



## Supreme Court of Georgia

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## SUMMARIES OF OPINIONS

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### **THE STATE V. ASHLEY (S15G1207)**

The Supreme Court of Georgia has reinstated a man's convictions and life prison sentence for kidnapping a 7-year old girl in **Douglas County** and attempting to kidnap her 2-year old sister.

In today's unanimous opinion, written by **Justice David Nahmias**, the high court has reversed a decision by the Georgia Court of Appeals, finding the appellate court was wrong to throw out Thad Ashley's convictions on the ground that the Douglas County judge improperly admitted evidence of prior incidents in which Ashley allegedly acted inappropriately toward children.

According to briefs filed in the case, on Sunday, Sept. 4, 2011, Lucero Lorenzo was preparing to take her four daughters and infant nephew to church. As she locked her trailer in the Douglas Estates Trailer Park where they lived, she had her oldest daughter, 7-year-old K.L., put the younger children in the van. The girl got the others settled in the van, but left the sliding door open on the driver's side. Ashley, who was 37 at the time and a stranger to Lorenzo, approached and grabbed K.L. out of the van by her wrist. The child, screaming, broke away and ran toward Lorenzo, who was on the front porch of the trailer. Lorenzo said she then saw Ashley place his right foot on the van, reach in, and try to pull out 2-year-old B.L., but the child moved out of his reach. Lorenzo also said she saw Ashley "touching himself" in an inappropriate manner while trying to pull B.L. out of the van. Lorenzo screamed and told Ashley she was calling police. He then walked away, returning to his father's trailer in the same neighborhood. Eyewitnesses later told police where Ashley lived, and police arrested him for criminal trespass.

Prior to trial, the State filed notice it intended to present evidence that two months earlier, Ashley had received a criminal trespass warning following three incidents that had occurred at the neighborhood pool. In one, witnesses complained he was staring inappropriately at young girls 5-to-10 years old. In another, Ashley repeatedly touched a 10-year-old girl's torso when her mother went to the restroom. And in a third, adults saw him squirting a water gun at a 5-year-old boy that was so powerful it made him cry and left red marks on his skin.

Following a hearing, the trial court ruled that evidence of the three pool incidents was admissible as "similar transaction evidence" because it was being offered for the proper purpose of showing Ashley's intent during the physical acts alleged in the indictment and his desires regarding young children. The trial court also found the State provided enough evidence for the jury to conclude the pool incidents had occurred. And it found the pool incidents were sufficiently similar to the crimes charged that proof of those incidents tended to prove the new charges against Ashley.

In 2012, a Douglas County jury convicted Ashley of kidnapping, criminal attempt to commit kidnapping, and criminal trespass. He was sentenced to life in prison for the kidnapping plus an additional 30 years for attempted kidnapping. He appealed, and in a split 4-to-3 decision, the Court of Appeals concluded that the similar transaction evidence regarding the pool incidents had been improperly admitted, and it reversed his convictions. It did not address Ashley's other claims of error. The State then filed a petition for certiorari, asking to appeal the Court of Appeals ruling to the state Supreme Court. This Court granted the State's petition to review only the issue of similar transaction evidence, which the appellate court addressed in Division 2 of its opinion.

In today's Supreme Court decision, "we reverse the Court of Appeals judgment as to Division 2 of the majority opinion, and we remand the case for consideration of the other enumerations raised by Ashley."

"The Court of Appeals majority opinion correctly recited general principles governing the admission of similar transaction evidence under the old Evidence Code, but then seemed to confuse criminal intent with a completed crime," today's opinion says. "Intent, however, exists apart from the act that makes it a crime." While the Court of Appeals majority focused on whether the State had sufficiently argued that the similar transactions were "criminal," it was well established under the state's old Evidence Code, which applied in this case, that similar transaction evidence was not limited to a defendant's previous *illegal* conduct. (The state's new Evidence Code applied to any trial that began after Jan. 1, 2013; Ashley's began June 11, 2012.)

"The fact that the State did not file criminal charges against Ashley based directly on the pool incidents...does not mean that his behavior in those incidents was non-criminal or that it was not indicative of his state of mind," the opinion says.

