical motions to suppress the discovery of the marijuana because it was the "fruit" of an illegal seizure. An audio-video recording of the traffic stop was played at the suppression hearing. Based on the video and the testimony of Jackson, who was the sole witness, the trial court concluded that because the officer had completed the warning when he initiated the computer check, "the officer had no basis to hold either the driver or the passenger," and there was "no valid law enforcement purpose to conduct a check on Allen's identification." Therefore the overall traffic stop was unreasonably prolonged in doing so. The State appealed, but the Georgia Court of Appeals, in a split 4-to-3 decision, upheld the Henry County court ruling, finding that the evidence "showed that the officer – having accomplished the tasks related to his investigation into lane infractions and having no reasonable, articulable suspicion of criminal activity aside from the traffic violation – unreasonably prolonged the duration of the traffic stop when he initiated the computer check." The State now appeals to the Georgia Supreme Court. At issue in this case is whether the traffic stop was already concluded by the time the officer

delayed the men further to run a computer check and ultimately search the car after using the drug dog.

ARGUMENTS: The District Attorney, representing the State, argues the Court of Appeals erred when it upheld the lower court's granting of Allen's motion to suppress the evidence. "The Court of Appeals decision sets a 'magical' standard that the writing of a citation (in this matter, a warning citation) ends a traffic stop encounter between and officer and a driver," the State argues in briefs. "[T]he computer check of a driver's legal ability to operate the vehicle for which he has just been issued a warning/citation for a driving violation is essential to law enforcement and to public safety." Additionally, a computer check by radio only takes a short amount of time, and in this case, only three minutes. Furthermore, in its 2009 decision in *Arizona v. Johnson*, the U.S. Supreme Court stated that a traffic stop ends "when the police have no further need to control the scene, and inform the driver and passengers they are free to leave." Here, despite Jackson's testimony that he had finished writing the citation, the video shows he had not completed the stop because he had not yet returned the men's identification cards or handed over the warning when he instituted the search. The only requirement placed on officers is that "their investigatory tasks do not 'measurably' extend the overall duration of the stop." The U.S. Supreme Court has indicated that computer checks fall into the broader category of investigatory tasks which may be pursued during a traffic stop because a check of license validity and warrants plays a vital role in officer safety. "Surely officers are not required by the Fourth Amendment to give drivers an opportunity to depart without first ensuring that, in so doing, they are not permitting a dangerous person to get behind them," the State argues. There is "no constitutional stopwatch on traffic stops...and courts generally do not impose a particular sequence or protocol on how an officer proceeds during a stop. That is precisely what the Court of Appeals is doing in this case, engaging 'in a post hoc evaluation of police conduct' and then telling the officer a better way of doing his job!"

Allen's and Scott's attorneys argue the Court of Appeals did not err in affirming their motion to suppress the drug evidence. "The State can cast the issues however it wants, but Georgia jurisprudence is clear that once the purpose of the investigation has been completed, continued detention is not authorized without reasonable and articulable suspicion," the attorneys argue in briefs. The appellate court's decision is consistent with the Georgia Supreme Court's 2014 decision in *Rodriguez v. State*, "in that, although the officers can run driver and criminal histories during the investigation of the stop and for officer safety, they cannot run a computer check after the fact as a way to unreasonably prolong the stop." In this case, "Jackson had already concluded the investigation regarding the lane infractions, which was the basis of the traffic stop in the first place," the attorneys argue. "Whether Officer Jackson asked for the check of the histories before he handed the warning citation to Mr. Scott is immaterial. The significant fact is that he had concluded all tasks related to the investigation of the lane infractions, and the trial court properly determined that the prolongation of the stop was unreasonable." Jackson chose neither to have dispatch run a computer check nor bring out his drug dog until after he completed the warning. "The Court of Appeals properly affirmed the trial court's ruling in favor of the defense," the men's attorneys argue. "Georgia law is clear that once an officer's investigation has ceased, he cannot continue to detain the defendant without reasonable and articulable suspicion."

Attorneys for Appellant (State): Jim Wright, District Attorney, Blair Mahaffey, Chief Asst. D.A.

