



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Monday, October 5, 2015

10:00 A.M. Session

GEORGIA DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL DISABILITIES ET AL. V. UNITED CEREBRAL PALSY OF GEORGIA, INC. ET AL. (S15G1183)

State government agencies that reduced funding for people with disabilities are appealing a Georgia Court of Appeals ruling that allows a lawsuit against them to go forward on the ground that they failed to let service providers know they were cutting their funding.

FACTS: Medicaid is a cooperative federal-state program through which the federal government furnishes financial assistance to states so they can provide medical, rehabilitation, and other services to low-income persons. With federal approval, states may enact “waiver programs” that exempt them from certain federal Medicaid requirements. In 2007, the federal government approved two such waiver programs in Georgia to enable organizations such as United Cerebral Palsy of Georgia, Inc. to deliver services for developmentally disabled citizens in their homes and in community-based settings rather than in institutions. Under the provisions of the waiver programs, Medicaid service providers are entitled to be paid certain rates for their services. According to United Cerebral Palsy of Georgia and other nonprofit service providers, beginning in 2008, the Georgia Department of Behavioral Health and Developmental Disabilities and the Georgia Department of Community Health unilaterally reduced the rates they paid to

providers and limited the amount and types of services disabled citizens could receive, sometimes to below the amount that was medically necessary. The service providers alleged that the state agencies made these reductions without public notice and comment as required by federal and state law and without giving the providers or recipients proper notice in violation of their constitutional right to due process. They also claimed that the departments refused their informal inquiries about the changes and then omitted information they were required to give them in response to the Open Records Act inquiries regarding how the departments arrived at the new reimbursement rates.

In August 2013, the service providers filed a class action lawsuit in **Fulton County** Superior Court against the two state departments and their commissioners, alleging breach of contract, noncompliance with federal Medicaid statutes, violation of their constitutional rights, and other things. But the trial judge granted the departments' motion asking the court to dismiss the lawsuit on the ground that the service providers failed to first seek an administrative review of their complaints by the departments before taking the matter to court. On appeal, however, the Georgia Court of Appeals reversed that decision, finding that because the departments failed to give written notice of the reductions, they were not entitled to dismiss the lawsuit based on the service providers' failure to exhaust their administrative remedies. The agencies now appeal to the state Supreme Court which has agreed to review the case to determine whether exhaustion of all available administrative remedies is required when a state agency fails to give proper notice of its adverse decision.

ARGUMENTS: The Attorney General's office argues for the state departments that the plaintiffs in this case are a group of Medicaid providers and beneficiaries who seek class action status for themselves and other providers and beneficiaries to challenge Georgia's means of allocating Medicaid services and payments. "Class action status notwithstanding, Medicaid disputes of this nature are not unusual," the state attorneys argue in briefs. "What is unusual, however, is Plaintiffs' flawed strategic decision to leapfrog the mandatory statutory administrative review process and first raise their grievances in the Superior Court of Fulton County. The superior court recognized this error and properly dismissed Plaintiffs' complaint for failure to exhaust administrative remedies." The Court of Appeals has "wrongly concluded that an alleged procedural error by Appellants [i.e. the state departments] – failing to send formal, written notice that payment and service allocations were less than Plaintiffs anticipated – excused Plaintiffs' decision to ignore their administrative remedies and file with the superior court a proposed class action to decide complex Medicaid reimbursement questions about which Appellants are statutorily empowered to exercise their expertise to resolve in the first instance." The state Supreme Court ruled in 1999 in *Cerulean Cos., Inc. v. Tiller* that "Long-standing Georgia law requires that a party aggrieved by a state agency's decision must raise **all issues** before that agency and exhaust available administrative remedies before seeking any judicial review of the agency's decision." The Supreme Court is now asking "whether Plaintiffs' allegations of a procedural error – the type of notice provided – excuses their strategic decision to bypass statutory and jurisdictional requirements to exhaust administrative remedies. Decades of Georgia law provide that the answer is a resounding 'no,'" the State's attorneys argue. The Georgia Legislature in 1977 enacted § 49-4-153 to provide a method to appeal disputes over Medicaid reimbursement and quantity of services. "Code Section 49-4-153 (b), which authorizes the administrative appeals process, does not require any kind of notice, formal or otherwise, to

trigger an administrative appeal,” the attorneys contend. The Court of Appeals erroneously decided that the service providers 1) failed to receive proper notice of their alleged payment and service discrepancies; and 2) that the failure warranted a new exception to the requirement that parties exhaust administrative review,” the State attorneys argue. “Both conclusions warrant reversal, as the General Assembly empowered the executive branch with the exclusive jurisdiction to decide procedural and substantive questions first, and the jurisdiction of the judicial branch is established only after administrative review.”