At least two of the pool incidents offered evidence of his intent, which is a proper reason for admitting them as similar transaction evidence under the old Evidence Code.

"Two of the allegedly similar transactions involved Ashley's making physical contact with young children in an offensive manner that they indicated to him was unwanted – one child by saying that she would punch him if he did not stop, and the other by crying – much like K.L. and B.L., who were screaming and trying to get away from Ashley," the opinion says. The third pool incident – his leering at young girls – "was evidence of Ashley's lustful disposition toward young girls like K.L. and B.L., which would give him a motive to kidnap them."

“We therefore conclude that under the old Evidence Code and the cases interpreting it, the trial court acted within its discretion in admitting the evidence of Ashley’s conduct at the pool involving the 10-year-old girl and the 5-year-old boy as proof of his intent when he grabbed K.L. and tried to grab B.L. – particularly in view of Ashley’s protestations, both before and at trial, that he acted with innocent or even helpful intent,” the opinion says. “We also conclude that even if the evidence of Ashley’s leering at young girls at the pool was not properly admitted on the issue of intent, the trial court could have properly admitted it for other purposes and the other evidence of Ashley’s guilt was strong, so any error was harmless.”

“Rather than engaging in a straightforward analysis of similar transaction evidence under the old Evidence Code and the copious case law interpreting it, the Court of Appeals majority looked for ‘persuasive’ guidance to the new Evidence Code and cases interpreting the new Code and the Federal Rules of Evidence, which may account in part for how the majority went astray and was a principal criticism of its opinion by the dissenting judges,” today’s opinion says. The high court cautions lawyers to carefully compare the old Evidence Code and the new one and make no assumptions about their similarities or dissimilarities. In the meantime, “we render no opinion on how this case would be decided under the new Evidence Code,” the opinion says.

**Attorney for Appellant (State):** Emily Richardson and Brian Fortner

**Attorneys for Appellees (Ashley):** Cynthia Harrison

### **COTTRELL V. SMITH ET AL. (S16A0013)**

A self-proclaimed marathon runner and Christian evangelist has lost his appeal of a **Cobb County** judge’s ruling that overturned a jury’s \$635,000 verdict in his favor against five people he had sued for posting defamatory statements about him on the internet.

According to the facts of the case, for a number of years, Stanley Cottrell, Jr. engaged in highly publicized running exhibitions that had a Christian evangelical and “friendship” emphasis. Cottrell gained public notice and his solo running achievements were often portrayed in movies, books and other media. He successfully parlayed his image as a “world-renowned ultra-marathon runner” into business endeavors, executive leadership roles, and motivational speaking. However, his notoriety was accompanied by controversy related to his character and media reports that questioned the authenticity of his achievements, including whether he actually ran the long distances he claimed. His critics also complained that as a married man he was engaged in a number of extra-marital affairs in conflict with his self-avowed Christian evangelism. Among his critics were five people Cottrell ultimately sued: Glenn and Marian Crocker who worked for Cottrell and helped plan two of his running exhibitions; Dr. Hugh Johnson, a Baptist minister who was Cottrell’s prayer partner and confidant and learned about several women with whom Cottrell was intimately involved; Peggy Smith, one of the paramours; and Karen Smith, Peggy’s daughter-in-law, who located and contacted several people she believed had information about Cottrell, including the Crockers and Johnson.

After becoming convinced that Cottrell deceived people for financial gain and had no intention of repaying her mother-in-law for a \$20,000 loan she had given him, Karen Smith and her husband created a “WordPress” blog about Cottrell called, “You Shall Know the Truth.” According to briefs filed in the case, the posts contained statements such as, Cottrell was a “scam artist,” and “his runs aren’t even real.” Karen Smith also sent emails to a “list-serve” group

criticizing Cottrell and sharing links to the Blog posts. Peggy Smith sent messages to a number of Cottrell's Facebook friends making similar allegations.