Attorneys for Appellees (Allen): William Puckett, Holly Veal

2:00 P.M. Session

MCHUGH FULLER LAW GROUP, PLLC V. PRUITTHEALTH-TOCCOA, LLC
(S15A0362)

MCHUGH FULLER LAW GROUP, PLLC V. PRUITTHEALTH-TOCCOA, LLC
(S15A0641)

A group of lawyers is appealing a court ruling that concluded they engaged in “false and misleading” advertising about a Toccoa nursing home.

FACTS: On April 17, 2014, McHugh Fuller – a Mississippi-based law firm – posted an advertisement in “The Toccoa Record” newspaper in **Stephens County** where PruittHealth has provided nursing home services since 1969. The law firm said the ad was based on a 2012 survey report about PruittHealth-Toccoa, LLC published by the federal Centers for Medicare and Medicaid Services. The ad showed a photo of a nursing home owned by PruittHealth and said: “ATTENTION! The government has cited HERITAGE HEALTHCARE OF TOCCOA for failing to assist those residents who need total help with eating/drinking, grooming and personal and oral hygiene. If you suspect that a loved one was NEGLECTED or ABUSED at Heritage Healthcare of Toccoa, call **McHugh Fuller** today! Has your loved one suffered? Bedsores, Broken Bones, Unexplained Injuries, Death.” At the bottom of the ad was the law firm’s 800 number. The following day, on April 18, PruittHealth sued, seeking a temporary restraining order and an injunction. Pruitt Health argued that the government had never found that its nursing home failed to help residents with “eating” or “drinking;” that the government citation on which the ad was based had been issued two years earlier in May of 2012; that it involved one resident who had long, dirty fingernails, and another who stated she did not have swabs or mouthwash for her gums; and that the nursing home had resolved these problems immediately. PruittHealth argued it was entitled to an injunction and restraining order because McHugh Fuller had commissioned a deceptive newspaper ad aimed at seeking clients to bring suit against its Toccoa nursing facility, and that the ad violated several provisions of the state Uniform Deceptive Trade Practices Act because it contained false and misleading statements. That day, the trial judge granted the temporary restraining order until a hearing could be held, requiring McHugh Fuller to pull the ad until further notice. The judge scheduled a hearing for three weeks later to address “whether injunctive relief should continue.” Following the May 13 hearing, where an expert witness from Emory Law School and a partner from McHugh Fuller testified for the law firm, and the nursing home administrator testified for PruittHealth, the judge ruled in favor of PruittHealth. It issued an order May 23, 2014, finding that McHugh Fuller’s “advertisement is false and misleading” and in violation of the Uniform Deceptive Trade Practices Act. The order stated that “defendant is enjoined from publishing or causing the offending advertisement to be published in the future. In addition, within 20 days from the date of this order, defendant shall remove or cause to be removed at its expense all electronic postings

of the advertisement by *The Toccoa Record*, including any electronic archived versions of the advertisement.” McHugh Fuller now appeals to the state Supreme Court.

One of the issues in this case is whether the trial court followed proper procedure by combining a hearing on the interlocutory (or interim) injunction with a final trial on the merits of the case. While that is allowable, the parties must have notice beforehand of the consolidation so they can prepare. McHugh Fuller claimed it did not have notice, although PruittHealth argues it did have notice and came well prepared May 13 to argue the entire case. Following issuance of the court’s May 23 order, McHugh Fuller also claimed it was not clear that the trial court’s ruling was final and that it was issuing a permanent injunction, and it therefore filed additional arguments and documents to be included in the record, pending a final ruling. The trial court ruled, however, that the case had been terminated, and any materials filed after the termination date were not properly part of the record and could not be considered on appeal. McHugh Fuller, in a separate action, now appeals that ruling as well.

