Supreme Court of Georgia
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SUMMARIES OF OPINIONS

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THE CITY OF ATLANTA V. ATLANTA INDEPENDENT SCHOOL SYSTEM ET AL. (S16A1103)
ATLANTA INDEPENDENT SCHOOL SYSTEM V. CITY OF ATLANTA ET AL. (S16X1105)

The Supreme Court of Georgia has ruled against the City of Atlanta and ordered the dismissal of its lawsuit against the Atlanta Public Schools system over who owns school property in areas annexed by the City from **Fulton County**. An underlying issue in this case is property taxes and where children will go to school.

In today's unanimous opinion, **Justice Harold Melton** writes that at the time the Fulton County Superior Court ruled partially in favor of the school system, there had not yet been an actual annexation of the properties in question, only proposals to annex the properties. As a result, there was no "justiciable controversy," or a matter that could be resolved by the courts. Therefore, "we find that the trial court should have dismissed this action at the time that it was filed, and accordingly, we must vacate the decision of the trial court and remand the case for the entry of an order of dismissal," today's opinion says.

As background to the case, in 1950, the Georgia General Assembly passed a local constitutional amendment to the Georgia Constitution that said: (1) "when the corporate limits of the City of Atlanta are extended into Fulton County, the territory embraced therein shall become a part of the independent school system of the City of Atlanta and shall cease to be a part of the school system of the county,"; and (2) any "school property" within this annexed territory "shall become the property of the City of Atlanta." At the time the amendment was enacted, the Atlanta Independent School System (i.e. the Atlanta public schools) was part of the City's municipal

government and not a separate political entity. That changed, however, in 1973, when the General Assembly separated the city's school system from Atlanta's municipal government by enacting separate charters for the two entities and removing educational responsibilities from the municipal government.

Ten years later, the 1983 Constitution specifically forbade any further local amendments. Those pre-dating the 1983 Constitution, however, could be continued by the General Assembly through local legislation. Any that were not continued by local legislation prior to July 1, 1987 would be automatically "repealed and . . . deleted." In 1986, the General Assembly passed House Bill 1620, which is the crux of this case. The legislation stated that the 1950 local constitutional amendment "shall not be repealed or deleted on July 1, 1987, as part of the Constitution of the State of Georgia but is specifically continued in force and effect on and after that date as part of the Constitution of the State of Georgia." House Bill 1620 described the 1950 schools amendment as a "constitutional amendment providing that, upon the extension of the corporate limits of the City of Atlanta into Fulton County, the additional territory and school property located in annexed area become[s] a part of the City of Atlanta independent school system."

Since that time, Atlanta has acquired a piece of property located within unincorporated South Fulton and wants to annex it. In addition, residents of several communities in unincorporated Fulton County have approached City officials requesting possible annexation into Atlanta. In March 2015, the City filed a lawsuit in Fulton County asking the court to determine whether the Atlanta public schools' boundaries would automatically expand upon annexation, or whether the City could decide if it wanted to expand the boundaries of the Atlanta Public Schools after the City annexed the property. In essence, it was seeking the court's direction as to whether the local constitutional amendment was still valid. The City argued that House Bill 1620 was unconstitutional because it violated the requirement that any local constitutional amendment be continued "without amendment." It contended that while the 1950 amendment stated that the "school property within the area embraced in the [annexation] shall become the property of *the City of Atlanta*," the 1986 statute changed the wording and stated that "school property located in the annexed area becomes a part of *the City of Atlanta independent school system.*" In May 2015, the Fulton County School District filed a motion to intervene as a party on the side of the Atlanta Public Schools. In October 2015, the trial court concluded that the 1950 local constitutional amendment had been properly continued by House Bill 1620. However, at the same time it rejected the school system's argument that the City's lawsuit requesting a declaratory judgment was barred by sovereign immunity, which protects government agencies from being sued. In other words, it ruled that the City's lawsuit could go forward. The City then appealed the ruling that House Bill 1620 was valid to the state Supreme Court, while the school system filed a cross-appeal of the ruling that the City's lawsuit was not barred by sovereign immunity.

In today's opinion, the high court points out that under Georgia statutory law, superior courts have the power "to declare rights and other legal relations of any interested party petitioning for such declaration" in cases of "*actual controversy.*" But in this case, "At the time that the trial court considered the motions of the parties, three communities in unincorporated Fulton County had submitted annexation petitions to become part of the City," the opinion says. "There was, however, no actual annexation of any of the properties in question."

In another annexation case decided last month by this court, *Fulton County v. City of Atlanta,* "we set forth the history of the longstanding principle requiring the presence of an actual

justiciable controversy in order for a court to render an opinion, even in a declaratory judgment action," the opinion says. "We also noted that questions about merely proposed legislation present no justiciable controversy, and judicial attempts to resolve such questions amount to advisory opinions."