Cottrell sued all five in Cobb Superior Court, claiming defamation, invasion of privacy, violation of the Georgia Computer Systems Protection Act (Georgia Code § 16-9-90) and other acts of wrongdoing, based on the on-line postings and the information they had shared about him. Following a four-week trial, the jury ruled in his favor and against Karen and Peggy Smith for defamation; against Peggy Smith and the Crocker's for breach of fiduciary duty; and against all five of them for invasion of privacy, awarding Cottrell \$635,000. However, the jury ruled in favor of the five defendants regarding Cottrell's claim of "tortious interference." And the judge directed a verdict against Cottrell's claims of intentional infliction of emotional distress and violation of the Computer Systems Protection Act, which the judge ruled was unconstitutional. Following the trial, Karen and Peggy Smith and Hugh Johnson filed a motion requesting a "judgment notwithstanding verdict," in which a judge overrules the decision of the jury because there is no evidence to support the verdict. On April 30, 2015, the judge granted their motion and threw out the judgment against the Smith women and Johnson, finding the evidence "clearly failed to establish the elements of the torts alleged to the degree required." ("Tort" is a legal term for a civil wrongdoing done by one party to another.) Cottrell then appealed to the state Supreme Court.

In today's 29-page opinion, written by **Presiding Justice P. Harris Hines**, the high court first addresses Cottrell's contention that the superior court judge erred in directing a verdict in favor of the defendants regarding his claims that their conduct violated the Georgia Computer Systems Protection Act. The state Supreme Court disagrees, finding that "the direction of a verdict on the [Act's] claims was demanded based upon the evidence, or rather the lack thereof, in regard to the alleged statutory violations," the opinion says. "There was simply a failure of the evidence in regard to the Georgia Computer Systems Protection Act claims."

As to Cottrell's claim of intentional infliction of emotional distress, whether it "rises to the level of extreme and outrageous conduct necessary to support a cause of action for the intentional infliction of emotional distress is a question of law," the opinion says. In assessing such conduct, liability "has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. The standard was plainly not met in this case, including the showing of extreme emotional distress suffered by Cottrell as a result of the defendants' actions."

Cottrell also claimed that the statements posted on Karen Smith's "You Shall Know the Truth" blog constituted defamation, and the trial court erred in granting the defendants' motion for a "judgment notwithstanding verdict."

Today's opinion finds that some of the posts "cannot support a verdict for defamation," and others, such as statements that Cottrell had not accomplished all he claimed, "are fairly characterized as opinion."

"But even if these statements could amount to libel per se as making charges in regard to Cottrell's trade or profession, there is no evidence of actual malice on the part of Karen, i.e. that Karen believed or entertained serious doubts as to whether Cottrell's runs were legitimate." In a case involving a public figure – and the trial court concluded that Cottrell was a "public figure" due to his running and evangelism – the standard of proof of actual malice is extremely high,

today's opinion points out. "Actual malice" is a legal term that does not just mean hatred or ill will, but requires that a person who makes a false statement acts "with reckless disregard" for the truth or knows it is false. In this case, the evidence supports that Karen believed that what she was told by others and posted about Cottrell was true.

"This Court has found no evidence to support a finding of 'actual malice' on the part of either Karen or Peggy with regard to the blog posts at issue," today's opinion says.

Similarly, the list-serve emails sent by Karen and examined by the superior court "likewise do not support a finding of defamation," the opinion says. "To the extent that they contain objectionable implications that Cottrell is involved with shady businesses, the remarks are germane to his character and his public figure status as a Christian evangelist. What is more, many of the comments are in the nature of opinion."

"As for references to Cottrell's having extra-marital affairs, he admittedly had several such relationships," today's opinion says. "And, most significantly, the statements are based on at least some evidence, and there was no evidence that any of the comments were made with 'actual malice.'"

Finally, "Cottrell's claims of breach of fiduciary duty must fail," the opinion says. And his claims that the disclosures about his affairs were an invasion of privacy also fails "because the facts allegedly disclosed by defendants were not private. There is simply no basis upon which to sustain the jury verdict against defendants for invasion of privacy based on the public disclosure of embarrassing private facts," the opinion says.