ARGUMENTS (S15A0362): Attorneys for the law firm argue the trial court’s order must be thrown out because the court failed to provide notice of its intention to consolidate the hearing on the interlocutory injunction with the trial on the merits. Under normal procedure, once a party obtains a temporary restraining order, as PruittHealth did, it must also receive an interlocutory injunction to maintain the status quo until there is a later hearing on the case’s merits. Under limited circumstances, however, a trial court may consolidate the hearing on the interim injunction with a final trial on the case. But the “general rule is that unless there is an order consolidating the trial on the merits with the hearing on the application for interlocutory injunction...then the entry of permanent relief after an interlocutory hearing is improper,” the attorneys contend. “Where a trial court does not enter a consolidation order prior to the hearing on the interlocutory injunction, reversal is required because the parties were not given adequate notice and the ability to prepare.” Prior to the May 13 hearing, the trial court gave no notice to McHugh Fuller it planned to consolidate the hearing with the trial, nor did it issue a consolidation order. The trial court also abused its discretion by imposing a permanent injunction and by finding that the ad was false and misleading. While the trial court specifically objected to the phrase, “failing to assist” as the basis for finding the ad misleading, the 2012 Health Inspection Summary published on Medicare’s website specifically states that: “Inspectors determined that the nursing home **failed to:** Assist those residents who need total help with eating/drinking grooming and personal and oral hygiene.” “In sum, PruittHealth has done nothing to demonstrate the advertisement made any misleading, let alone false statements,” the attorneys for the law firm argue. Even if McHugh Fuller violated the Georgia law, PruittHealth failed to show it was likely to be damaged in the future. “By definition, an injunction provides relief from *future* wrongful conduct: the remedy by injunction is to prevent, prohibit or protect from future wrongs and does not afford a remedy for what is past.” Here the offending ad ran only once, on April 17, 2014, and there is no evidence McHugh Fuller planned to run it again. The trial court’s order must also be vacated because it is not “sufficiently specific,” the attorneys contend. “In particular, the court’s order does not sufficiently explain whether only the *exact* advertisement is enjoined or whether McHugh Fuller is also enjoined from placing similar, but not identical, future advertisements.” Under state law, because the order “lacks specificity, it must be vacated,” the attorneys argue.

Attorneys for PruittHealth argue that in April 2014, McHugh Fuller “embarked on a targeted, statewide advertising campaign” against PruittHealth-Toccoa and 17 of its affiliated Georgia nursing homes. “The purpose of these solicitations was to drive business to McHugh Fuller, a Mississippi based law firm with a national practice focused on suing nursing homes. All of the ads were offensive. The ad in this case was deceptive.” Any problems identified by the 2012 citation had been immediately resolved almost two years before the ad ran. “In addition, the government found in 2012 that none of PruittHealth’s nursing home residents experienced any ‘actual harm’ and that residents were only exposed to a ‘potential’ to experience ‘minimal’ harm,” the attorneys argue. “This was a far cry from the ‘abuse,’ ‘neglect,’ ‘broken bones,’ ‘bedsores,’ and ‘death’ that McHugh Fuller insinuated through its ad. Finally, and perhaps most importantly, contrary to the statement in McHugh Fuller’s advertisement, the government never found that PruittHealth failed to help residents with ‘eating’ or ‘drinking.’” The trial court was fully authorized to enter a permanent injunction after McHugh Fuller presented evidence and did not object to a hearing on the merits. “The superior court based its decision on the testimony of multiple witnesses and documents presented after ample notice to all parties,” the attorneys argue. “McHugh Fuller made no objection to a full hearing on the record, and McHugh Fuller participated fully, even going so far as to retain and call an expert to testify. McHugh Fuller acquiesced to the hearing, admitted to publishing advertisements that were inaccurate, and participated in closing arguments. For all of these reasons, the trial court’s entry of a permanent injunction was appropriate and was supported by substantial evidence.” “When, as here, deceptive practices are found to exist, injunctive relief is the only remedy available to the trial court to prevent those practices from continuing.” Evidence was introduced that in the wake of the ad, PruittHealth’s patient census levels had “dropped precipitously” and “patients, families, and members of the community had expressed concerns over the advertisement’s allegations about abuse, neglect, broken bones, bedsores, and death,” the nursing home’s attorneys argue. PruittHealth showed that the ad remained online and “thus would continue to harm PruittHealth in the future.” Finally, the trial court’s order is specific, as there is no doubt regarding the scope of the injunction, the attorneys contend.