Attorneys for the service providers argue the Court of Appeals correctly ruled that the failure to formally notify them of the rate changes excused them from the exhaustion requirement and allowed them to appeal to the courts. Here, the Departments have completely misstated the question posed by the state Supreme Court. “Ignoring the Court’s direction, the Departments substituted their own judgment about what the Court should have asked,” the attorneys argue in briefs. “This case is about the Departments’ secret and unlawful reduction of already allocated Medicaid funds, which stripped away money and services from intellectually and developmentally disabled Georgia citizens and their health care.” As the state Supreme Court has long held, the “right to due process is, at its core, the right of notice and the opportunity to be heard.” “The regulatory framework is clear: Before the Departments take any adverse action against the Participants, they must provide the ‘core’ of due process – notice of their proposed adverse action. This notice triggers the Departments’ administrative review process. Without notice, the Participants had no opportunity to be heard in an administrative review.” The Departments “misleadingly frame their complete failure to provide notice as an innocent ‘procedural error.’ Far from a mere ‘procedural error,’ however, the Departments deprived the Participants of any ‘procedure at all, and gutted the Participants’ due process rights. If successful, the Departments will have ensured their actions are entirely unreviewable, both administratively and judicially.” The Departments’ argument that the Departments’ regulations and policy manuals say nothing about any form of notice “is patently false,” the attorneys argue. As the Court of Appeals delineated in detail, state and federal regulations, and policy and procedure manuals specifically tie the administrative review process to formal notice. And so does state law. Georgia Code 49-4-153 (b) specifically states that the request for an administrative hearing “shall be filed no later than 15 business days *after the provider of medical assistance receives the decision of the Department of Community Health which is the basis for the appeal.*” The Medicaid manual dictates that such a hearing must be requested in writing and include “a copy of the adverse action letter.” “Thus, both the providers and the members are entitled to written notice of a proposed adverse decision, which triggers the administrative review process,” attorneys for the service providers argue. “Exhaustion of administrative remedies is not required when a state agency renders administrative remedies unavailable.” Finally, the Court of Appeals’ decision “reinforces – not undermines – the administrative review process,” the service providers argue.

Attorneys for Appellants (Departments): Samuel Olens, Attorney General, Dennis Dunn, Dep. A.G., Shalen Nelson, Sr. Asst. A.G., Jaime Theriot, Spc. Asst. A.G., Josh Belifante, Spec. Asst. A.G.

Attorneys for Appellees (Service Providers): Eric Taylor, Lawrence Bracken II, Jason Beach, Peter Busscher, Deepak Jeyaram

GEORGIA FARM BUREAU MUTUAL INS. CO. V. SMITH ET AL. (S15G1177)

An insurance company is appealing a Georgia Court of Appeals ruling that would require the company to cover claims by a woman who alleges her daughter suffered permanent injuries after ingesting lead-based paint in their rental house.

FACTS: Amy Smith sued her landlord, Bobby Chupp, in **Newton County**, alleging that her daughter, who was born in 2004, suffered brain damage from ingesting lead-based paint as a result of his failure to keep the premises in repair and to provide warnings about the risks of lead-based paint. Smith and her daughter had lived in Chupp's rental house, beginning in 2004 when Smith's daughter was a few months old. She alleged in her personal injury complaint that in 2007, a health department inspection revealed the house had been painted with lead-based paint; that the paint was cracking, chipping and peeling; that medical tests in 2007 revealed the child had lead in her bloodstream; and that the child's exposure to the lead-based paint during her infancy resulted in debilitating, permanent disabilities.

Chupp had a commercial general liability insurance policy on the property with Georgia Farm Bureau Mutual Insurance Co. After Smith sued Chupp, the insurance company filed an action against both Smith and Chupp, asking the court to determine that it was not required to cover the child's alleged injuries, nor was it required to defend Chupp in the personal injury action because the child's alleged injuries came under the policy's "pollution exclusion."

The policy states: "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." Under a section called "Exclusions," the policy states: "This insurance does not apply to: 'Bodily injury' or 'property damage' arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants.'" The policy defines "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

At dispute in this case is whether Smith's lead-based paint claims are excluded from coverage under the insurance policy's "pollution exclusion."

The trial court ruled in favor of the insurance company, finding Smith's claims were excluded under the policy. But on appeal, the Court of Appeals reversed that decision, ruling that the pollution exclusion did not encompass injuries caused by the ingestion of lead-based paint. It further held that if Georgia Farm Bureau Mutual "had intended to exclude injuries caused by lead-based paint from coverage in the policy at issue in this case, it was required, as the insurer that drafted the policy, to specifically exclude lead-based paint injuries from coverage." Because the appellate court ruled the exclusion did not apply, it also ruled that the insurance company "had a duty to defend Chupp against Smith's lawsuit." The insurance company now appeals to the state Supreme Court.

ARGUMENTS: Attorneys for the insurance company argue that the Court of Appeals was wrong and its decision should be reversed. "The undisputed facts of this case show that [Smith's] claims are excluded from coverage under the absolute pollution exclusion in the policy because (1) lead is a pollutant; and (2) ingestion of lead can only occur after a discharge, dispersal, seepage, migration, escape, or release of lead contained in lead paint," the attorneys argue in briefs. At least 12 other states have found that similar pollution exclusion clauses encompass injuries arising from the ingestion of lead-based paint. With this ruling, the Court of Appeals "has departed from the clear law" of the Georgia Supreme Court's 2008 decision in

Reed v. Auto Owners Insurance Company, the attorneys contend. In that case, the issue was whether carbon monoxide was excluded under a pollution exclusion clause identical to the one here. In answering yes, the state Supreme Court reasoned that it “need not consult a plethora of dictionaries and statutes to conclude” what is and is not a pollutant. “But rather than follow *Reed*, the Court of Appeals took a strained approach to reading the pollution exclusion clause in question – finding that injuries caused by lead-based paint are not excluded because lead-based paint is not specifically listed as a ‘pollutant’ in the policy. This was in error and contrary to *Reed*.” As Judge Carla Wong McMillian wrote in a special concurrence to the Court of Appeals majority decision, “it has never been the law in the state of Georgia that a pollution exclusion clause in an insurance contract must specifically list the exact pollutant in order for the clause to exclude coverage.” The Court of Appeals has misapplied *Reed*, and the Georgia Supreme Court’s “common sense approach to absolute pollution exclusion clauses mandates that lead paint poisoning due to ingestion falls within the pollution exclusion contained in the policy,” the insurance company’s lawyers argue.