"In summary, a judgment notwithstanding the verdict was warranted in this case."

**Attorney for Appellant (Cottrell):** Tyler Dixon

**Attorneys for Appellees (Smith, Johnson):** Christopher Moorman, Nicholas Pieschel, Timothy Baxter

### **BICKERSTAFF V. SUNTRUST BANK (S15G1295)**

Under an opinion today by the Supreme Court of Georgia, a woman whose son claimed his bank charged exorbitant overdraft fees in violation of the state's usury laws may proceed with efforts to make the case into a class action lawsuit.

The high court has reversed a ruling by the Georgia Court of Appeals and determined that Ellen Rambo Bickerstaff, who is acting in place of her now-deceased son, may pursue a class action and represent similar SunTrust Bank customers who were charged an overdraft fee for ATM or debit card charges. With today's unanimous decision, written by **Justice Robert Benham**, the Supreme Court is sending the case back to the Court of Appeals for further action. This is the first step toward certifying the case as a class action lawsuit.

According to the facts of the case, Jeff Bickerstaff, Jr. opened a personal checking account in 2009 with SunTrust Bank, and like other bank customers, signed a Deposit Agreement in which he agreed that any dispute between the bank and the customer would be resolved by arbitration as opposed to a lawsuit. Specifically, the agreement stated that these "rules and regulations constitute a contract between you and the Bank.... This agreement is for the benefit of, and may be enforced only by you and the Bank and their respective successors and permitted transferees and assignees, and is not for the benefit of, and may not be enforced by, any third party." The arbitration provision of the agreement stated that, "neither the Depositor nor the Bank will have the right to: (1) have a court or a jury decide the claim; (2) engage in

information-gathering (discovery) to the same extent as in court; (3) participate in a class action in court or in arbitration; or (4) join or consolidate a claim with claims of any other person.” In June 2010, in response to unrelated federal regulation, SunTrust amended the agreement to allow customers to reject arbitration if they gave written notice by Oct. 1, 2010. “This is the sole and only method by which you can reject this arbitration agreement provision,” the arbitration provision said.

According to briefs filed by Bickerstaff’s attorneys, when SunTrust bank customers use their bank cards and overdraw their accounts, SunTrust automatically loans them a small amount of money to cover the overdraft and charges them \$36 in overdraft fees. That charge constitutes interest, often in excess of 1,000 percent, Bickerstaff’s attorneys claimed. On July 12, 2010, Bickerstaff filed a lawsuit against the bank in **Fulton County** State Court, alleging that SunTrust charged its customers overdraft fees in violation of Georgia usury laws, which protect people against interest rates considered grossly unfair or unreasonable. At the time the suit was filed, SunTrust had not yet given any notice to Bickerstaff or its customers that it had amended the arbitration provision and they could now opt out of arbitration if they did so in writing by Oct. 1, 2010. Only after Bickerstaff filed his lawsuit did the bank include in customers’ monthly August statements nonspecific language that an updated version of the rules and regulations for deposit accounts was now available at branch offices and on the bank’s website. The website included the opt-out provision and the information the customer’s written statement had to include.

On Oct. 4, 2010, the first business day after the opt-out deadline of Oct. 1, SunTrust filed a motion to compel Bickerstaff into arbitration. Following a hearing, the judge denied the motion, finding that Bickerstaff effectively exercised his right to opt out of arbitration by filing a lawsuit before the Oct. 1 deadline, and finding that any failure on Bickerstaff’s part to sufficiently comply with the opt-out provision was excused by SunTrust’s own “misleading” actions regarding the opt-out provision. SunTrust appealed to the Georgia Court of Appeals, which upheld the trial court’s ruling.