ARGUMENTS (S15A0641): In a related appeal, the law firm challenges the trial court’s ruling that any materials filed by the law firm after the June 2, 2014 termination of the case were not before the trial court at the time of the trial and therefore were not properly part of the record to be considered on appeal. The trial court erred in interpreting a Georgia statute to mean that it had the authority to determine all issues related to designation of the appellate record. The “trial court’s interpretation is too broad,” the law firm’s attorneys argue. Under the statute, relief is limited to situations where the record does not fully disclose what transpired in the trial court. “The statute provides no ability for an appellee [i.e. PruittHealth] to request that materials designated by the appellant [i.e. McHugh Fuller] be omitted from the record.” “This, however, is exactly what PruittHealth urged below and convinced the trial court to do. PruittHealth submitted an improper record designation asking that the court omit materials from McHugh Fuller’s designation and requested a hearing...to accomplish this purpose.” No one asserted that the documents in the trial court record were somehow inaccurate, only that they had been filed after the trial court reached its decision. But as McHugh Fuller wrote in a letter to the court following its ruling, it was unclear whether the injunction was intended to be permanent or interlocutory. “As the court did not give any notice that it was holding a trial on the merits or reaching a final

decision in this matter, McHugh Fuller assumes the court's intention was to order an interlocutory injunction until this matter has been finally resolved." Believing a final trial might still occur, McHugh Fuller filed more documents on June 10, and they should be part of the record, the law firm argues. The trial court "abused its discretion by removing the record materials filed after June 2" because it failed to make the required findings.

Attorneys for PruittHealth argue the superior court properly exercised its authority "to ensure that the record in the first appeal truly and fully disclosed what transpired in the trial court." "The reason for the exclusion of items submitted after June 2, 2014 is that such items logically could not have been considered by the trial court in connection with the order and, therefore, cannot properly be considered in the first appeal." Under the statute, "Where any party contends that the transcript or record does not truly or fully disclose what transpired in the trial court and the parties are unable to agree thereon, the trial court shall set the matter down for hearing with notice to both parties and resolve the difference so as to make the record conform to the truth." PruittHealth filed a request for a hearing because the amended record "did not speak the truth," attorneys argue. "The trial court properly excluded the belatedly-filed materials because they do not truly or fully disclose what transpired in the trial court."

Attorneys for Appellant (McHugh Fuller): Shannon Sprinkle, Tyler Wetzel

Attorneys for Appellee (PruittHealth): Jason Bring, J. Ryan Hood

THE STATE V. CASH ET AL. (S15A0720)

The State is appealing a **Paulding County** judge's ruling granting a new trial to a mother and daughter who were convicted of murdering the daughter's boyfriend. In this high-profile case, State prosecutors argue the judge was biased and should have recused himself.

FACTS: On Memorial Day weekend, 2011, Lennis Donovan "Donny" Jones was at the home of Elgerie Mary Cash in Dallas, mowing the grass. Jones, 44, was friends with Cash, 45, and according to prosecutors, had recently become romantically involved with Cash's daughter, 20-year-old Jennifer Weathington. The women later said that Jones came inside the home in the afternoon. Soon after, neighbors heard an outcry from the house, and the next-door neighbor said Cash ran out of the house shouting that "Donny" had been shot. Deputies from the Paulding County Sheriff's Office arrived within minutes where they found Jones in the upstairs bedroom lying on the floor, with a single gunshot wound to the head. According to the women's attorneys for their appeal, deputies found Weathington crouching by Jones and holding a towel to his head, crying and begging for help. Jones was transported to Kennestone Hospital where he died that day, May 30. Cash and Weathington told officers at the scene that Jones had been examining a Glock automatic pistol recently purchased by Cash and, believing it to be empty, had placed the pistol to his head and pulled the trigger. Officers later testified that at that point, they did not suspect foul play. Jones' body was transferred to the Georgia Bureau of Investigation where medical examiner Dr. Jonathan Eisenstat conducted an autopsy. He found no stippling or powder tattooing at the site of Jones' wound and concluded it was not possible the wound was self-inflicted as the fatal shot was fired from at least 18 inches from the point of entry. According to prosecutors, while Cash told officers that Jones had held the pistol "against his right temple," the bullet had entered behind and below his right ear and exited at the top left of his forehead. On June 6, 2011, investigators used a search warrant to go through Cash's home where they found Jones' baseball cap in the laundry room, which had Jones' blood on it. According to the

women's attorneys, if Jones had been wearing the hat at the time of his death, that could explain the finding that the wound was inflicted from at least 18 inches away.