The Court of Appeals “correctly found that lead-based paint is not clearly a pollutant as defined by the policy,” Smith’s attorneys argue. The “overwhelming majority of courts” have held that lead-based paint is not a pollutant. “This issue is one of first impression before this Court in which it must balance the competing interests of a brain-damaged little girl and an insured landlord against the pecuniary interests of the insurance industry,” the attorneys argue in briefs. The primary issue is whether Georgia Farm Bureau Mutual, “which drafted and sold a liability policy for a rental home that was built prior to 1978, while knowing that lead paint was commonly used in most residential homes built prior to 1978, should bear the risk of loss rather than an innocent third-party child or the property owner who purchased a policy that did not clearly disclaim such losses.” The insurance company’s assertion that a majority of courts that have addressed the issue find that lead-based paint is a pollutant “is false,” Smith’s attorneys argue. “At least 17 of 23 sister states have already decided this issue in the same fashion as the Court of Appeals, so its decision is in accord with the vast majority of other jurisdictions that have addressed the question.” The reason for “buying a liability insurance policy was to provide cover for Chupp’s possible negligence arising from his business pursuit, and Georgia Farm Bureau Mutual’s reading of the pollution clause to exclude coverage for his negligent acts is beyond his reasonable expectations as an insured, particularly in light of the lack of clarity of that clause.” The insurance company’s assertion that injuries caused by lead-based paint are excluded from coverage “is not only contrary to Georgia law, but is also contrary to the public policy of the State of Georgia,” Smith’s attorneys argue. Excluding lead-based paint when neither “lead” nor “lead-based paint” is identified as an excludable pollutant “would be tantamount to granting insurers blanket immunity to exclude *any* potential contaminant not identified in their insurance policies.” As Chupp’s attorney argues, at best for the insurance company is that the policy it drafted and sold Chupp is ambiguous as applied to the ingestion of lead-based paint. However, under the law, if a provision of an insurance contract is susceptible to two or more constructions, and is ambiguous, “the contract will be strictly construed against the insurer/drafter and in favor of the insured,” attorneys for Smith and Chupp argue.

Attorneys for Appellant (Georgia Farm Bureau Mutual): Norman Fletcher, Duke Groover, Lee Gillis, Jr.

Attorneys for Appellees (Smith, Chupp): Jonathan Johnson, C. Andrew Childers, John Strauss

THORNTON V. THE STATE (S15G1108)

A woman is appealing a Georgia Court of Appeals ruling that upheld her conviction in **Wayne County** for conspiracy to commit murder for her role in the shooting death of her husband.

FACTS: According to the facts, Patti Thornton, who was married to Richard “Shell” Thornton, III, began having an affair with Walter Booth, who was also married. She and Booth worked together driving dump trucks for a father-son trucking business. Witnesses testified that at work, Booth made statements that Shell Thornton mistreated Patti and he, Booth, would kill anyone who “messed” with her. He once asked a co-worker to deliver a note to Booth that said, “I love you,” and she sent him numerous emails expressing her love for Booth. She wrote frequently of her hatred for her husband, his mistreatment of her, and her desperate desire to have him “gone for good,” so she could spend more time with Booth. She regularly begged Booth to help get her out of “this hell-hole,” said she could not take it anymore, and in November 2007, reminded Booth that he had “promised it would be done before Thanksgiving.”

A few weeks later, on Dec. 14, 2007, a sheriff’s deputy was summoned to the Thornton house where he found Shell dead in the bedroom. Patti told investigators her daughter had called early that morning and asked Patti to bring her daughter’s driver’s license to her at work. Patti woke her two teenage sons so they could get ready for school and she also spoke to Shell, who asked her to make a bank deposit while she was out. Patti told investigators she then left the house to take her daughter’s license to her, make the deposit, and run some other errands. She told them she also stopped at her mother’s house nearby. When she eventually returned home, she told investigators she immediately noticed that a bowl of change had been knocked over and several guns were lying on the floor. The door to the bedroom she shared with Shell was open, yet it had been closed when she had left earlier that day. Fearing someone was in the house, Patti said she went back to her mother’s house and told her mother to call police. A sheriff’s deputy returned with Patti to the house, where he found Shell in the bedroom with several gunshot wounds to his head.

A GBI crime scene specialist testified there were no signs of forced entry and other than the carport door, all the doors and windows were locked. Investigators did find a computer in the back of Shell’s truck the morning of the crime. Patti told them Shell had put the computer in his truck the night before to take it in for repair. The monitor was still on, and upon later analyzing the computer, investigators discovered Patti’s emails to Booth. Both Patti and Booth denied having a romantic relationship and Booth denied ever being at her house on Dec. 14. He told officers he’d decided not to go to work that day and instead went to a convenience store for coffee then went and played video poker. The explanation of his whereabouts, however, did not check out.

As part of the investigation, Booth’s house was searched and police seized two bottles of Trazodone, which is sometimes used as a sleep aid. Shell’s blood was tested for a variety of substances and one test revealed he had Trazodone in his blood at the time of death. Shell’s physician testified he had never prescribed Trazodone for Shell.

Patti Thornton was charged with murder, conspiracy to commit murder, making false statements and tampering with evidence; Booth was charged with the same crimes except for tampering with evidence. Following a joint trial in 2009, the jury found Patti not guilty of murder but guilty of the remaining charges. The same jury found Booth guilty only of making false

statements. He was acquitted of murder and conspiracy to commit murder. Patti appealed, arguing that the trial court should have thrown out her conviction for conspiracy because the jury's verdict of guilty was inconsistent with its verdict acquitting Booth. The Court of Appeals disagreed, and affirmed her conviction. She now appeals to the Georgia Supreme Court.