On April 13, 2013, Bickerstaff filed a motion to certify a class of all Georgia citizens with a SunTrust deposit agreement who in the last four years had at least one overdraft of \$500 or less resulting from an ATM or debit card transaction and who had paid an overdraft fee. SunTrust claimed it had written the arbitration clause in such a way that only an individual depositor could exercise his right to reject arbitration, and therefore he could only sue the bank as an individual representing himself. The trial judge agreed and denied Bickerstaff’s motion, concluding that Bickerstaff “did not, by filing this lawsuit, effectively opt out of arbitration on behalf of the over 1,000 SunTrust account holders who would be part of this putative class.” (The “putative class” is the supposed group of individuals who would make up the class.) To rule otherwise, the judge ruled, “would be contrary to the plain language of the Arbitration Agreement which does not specifically grant a customer the ability to opt out of the Arbitration Agreement on behalf of anyone other than themselves, and, rather, requires strict compliance with the opt-out provision.”

Bickerstaff appealed to the Court of Appeals, which ruled against him and upheld the trial court, finding that “the Deposit Agreement contract and its arbitration clause prohibit Bickerstaff from altering others’ contracts where he is neither a party nor in privity with a party.” (Being in privity with a party means having a legal interest in the contract.) Bickerstaff then appealed to the state Supreme Court, which agreed to review the case to determine whether the

Court of Appeals erred in upholding the trial court's denial of class certification on the ground that the contractual language prohibited Bickerstaff from opting out of the arbitration clause on behalf of the other class members. (Since this case was filed, Jeff Bickerstaff died. The Georgia Supreme Court subsequently granted a motion to substitute his mother, Ellen Rambo Bickerstaff, the executor of his estate, as his legal representative.)

For a case to be certified as a class action, the party applying for certification must show that the class of potential plaintiffs is so large that including them all in the lawsuit would be impractical. It's called "numerosity." The Court of Appeals found that because Bickerstaff's filing of his lawsuit could not serve to reject the arbitration clause on behalf of class members who had not individually given notice, the class consists of only one depositor and therefore lacks the "numerosity" required for class certification.

But in today's opinion, the Supreme Court states, "We disagree."

"In the case filed by Bickerstaff, it is undisputed that the purported class numbers at least 1,000, and SunTrust has stipulated that it is unfeasible for so many depositors with relatively small claims to bring such claims individually," the 23-page opinion says. The main issue is whether the filing of Bickerstaff's lawsuit, signaling his rejection of the arbitration agreement, postponed the deadline by which the supposed class members were required to notify SunTrust of their intent to reject arbitration. "The answer is yes," the opinion states.

The Georgia Supreme Court's precedent-setting decisions in 2010, *Schorr v. Countrywide Home Loans, Inc.*, and in 2006, *Barnes v. City of Atlanta*, establish that a representative of the class may satisfy conditions for a lawsuit on behalf of the supposed class members and that the class members may subsequently ratify the acts of the representative as their own. "Indeed, the Court of Appeals has held that a class representative may satisfy contractual notice requirements."

In today's opinion, the high court states that "we are unconvinced by SunTrust's argument that a contractual deadline requiring individual action may not be suspended until the certification of a class (and the attendant opportunity of class members to opt out or remain bound by the result of the class action) when it is clear that deadlines imposed by statutes or regulations requiring individual action can be suspended by the filing of a class action."

"That the SunTrust contract requires individual notification of rejection of arbitration does not mean that Bickerstaff cannot act as a representative for that purpose until such time as a class member may opt out of such representation," the opinion says. "Georgia contract law provides that contractual obligations may be performed by an agent, where personal skill is not required."

The Court also rejects SunTrust's argument that "permitting Bickerstaff's rejection of arbitration to be applied to other depositors illegally permits Bickerstaff to abridge the contractual rights of others."

"Here, Bickerstaff is not attempting to bind any other class member to rejection of arbitration prior to class certification; his class action complaint, in which he personally rejects arbitration, simply [extends] the time in which the other putative class members may elect to opt out of the class action, or remain in it," the opinion says. "A class member's decision to remain in the class after class certification and notification is what will serve as his or her own election to reject the arbitration clause."

**Attorneys for Appellant (Bickerstaff):** Michael Terry, Steven Rosenwasser, Jason Carter, Joshua Thorpe, C. Ronald Ellington, J. Benjamin Finley

**Attorneys for Appellee (SunTrust):** William Withrow, Jr., Jaime Theriot, Lindsey Mann