More than six months later, in December 2011, Cash and her daughter were arrested and charged with Jones' murder. In October 2013, a jury convicted them of malice murder, felony murder, two counts of aggravated assault and possession of a firearm during the commission of a felony. They filed a motion requesting a new trial, which is standard, and a hearing was set for May 12, 2014. Four days before the hearing, the State filed a motion asking the judge to recuse himself. The trial judge dismissed the motion and denied the State's request for a "Certificate of Immediate Review," which would have allowed the State to appeal his refusal to recuse himself and allow another judge to hear the motion. Following a two-day hearing, the trial judge granted the women a new trial, finding that the jury's verdict went against the weight of the evidence and that Cash's trial attorney had rendered ineffective assistance of counsel based on a number of deficiencies, including his failure to secure expert testimony at trial and "atrocious" conduct during trial. The State now appeals to the Georgia Supreme Court.

ARGUMENTS: The District Attorney, representing the State, argues the trial judge erred in summarily dismissing the State's motion asking him to recuse himself and in not referring the motion to another judge for consideration. The trial court erred in dismissing the motion based on legal insufficiency. "The State's motion and accompanying affidavit were legally sufficient," the State argues in briefs. The state Supreme Court has the authority to consider the appeal of that dismissal under the "collateral order doctrine." In many states, "the prosecution's right to an impartial judge is protected in one or more ways without the need to resort to testing the applicability of the collateral order doctrine, because the State can automatically disqualify the judge; or the legal sufficiency of a motion to recuse is subject to review by a disinterested judge," the State argues. In this case, the State alleged that the trial judge "exhibited progressively hostile and demeaning treatment toward the District Attorney's Office." The Georgia Supreme Court "has recognized that bias against counsel can be grounds for recusal even when the conduct occurs during the trial of a case," the State contends. The trial judge also erred in granting the motion for a new trial after he heard additional evidence the jury never heard. "To allow a trial court to rule '...as the 13th juror...' several months later and only after the trial court has heard some or a great deal of additional evidence is patently unfair to the State and is an offense to the 12 jurors who heard only the presentations of evidence made during the trial, upon which the jury based its collective decision," the State argues. In this case, "the trial court judge has now become a jury of one after the fact." And the trial judge abused his discretion in finding that the women's trial attorneys were ineffective as "there was no showing on the motion for new trial that any alleged deficiency on the part of trial counsel prejudiced the defendants in any way," or likely led to a less favorable verdict. "While trial counsel may have engaged in histrionics in the courtroom and acted in some respects foolishly, a thorough reading of the record reveals that the attorney for defendant Cash diligently and thoroughly cross-examined every witness called by the State, joined in and made reasonable objections and motions, and generally conducted the trial as an able counselor," the State contends. Weathington's attorney was also diligent in his cross examination of witnesses and in his objections and motions. "In a rambling soliloquy at the end of the motion for new trial hearing, the court made reference to counsel's 'atrocious' performance and unprofessional errors, but never articulated in its speculations on how the jury's verdict might have been different but for

counsel's actions." The trial judge also abused his discretion in granting a new trial "on grounds that the verdict was contrary to the principles of justice and decidedly and strongly against the weight of the evidence." In this case, "the evidence was clear," the State contends. "Any rational trier of fact, including the court sitting as the 13th juror, could find beyond a reasonable doubt the guilt of both of the accused. The trial court greatly abused its discretion in holding to the contrary, especially six months after the jury's verdict was handed up and six months after entry of judgment and the immediate sentencing." The motion for new trial that was granted by the trial court should be thrown out, the State argues, and the original verdict reinstated. "Or the matter should be remanded for a new hearing on the motion for new trial before an impartial judge."