ARGUMENTS: Patti Thornton's attorney argues the Court of Appeals erred in upholding her conspiracy conviction. The trial court should have vacated the conviction because the verdict finding her guilty is inconsistent with the verdict acquitting Booth, her only alleged co-conspirator. With its decision, the appellate court has "ignored Georgia's legal precedent, which recognized the offense of conspiracy as fundamentally different [from] other offenses because a necessary element of the crime is the culpability of the co-conspirator," the attorney argues in briefs. Thornton's case is even more unique as there was only one alleged co-conspirator with which she was jointly tried. Under Georgia Code § 16-4-8, "A person commits the offense of conspiracy to commit a crime when he together with **one or more persons** conspires to commit any crime and any one or more of such persons does any overt act to effect the object of the conspiracy." "The crime itself requires 'two or more persons' for the crime to exist at all," the attorney argues. "The sanctity of the jury's verdict need not be invaded to make appellant's [i.e. Thornton's] verdict reconcile rationally, because legally by acquitting Booth, there can be no crime of conspiracy. An agreement between both appellant and Booth was necessary for a crime to have occurred. Booth's acquittal made a conviction of appellant a legal impossibility." In its 1982 decision in *Smith v. State*, the Georgia Supreme Court concluded that, "in a joint trial of co-conspirators, a failure of proof as to one conspirator would amount to a failure as to both." In 2005, the Court of Appeals ruled in *Hubbard v. State* that, "Co-conspirators, alleged to be the only two parties to a conspiracy, may not receive different verdicts where they are tried together." "Despite the Court of Appeals endorsement of the general rule for co-conspirators in 2005, the Court failed to follow the same rationale for appellant," relying on the Georgia Supreme Court's 1986 decision in *Milam v. State*, which was based on the U.S. Supreme Court's 1984 decision in *United States v. Powell*. But neither case involved two co-conspirators tried before the same jury, the attorney argues. If the Georgia Supreme Court "simply follows Georgia precedent and rationale with regard to the limited situation of jointly tried co-conspirators, the answer is simple," the attorney contends. Follow *Smith* and "Uphold that 'in a joint trial of co-conspirators, a failure of proof as to one conspirator would amount to a failure as to both.'"

The District Attorney argues for the State that the Court of Appeals did not err in upholding Thornton's conviction for conspiracy to commit murder even though her sole co-conspirator was acquitted of the same offense. Both the trial court and the Court of Appeals properly followed the decisions of the Georgia Supreme Court in concluding that "the acquittal of one of two jointly-tried co-conspirators does not preclude the conviction of the other co-conspirator." Under its 1982 decision in *Smith*, the state Supreme Court recognized that in a joint trial of two alleged conspirators, a verdict of acquittal for one and conviction of the other "are inconsistent because they reach different results regarding the existence of a conspiracy between these two parties based on exactly the same evidence." But the inquiry doesn't end there, the State argues. "Rather, the key question is whether this inconsistency in the verdicts required appellant to be acquitted of the conspiracy charge." That question was answered in the Georgia Supreme Court's 1986 decision in *Milam*, which was decided four years after *Smith*. In *Milam*,

this Court abolished the inconsistent verdict rule in criminal cases and held that a defendant may not attack a conviction because it is inconsistent with the jury's verdict of acquittal on another charge. In doing so, the Court adopted the rationale enunciated by the U.S. Supreme Court in its 1984 *Powell* decision in which it ruled that inconsistent verdicts "need not be set aside but may instead be viewed as a demonstration of the jury's leniency." It went on to say that it was within the province of the jury to acquit or convict because it was possible that the jury, "through mistake, compromise, or lenity, arrived at an inconsistent conclusion." Appellate courts have consistently applied *Milam* and adopted the federal court's rationale, "explaining that appellate courts cannot know and should not speculate why a jury acquitted on one offense and convicted on another offense," the State argues. "The reason could be an error by the jury in its consideration or it could be mistake, compromise or lenity." But any individualized assessment of the reason for the inconsistency "would be based on either pure speculation, or would require inquiries into the jury's deliberations that the courts generally will not undertake." "Accordingly, the Court of Appeals did not err in affirming Thornton's conviction for conspiracy to commit murder on the basis that such verdict was inconsistent or irreconcilable with the acquittal of her co-conspirator," the State contends.

Attorney for Appellant (Thornton): Sophia Butler

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

ATLANTA DEVELOPMENT AUTHORITY V. CLARK ATLANTA UNIVERSITY, INC.
(S15A1684)

Atlanta's economic development agency is appealing a **Fulton County** court's refusal to dismiss Clark Atlanta University's claim that when Morris Brown College went into bankruptcy, ownership of three of its properties reverted to Clark based on a 1940 deed.

FACTS: In 1940, Clark Atlanta University transferred three parcels of property to Morris Brown College. At the time, the historically black college was in financial trouble and at risk of losing its campus due to foreclosure. In a deed, Clark conveyed the three parcels of land, consisting of about 13 acres, for \$1 as a charitable gift. At issue in this case is language in the deed which states: "The above property is conveyed subject to the condition that Morris Brown College shall use the same for educational purposes....If at any time the said Morris Brown College shall cease to use said property for the particular educational purposes above set forth, the title to said property shall revert to and become vested in the Grantor or its successors." This "use restriction" included as educational purposes undergraduate work in Arts and Sciences, as well as "graduate course [sic] in Theology, if it chooses to do so." Recently, in the aftermath of severe financial trouble, a dwindling student body and loss of accreditation, Morris Brown filed for Chapter 11 Bankruptcy. Through the bankruptcy proceedings, Morris Brown sold the three properties, along with others, to the Atlanta Development Authority, which is today known as "Invest Atlanta." In September 2014, Clark Atlanta sued, seeking a declaration by the court that as a result of Morris Brown's sale of the three properties and its consequent failure to use the properties for educational purposes, the property automatically reverted to Clark Atlanta. The next month, Invest Atlanta filed a motion asking the court to dismiss the case, challenging the scope of the use restriction and arguing the property did not revert to Clark Atlanta. The trial court ruled against Invest Atlanta and denied its motion to dismiss the case, finding that the use

restriction in the 1940 deed was a valid restriction, that it fell within the “charitable purposes” exception to the general rule against putting restraints on the use of property, and that the restriction applies to all three parcels of one’s property, requiring Morris Brown to “possess and occupy” the properties. Invest Atlanta now appeals to the Georgia Supreme Court.

ARGUMENTS: Attorneys for Invest Atlanta argue the trial court’s order is erroneous for several reasons. The sale of the three properties did not violate the “use” restriction as a matter of law. For one thing, the attorneys argue, the restriction only applies to the third property described in the 1940 deed, not all of them. “However, even if that restriction applied to all three properties – as Clark Atlanta University contends – the trial court improperly construed the restriction in a manner that violated multiple rules of construction, a fundamental error,” the attorneys contend. For one thing, the trial court failed to consider the “broad and liberal” definition of “use” under Georgia law. Real property may be “used” in many ways, the attorneys argue. “It may be occupied or possessed, but it may also be mortgaged to secure a loan, leased for rental income, or exchanged for like-kind property.” “There is no dispute that the sale of the properties not only fostered Morris Brown’s educational mission, but was necessary for Morris Brown to have an opportunity to emerge from bankruptcy and regain its accreditation....” The trial court impermissibly re-wrote the 1940 deed by adding the more restrictive terms requiring Morris Brown to “possess and occupy” the properties. “Essentially the trial court, by not applying established legal standards and by adopting a construction most favorable to the grantor in a manner contrary to Georgia law, re-wrote the 1940 deed for the benefit of Clark Atlanta.” The trial court also erred in ruling that the use restriction did not violate Georgia’s well-established policy against restraints on the use of property by those who own it. The state Supreme Court “has stressed the need to make every effort to uphold charitable gifts to avoid forfeitures, such as the forfeiture now advocated by Clark Atlanta University,” Invest Atlanta’s attorneys argue.

Attorneys for Clark Atlanta University argue that the trial court properly recognized that the language of the 1940 deed is “plain and unambiguous” and the sale of the three properties does not constitute a “use” of the property for educational purposes by Morris Brown. The trial court properly construed the word “use” in accordance with prior state Supreme Court decisions, while Invest Atlanta has relied on cases that don’t apply. In a 2011 Memorandum of Understanding signed by the chairman of Morris Brown’s board of trustees, Morris Brown acknowledged that Clark Atlanta University’s reversionary rights to the properties would be triggered if Morris Brown “attempts to transfer ownership of the properties to another person or entity without Clark Atlanta University’s prior written consent” or “the properties cease to be used for the purposes or uses reflected in the reversionary clauses.” Additionally, in its bankruptcy documents, Morris Brown stated that if it should “(i) cease operations, or (ii) cease utilizing the real property for educational purposes, much of the Morris Brown College campus would become property of Clark Atlanta University.” Significantly, “at one point in this litigation even Invest Atlanta agreed that the sale of the reversionary property would trigger Clark Atlanta University’s reversionary interest,” the attorneys point out. The trial court also correctly concluded that the use restriction applies to all three parcels conveyed by the 1940 deed. “The intention of the parties to the 1940 deed as ascertained by the plain meaning of the deed’s unambiguous language necessitates the conclusion that the ‘use’ restriction applies to all three parcels,” the attorneys argue. Finally, Invest Atlanta’s contention that the “use” restriction

is void because it constitutes a restraint on the use of property “ignores longstanding Georgia authority that undermines its argument – namely, the ‘charitable purposes’ exception.” The Georgia Supreme Court has ruled that Georgia recognizes an exception to the general rule, “where property is transferred to a charitable group for charitable purposes.” “Here, Clark Atlanta University provided the reversionary property to Morris Brown as a charitable gift ‘for educational purposes’ – an act that clearly brings the 1940 deed within the charitable purpose exception,” Clark Atlanta’s attorneys contend.

Attorneys for Appellant (Invest Atlanta): John Watkins, Roy Hadley, Jr., J. Christopher Fox, II, Garrett Nail

Attorneys for Appellee (Clark): Bernard Taylor, Derin Dickerson

2:00 P.M. Session

MCDUFFIE V. THE STATE (S15A1093)

A **Telfair County** man is appealing his malice murder conviction and life prison sentence for shooting and killing a man.

FACTS: The night of Aug. 18, 2004, Officer Kary Benton Sumate was outside the McRae City Police Station when he heard gunshots. Heading in their direction, Shumate saw a gold Jeep Cherokee stopped in the middle of the road with three men standing around it talking to the driver. As Shumate approached, the car sped off. It was later stopped by another officer. The driver was Eugene McDuffie. Soon after, officers found the body of Jurrell “Fat Man” Clark lying in the yard of the Gregg Apartment Complex near the apartment of George “Tony” Harris. According to several witnesses, earlier McDuffie had walked up to Harris’ porch where Harris and another man were sitting. The witnesses said Clark began yelling at McDuffie, claiming McDuffie’s father had stolen his “merchandise,” which is street slang for crack cocaine, from his backyard. While McDuffie admitted his father had taken the drugs, he said he wasn’t responsible for his father’s actions. McDuffie and Clark continued to argue until Clark threatened he was going to get his gun. As Clark turned to walk back toward his car, witnesses testified McDuffie remarked that Clark wasn’t the only person with a gun. While Clark’s back was to him, McDuffie pulled out his gun and fired two to three shots, hitting Clark in the back of his head and the top of his leg. McDuffie later tried to drag Clark’s body around to the back of the apartment complex, but it was too heavy.