The attorneys for Cash's and Weathington's appeal argue the state Supreme Court does not have the authority to rule on the trial court's denial of the State's motion asking the judge to recuse himself. If a motion to recuse is denied before the jury is impaneled in a case, the State can appeal. If it is denied afterwards, it cannot. In this case, the jury was impaneled Oct. 15, 2013; the motion to recuse was filed May 8, 2014. "Because the State filed the motion seven months after jeopardy attached, this Court does not have jurisdiction to review its denial," the women's attorneys argue. As to the evidence, both women gave multiple statements that Jones shot himself accidentally. "In fact, a careful review of the evidence supports this conclusion," the attorneys argue. But due to multiple deficiencies by the trial attorney, who "was distracted from his duties by his ongoing divorce, resultant drinking and bankruptcy, failed to prepare for trial whatsoever, failed to arguably stay awake at trial...failed to call expert witnesses who would have given powerful, undeniably crucial exculpatory evidence...represented his client in a manner that...frightened the jury..., Elgerie Cash (as well as her daughter the co-defendant) was convicted for his murder. Upon review, the trial judge ruled that he did not believe that the Appellee was guilty, and that effective counsel would have produced a different result..." Also, the women's attorneys argue, "there is nothing unfair about presenting 'some or a great deal' of evidence of actual innocence at a motion for new trial hearing." The judge did not really rely on the new evidence when he granted the new trial. "Instead, the trial court explained that his doubts were based on how unlikely it was that two women would murder someone and then immediately call the police, the failure of the police to recover the exculpatory hat, and the credibility of the witnesses," the attorneys argue. "Based on those factors, the trial court ruled that he did not believe there was even a preponderance of evidence to find [Cash and Weathington] guilty. This was not a 'rambling soliloquy.' It was a trial judge earnestly explaining to all why his conscience did not rest easy with the convictions as they stood." While the State does not disclose why the judge ruled that trial counsel was ineffective, "it is easily found" in the record, the attorneys argue. He was ineffective for failing to call or interview expert witnesses in both the ballistics and forensic medical areas, as the judge pointed out. The attorney failed to call expert witnesses to rebut the testimony of medical examiner Eisenstat, a key witness for the State. "Counsel for whatever inexcusable reason(s) did virtually nothing," the women's attorneys contend. "His representation was ineffective and pathetic." There were expert witnesses, including the Gwinnett County Medical Examiner, who would have testified at trial that the "evidence was far more consistent with a self-inflicted gunshot wound than murder," and did testify at the motion for new trial hearing and "provided a credible explanation of the facts that could have led to an acquittal." "The State has not shown that the evidence at trial demanded

a guilty verdict,” the women’s attorneys argue. The trial judge’s ruling “is the appropriate and just decision and result in these circumstances. That [Cash and Weathington] were convicted at a trial in these circumstances simply shocks the conscience, and cannot and must not be tolerated.”

Attorneys for Appellant (State): Donald Donovan, District Attorney, Steven Messinger, Chief Asst. D.A.

Attorneys for Appellee (Cash): Robert Citronberg, Andrew Fleischman

LAYER V. BARROW COUNTY ET AL. (S15A0725)

A man whose company constructed a sewer pumping station is appealing a **Barrow County** court decision that dismissed his lawsuit against the County and City of Auburn. The man argues they breached an agreement and failed to compensate him.

FACTS: Mike Layer contends that in July 2003, he and Barrow County reached an agreement that his company, Layer Landing, LLC, would construct a sewer pumping station, along with the necessary piping, to connect the sanitary sewer system to the Barrow County system in accordance with Barrow County specifications and requirements. He claims that under the agreement, he and Layer Landing would pay 100 percent of the construction of a force main and pump station. During planning and construction, Layer says that Barrow officials asked him to change the location of the pumping station from private lands to Barrow County property, which resulted in some construction complications and additional costs. This, he alleges, resulted in a subsequent agreement which the parties entered on Dec. 14, 2004 and which became the subject of his lawsuit. In that agreement, Layer alleges, “the Barrow County Board of Commissioners agreed that [Layer] would be granted individual rights and ownership in approximately one-half of the 100 gallon per minute pumping capacity of the Layer Landing pump station in order to recoup the costs for such changes, etc.” Layer alleges that the Board of Commissioners approved by vote a motion “to grant said individual rights and ownership in Plaintiff’s capacity,” and that after the Board approved the agreement, it was recorded on the Dec. 14, 2004 Board of Commissioners’ minutes. Once construction of the sewer pumping station was complete, however, County and City officials refused to make the excess capacity available to Layer, he contends. Furthermore, they used the excess capacity without paying Layer and sold capacity at a fee to consumers without his approval and without compensating him. The County contends that Layer is not alleging there ever was a signed written contract containing the terms of this purported Dec. 14, 2004 agreement and that Layer instead relies solely on an “unsigned and unauthenticated” portion of the Dec. 14, 2004 minutes of the Board of Commissioners, which “reflect nothing more than a recommendation and motion.”