In May 2006, a Telfair County jury convicted McDuffie of malice murder, and he was sentenced to life in prison. He now appeals to the state Supreme Court.

ARGUMENTS: McDuffie’s attorney argues that his constitutional rights were violated because his trial attorney provided ineffective assistance of counsel in several ways, and because McDuffie was denied his due process of law when the prosecutor made racist remarks during her closing argument. McDuffie must be given a new trial because his trial attorney failed to “properly challenge the State’s case against him, failed to present evidence to support his sole defense, and failed to adequately consult and advise him,” the attorney argues in briefs. “In this case, trial counsel’s deficiencies undermined the defendant’s opportunity for a fundamentally fair trial with an effective defense. Trial counsel failed to impeach testimony given by the State’s witnesses, failed to require an eyewitness to testify about evidence supporting the defendant’s

sole defense, and failed to adequately consult the defendant about calling witnesses and his right to testify.” “Trial counsel’s failure to impeach the State’s witnesses was unreasonable in light of the defense’s case theory that the defendant was not the shooter,” McDuffie’s attorney argues. The attorney also contends that under the state Supreme Court’s 1943 decision in *Hicks v. State*, in closing, the prosecutor made a statement that was “so inflammatory and prejudicial that its injurious effect cannot be eradicated from the minds of the jurors by instruction from the court to disregard it.” Specifically the prosecutor said: “I’m sure you realized while the trial was going on that these witnesses, these young men, live by a different code and set of rules than the rest of us.... They value things like having nifty rides painted up with the rims, diamond earrings, gold teeth. These are things they value in their community, in their culture.” McDuffie’s attorney argues that, “While the prosecutor did not use a racial epithet, this allusion is clearly one that calls for ‘us v. them.’ And the ‘them’ are people like Eugene McDuffie, a black man. It is troubling too since the jury was made up of all white citizens.” The attorney argues that the prohibitions in the *Hicks* decision apply in this case because “there was no evidence regarding cars or physical appearances or even jewelry during the trial.” “So in a case where the jury did not reflect the full makeup of the community, an argument about rims, diamond earrings and gold teeth was a highly probable influence on the jury,” the attorney argues. “As such, Mr. McDuffie didn’t receive a fair trial.”

The State argues McDuffie was not denied his constitutional rights, and he received effective assistance of counsel. McDuffie claimed it was error for his attorney to fail to call GBI Agent Spencer Barron to testify for the purpose of showing the witnesses against McDuffie lacked credibility and were not to be believed. But McDuffie’s trial attorney later testified that she believed Barron’s testimony would have done more harm than good to her client. “The general rule in this regard is that whether or not to call a witness is within the province of trial counsel after consultation with their client,” the State argues in briefs. “If those decisions are reasonable, they do not constitute ineffective assistance of counsel.” Similarly, the trial attorney made a “strategic decision not to compel” the testimony of a woman who “was screaming and incoherent and refused to testify during the trial” out of fear. The trial attorney said the woman’s testimony at that point would have been unpredictable, and even if the woman testified that McDuffie was not the shooter, the attorney worried her testimony could have been seriously challenged during cross-examination. Finally, while every defendant has a right to testify in his own defense, “There is no right to be continuously informed of one’s right to testify, either by the court or by counsel,” the State contends. As to the prosecutor’s closing argument, “Under most circumstances, the statements complained of are those that are referring to or otherwise characterizing the defendant. Here, however, the complained of statement is in reference to the State’s witnesses.” The defense attorney argued in her closing argument that the “heart” of the State’s case was the four witnesses who testified at trial that McDuffie was the shooter, but their testimony was not credible, either because they had given different statements earlier or because they had denied knowing about the shooting. The State prosecutor’s statement was an attempt to describe to the jury why these witnesses may not immediately have reported their knowledge of the crime, the State argues. “Even assuming the statement was improperly prejudicial, it is a far cry to say it prejudiced the defendant when [it was] in reference to the State’s witnesses and not the defendant.”

Attorney for Appellant (McDuffie): R. Gary Spencer

Attorneys for Appellee (State): Timothy Vaughn, District Attorney, Joshua Powell, Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Mary Greaber, Asst. A.G.

WALKER V. OWENS, COMMISSIONER ET AL. (S15A0117)

A man who claims a Georgia probation supervisor ripped up a judge's order releasing him from probation is appealing a **Fulton County** judge's dismissal of his case. John T. Walker, Jr. filed a petition asking the court to declare that an insurance policy the Department of Corrections must maintain for its probation supervisors is a bond to which he may be entitled.

FACTS: According to briefs filed by Walker's attorney, in February 2011, Walker was sentenced to five years of probation under the Georgia First Offender Act. Neither Walker's brief nor the State's says what he did to earn a probation sentence. In September 2013, the Morrow probation office submitted a petition for his early discharge from probation. A probation officer, Andrew Scott, testified that after the petition was signed by Judge Matthew O. Simmons, Scott delivered it back to the probation office. Almost a year later, in August 2014, Scott wrote a letter to a Department of Corrections regional manager reporting that Walker's probation discharge order had been destroyed. According to Walker's brief, that led to a Department of Corrections internal investigation which unveiled irregularities in the Clayton Judicial Circuit, including that at least in Morrow, after probation office personnel retrieved orders from a judge's chambers, sometimes the chief probation officer, Chiquiti Dean, immediately filed the order with the Clerk of the Superior Court of Clayton County, as required, and sometimes she did not. In testimony, Dean later said she had destroyed the proposed early termination petition for Walker's discharge, but that she had "intercepted and voided" it before it went to the judge for signature because there were errors in the document. The judge later determined he had signed the order and put it in the hands of the Morrow probation office for filing with the court clerk but it had never been filed. In May 2014, Judge Simmons issued a probation revocation warrant for Walker, not realizing he had terminated Walker's probation the year before. The warrant was prepared by the Morrow probation office, according to Walker's attorney. Again, neither party's brief discloses why there was a warrant to revoke Walker's probation. In June 2014, Walker was arrested on that warrant and spent 21 days in jail. The petition to revoke his probation remained pending until Jan. 30, 2015 when it was ultimately denied based on probation officer Scott's "whistleblowing revelations" that the judge had signed an order terminating Walker's probation in September 2013 and there was no probation to revoke.

In March 2014, Walker filed a "Petition for Declaratory Judgment or in the Alternative for Writ of Mandamus" against Brian Owens, Commissioner of the Department of Corrections, Chiquiti Dean, chief probation officer in Morrow, and Sid Johnson, Commissioner of the Georgia Department of Administrative Services. In his petition, Walker sought a declaration by the Fulton County court that an insurance policy obtained by the Georgia Department of Administrative Services for probation officers should be read as a statutory bond for employees of the State of Georgia. Georgia Code § 42-8-26 (d) states that each probation officer "shall give bond...for the use of the person or persons damaged by his or her misfeasance or malfeasance..." As an alternative, Walker sought a ruling requiring the State to obtain a statutory bond for probation officers. Walker argued that for eight months, he lived under threat of having his probation revoked and being sent to prison – not knowing that he'd already been

released from probation. The defendants – Owens, Dean and Johnson – filed a motion to dismiss the case, arguing Walker’s petition was barred by sovereign immunity. Following a hearing, the trial court ruled in favor of the state officials, although not on the basis of sovereign immunity. Rather the trial court dismissed the case on the grounds that Walker’s “petition for declaratory relief was premature prior to his filing a lawsuit making a claim on the bond.” Walker now appeals to the state Supreme Court.

ARGUMENTS: Walker’s attorney argues the trial court erred in dismissing his case. “The trial court’s ruling that the petition is insufficient due to the lack of the petitioner having made a prior claim on the bond in the form of a lawsuit against the insured or the surety is simply not sufficient grounds to dismiss a declaratory judgment action,” the attorney argues in briefs. Georgia Code § 9-4-2 states that, “In cases of actual controversy, the respective superior court of this state shall have power, upon petition or other appropriate pleading, to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed....Relief by declaratory judgment shall be available, notwithstanding the fact that the complaining party has any other adequate legal or equitable remedy or remedies.” “The object of declaratory judgment is to permit determination of a controversy before obligations are repudiated or rights are violated,” Walker’s attorney contends. “A party seeking such a judgment ‘must establish that it is necessary to relieve himself of the risk of taking some future action that, without direction, would jeopardize his interests.’” Here, Walker sought from the court a declaration of his rights regarding the insurance policy. “According to him there existed an actual controversy and uncertainty as to whether the Great American policy was in fact a statutory bond and whether it should be declared as such....” The judge incorrectly reasoned that until a lawsuit was filed on the underlying claim against the chief probation officer, there was no actual controversy. But the “filing of a lawsuit is not a prerequisite to obtaining a declaratory judgment,” Walker’s attorney argues.

The Attorney General argues for the state officials that first, this appeal does not belong in the state Supreme Court, which lacks jurisdiction because the case does not involve “equity” or an “extraordinary remedy.” Second, the superior court correctly dismissed Walker’s petition and ruled that Walker was not entitled to declaratory relief because he did not face any uncertainty or insecurity as to his future conduct. “Instead, the superior court found that appellant [i.e. Walker] merely requests the court to interpret an insurance policy obtained by the Georgia Department of Administrative Services and to declare whether or not the insurance policy is a bond,” the State argues in briefs. “Here not only did appellant fail to show any insecurity or uncertainty as to his future conduct, but an actual controversy does not exist between the parties.” Walker is simply looking for “a possible theory of recovery and the appropriate parties to name in a possible or potential future suit.” Third, while the superior court did not make a ruling on the issue of sovereign immunity, Walker’s claim for relief is barred by sovereign immunity. “The Georgia Constitution extends sovereign immunity to the State and all of its departments and agencies” and can only be waived by an act of the General Assembly, attorneys for the state officials contend. Here, sovereign immunity has not been waived and Walker has failed to cite any basis for a waiver of the state officials’ sovereign immunity to permit his claims. The State asks that the Supreme Court transfer the case to the Georgia Court of Appeals or uphold the trial court’s ruling.

Attorney for Appellant (Walker): Wayne Kendall

Attorneys for Appellees (Owens): Samuel Olens, Attorney General, W. Wright Banks, Jr., Julie Jacobs

GREGORY V. SEXUAL OFFENDER REGISTRATION REVIEW BOARD (S15A1718)

A man is challenging as unconstitutional the Georgia statute that has allowed him to be classified a “sexually violent predator” who must wear an electronic monitor for the rest of his life. He claims a **Fulton County** judge’s denial to grant him a court hearing where he could challenge the classification violated his constitutional right to due process.