In 2011, Layer sued the County and its officials for a number of things including breach of contract, unjust enrichment, and damages. After Barrow County filed a motion to dismiss the lawsuit, in February 2014, a Barrow County Superior Court judge dismissed Layer’s suit, finding in part that Layer “provided no evidence to this court that a written contract was entered into between him and any of the Defendants.” Layer now appeals to the Georgia Supreme Court.

ARGUMENTS: Layer’s attorney claims the trial court made five errors, including its dismissal of the Barrow County Board of Commissioners and Public Works, as well as the City of Auburn Public Works, from the lawsuit. The trial court found that some of Layer’s claims, including breach of contract, unjust enrichment and an unconstitutional taking, were instead claims against Barrow County and the City of Auburn. Layer’s attorney argues the trial court

was wrong because it disregarded Layer's request for "mandamus" relief (designed to force public officials to do their jobs), and "given that no discovery has been permitted whatsoever, it was far too early in the litigation to determine that [Layer] could not introduce within the framework of his complaint evidence to sustain his claims for relief against these entities," the attorney argues in briefs. The Georgia Supreme Court has "often considered and upheld cases concerning writs of mandamus to collectively compel boards of commissioners to take action where they had otherwise refused," the attorney argues. The trial court also erred by dismissing Layer's claim for unjust enrichment by concluding the claim was barred by sovereign immunity. In some instances in Georgia, sovereign immunity is automatically waived; in others it does not apply. "Although it may ultimately be [Layer's] burden to prove these factual circumstances exist in the present case, it cannot be assumed that Appellant *will* fail in this regard," the attorney argues. And it was error to dismiss his claim for breach of contract based on sovereign immunity. The trial court "overlooked the fact that Plaintiff had alleged that an agreement was twice recorded on the minutes of the Board of Commissioners." "It is Georgia law that if a plaintiff pleads that a contract exists, as Appellant has, then...it must be assumed that a contract in fact exists. And if it is assumed that it exists, then, as the trial court aptly points out, sovereign immunity is no bar." Finally, the trial court erred by dismissing Layer's claims for unconstitutional taking and mandamus by concluding he had failed to sufficiently state a claim. Layer "has been divested of possession and control of his property," Layer's attorney argues. "Defendants have taken not only his right to use and control his portion of the pumping capacity of the pumping station he constructed at his own cost, but the actual pumping station itself and the miles of pipeline attached to it." They have "refused to honor their voted upon agreement to allow [Layer] to collect fees for pumping capacity in exchange for his constructing a pumping station on county property."

The County's attorneys argue that because Layer has failed to "demonstrate the existence of any written contract binding on the County under well-established Georgia law, and Appellant has failed to state any claims against the Barrow County [defendants] upon which relief may be granted based on his pleadings, the trial court's order dismissing this lawsuit should be affirmed." The trial court correctly dismissed the complaint against the Barrow Board of Commissioners and Public Works. "As the trial court recognized, Barrow County Public Works is not a legal entity subject to suit as to any of Appellant's claims based on well-recognized Georgia law." While Layer argues his claims against the Board should not be dismissed because his pleadings included a claim for mandamus, his argument "misses the mark," the attorneys contend. Here, Layer "relies on nothing more than an oral agreement at best that is presented through unsigned, unauthenticated portions" of the Board's meeting minutes, rather than on a binding written signed contract. The trial court also correctly dismissed Layer's claims for unjust enrichment and breach of contract on sovereign immunity grounds. "Georgia law requires proof of the existence of a written contract with a county government that is binding and enforceable against that county government in order to constitute an exception to a county government's sovereign immunity defense." And the claim for unconstitutional taking and mandamus were likewise correctly dismissed because Layer "failed to allege that there has been an unconstitutional taking for a public purpose, and also failed to sufficiently allege that he has a valid property interest in what has been purportedly taken." The mandamus claims were properly dismissed because Layer "has no clear legal right to the relief sought" and there were other legal

remedies he was required to pursue before seeking the “extraordinary” legal remedy of mandamus, the County’s attorneys argue. The City’s attorney argues that Layer’s claims against it “have no legal basis,” as the City has never been in a position control the excess capacity and is a mere user of the County system.

Attorney for Appellant (Layer): Christopher Conowal

Attorneys for Appellees (County): Angela Davis, Kenneth Robin, Mary Katz