FACTS: Scott Gregory was convicted of exposing himself and masturbating via webcam to a person he believed was a 14-year-old girl in an internet chat room. He pleaded guilty under the First Offender Act of violating the “Computer or Electronic Pornography and Child Exploitation Prevention Act of 2007.” According to state prosecutors, Gregory admitted to having been a sexual exhibitioner for more than 20 years. He was sentenced to 10 years on probation with conditions that included the requirement he get sex offender treatment, abstain from alcohol and drugs, and not commit any new offenses. In August 2012, the Forsyth County Superior Court revoked Gregory’s First Offender probation after he was arrested for indecent exposure at a public pool while intoxicated. He admitted to the offense and was sentenced to 10 years, with two in custody, part of which would be suspended upon completion of in-patient treatment. He would serve the remaining eight years on probation. Gregory is currently on probation and subject to specialized sex offender conditions, including restrictions against frequenting areas where children congregate.

In September 2013, based on Georgia Code § 42-1-14, the state Sexual Offender Registration Review Board designated Gregory as a “Sexually Dangerous Predator,” which denotes the highest risk. The Board, which is made up of law enforcement representatives, as well as professionals licensed in the treatment of sex offenders, employs clinical evaluators who evaluate sex offenders and recommend their risk classifications to the Board. The Board uses actuarial risk assessment instruments to determine the likelihood that a sexual offender will commit another dangerous sexual offense or another crime against a victim who is a minor.

On Sept. 16, 2013, Gregory received a letter from the Board informing him of his initial risk classification. The letter informed him of his right to request a reevaluation and to submit additional evidence, including psychological evaluations, treatment and work history, and any sexual history polygraph information. Gregory requested a reevaluation and submitted almost 400 pages of additional documentation, including treatment notes and reports, and letters from the community. According to state prosecutors, a different evaluator then completed a reevaluation of Gregory, after reviewing the new information. The second evaluator noted “robust indicators of sexual recidivism,” illustrated even in the documentation Gregory provided, and did not recommend lowering Gregory’s risk level. The Board again designated Gregory as a Sexually Dangerous Predator and notified him of that in a Jan. 13, 2014 letter. According to Gregory’s attorney, the Board denied Gregory’s petition for reevaluation on Jan. 13, 2014.

Gregory then filed a petition for judicial review in Fulton County court, requesting a hearing. In his petition, he challenged the accuracy of his classification and alleged that the classification process was unconstitutional. Georgia Code § 42-1-14 states, “The court may hold a hearing to determine the issue of classification.” The statute also says, “The court may uphold the Board’s classification,” or the court may change it if it finds the evidence shows the offender

was not placed in the right risk assessment classification. The court “shall” consider “any relevant evidence submitted,” the statute says. In July 2014, the trial court denied Gregory’s request for a hearing but instructed him to submit any additional evidence in writing for the court’s review. Gregory submitted additional evidence and a brief. In August 2014, the trial court upheld his classification as a Sexually Dangerous Predator and found that the statute is constitutional. Gregory now appeals to the state Supreme Court, which has agreed to review the case to determine whether the trial court erred in finding that the statute did not violate his constitutional due process rights.

ARGUMENTS: Gregory’s attorney argues that the trial court erred and he asks the state’s highest court to rule that § 42-1-14 is unconstitutional. The most important fact in this case is that “the Sexual Offender Registration Review Board has made a decision requiring that he wear a GPS tracking device on his body, and the Fulton County Superior Court has affirmed that decision without either entity ever hearing from a witness,” the attorney argues in briefs. “And both entities have ordered that Mr. Gregory will wear the monitor in spite of never hearing from Mr. Gregory or allowing him to cross examine any of the people who prepared documents upon which the Board relied.” The Board did not notify him, in advance of its decision, that it was working on his file. “And he had no opportunity to review the documents, cross-examine witnesses, or present his own witnesses to the Board before it reached its decision,” the attorney contends. The denial of a full hearing before the trial court and the unavailability of a hearing before the Board “violates Mr. Gregory’s procedural due process rights under the Fourteenth Amendment of the United States Constitution.” To be entitled to due process protection, a petitioner must demonstrate he has a liberty interest at stake. “In this case, the Board has done two things to restrain Mr. Gregory’s liberty,” the attorney argues. “It has deemed him publicly a ‘sexually dangerous predator,’ and its assessment will mean that he is required to wear a GPS tracking device for the remainder of his life.” In its 1999 decision in *Ruby-Collins v. Cobb County*, the Georgia Court of Appeals ruled that, “Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and the opportunity to be heard are essential.” “Not only is the state of Georgia officially labeling Mr. Gregory a sexually dangerous predator and requiring him to wear a GPS monitor, the State’s action has a substantial impact on Mr. Gregory’s family, who will also bear the stigma of living with a person so labeled,” Gregory’s attorney argues.

The Attorney General’s office argues for the Sexual Offender Registration Review Board that the trial court properly found that Georgia Code § 42-1-14 did not violate Gregory’s due process rights because Gregory received notice of the Board’s action, exercised his right to request a reevaluation, exercised his right to petition for judicial review, and had the opportunity to submit additional evidence. The right Gregory claims is not one that is protected by the due process clause of the Constitution, the State contends. “Neither the Constitution nor the challenged statute grants convicted sexual offenders a right to avoid being classified based on their risk to reoffend,” the State argues in briefs. Even assuming convicted sex offenders had a “liberty interest” in not being classified based on their risk, § 42-1-14 provides due process. “Opportunity to submit written evidence constitutes due process when the evidence is capable of being presented as effectively in writing as orally and the value of cross examining witnesses is limited,” the State argues. “Written submissions provide Appellant [i.e. Gregory] and other sexual offenders an adequate opportunity to be heard.” The trial court’s order affirming the

Board's classification of Gregory as a Sexually Dangerous Predator and its finding that § 42-1-14 is constitutional should be upheld, the State contends.

Attorneys for Appellant (Gregory): J. Scott Key, Robert Rubin

Attorneys for Appellee (Board): Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Joseph Drolet, Sr. Asst. A.G., Hye Min Park, Asst. A.G.