"Therefore, we repeat our final conclusion in that earlier case here: 'Here, [at the time that the trial court considered the matter,] the City's proposed annexation and the County's objection to that proposed annexation [were] just that, a proposal and an objection to a proposal. The objection lodged by the County [was] not one that [had] immediate legal consequences. The City simply want[ed] to know whether this objection to its proposal – if its proposal were enacted – would have merit…The courts are not legislative counsel, and they cannot answer such questions."

This is a parallel case to the earlier one, the opinion notes, and the trial court should have dismissed the lawsuit. With this ruling, "we do not reach any of the arguments set forth in the Atlanta Public Schools' cross-appeal, which relates to the same judgment now being vacated. As a result, the cross-appeal must be dismissed."

Attorneys for Appellant (City): Emmet Bondurant, David Brackett, Robert Ashe III, Robert Highsmith, Jr., Joseph Young

Attorneys for Appellee (Schools): Richard Sinkfield, Phillip McKinney, Timothy Fitzmaurice

THE STATE V. MORROW (S16G0584)

The Georgia Supreme Court has ruled that the sexual assault conviction of a **Cherokee County** school paraprofessional who had sex with a 16-year-old student must be thrown out.

In today's unanimous opinion, **Justice Keith Blackwell** writes that under the statute outlawing the conduct, the paraprofessional convicted of the crime could not be considered a "teacher," and therefore the statute did not apply to him.

According to briefs filed in the case, in December 2010, Robert Leslie Morrow, 27, was a paraprofessional and wrestling coach at River Ridge High School. The school had hired him as a paraprofessional to attend to the needs of a special-needs child, known as "Pablo." It was Morrow's job to accompany Pablo to all his classes and ensure that the boy, who had mental illness, did not disrupt the class. At the same time, P.M., 16, was a sophomore and cheerleader at River Ridge High School. She got to know "Coach Morrow," as the students called him, because she shared homeroom and math class with Pablo. During December 2010, P.M. misbehaved and was placed in River Ridge's in-school suspension program for eight days. During that period, Pablo was also in detention for one day, and Morrow accompanied him. P.M. acknowledged that earlier, she had given Morrow her phone number by leaving a note on his car window. The day Morrow accompanied Pablo to in-school suspension, P.M. again gave him her phone number, and he then sent her a text message. The two then began exchanging what she described as "flirty" text messages. On December 11, 2010, P.M. drove herself to a birthday party of a fellow student. While there, she and Morrow exchanged texts and talked by phone. She then left the party and drove to meet Morrow at a nearby Publix parking lot where she got into his car. Morrow drove to a parking lot in his neighborhood where they had sexual contact and P.M. performed oral sex on him. A week later she changed high schools and became enrolled at Roswell High School. After leaving River Ridge, P.M. met Morrow on two to four other

occasions and the two had sexual intercourse, although Morrow was not charged for his acts after she transferred.

About six months later, P.M. told her mother about her sexual contact with Morrow, and she took her daughter to report the matter to local law enforcement. Morrow was arrested and indicted on one count of sexual assault under Georgia Code § 16-5-5.1. That statute says: "A person who has supervisory or disciplinary authority over another individual commits sexual assault when that person (1) is a teacher, principal, assistant principal, or other administrator of any school and engages in sexual conduct with such other individual who the actor knew or should have known is enrolled at the same school…."

Morrow's attorney filed a motion to "quash" or throw out the indictment, arguing that because he was a "paraprofessional," rather than a "teacher," the statute under which he was indicted did not apply to him. Following a hearing, the trial court denied Morrow's motion, relying on the Georgia Court of Appeals' 2013 decision in *Hart v. State,* in which it ruled that the term "teacher," as used in § 16-5-5.1, "would include a paraprofessional who taught in a high school classroom." Morrow was subsequently tried by a jury and convicted of sexual assault. He was given a 10-year sentence on probation with specialized sex offender conditions, a $1,500 fine, and 240 days in a detention center. Morrow appealed to the Georgia Court of Appeals, arguing that the statute did not apply to him because he was a paraprofessional, not a teacher, and there was insufficient evidence that he had supervisory or disciplinary authority over P.M. The appellate court agreed and reversed the ruling, finding that the State was required to prove that Morrow was a "teacher, principal, assistant principal, or other administrator" of the school where P.M. was enrolled *and* that he had supervisory or disciplinary authority "specifically" over her. "Given the State's failure to prove that Morrow had any supervisory or disciplinary authority over the victim, it failed to prove an essential element of the charged crime," the Court of Appeals ruled. The State then appealed to the Georgia Supreme Court, which agreed to review the case to determine whether the Court of Appeals correctly interpreted § 16-5-5.1 to require proof that the defendant had "specific" supervisory or disciplinary authority over the student in question, as opposed to having that authority over students "generally." Also, the high court asked whether any "rational" judge or jury could have reached the jury's conclusion that Morrow was a "teacher" at River Ridge High School under § 16-5-5.1.

In today's opinion, "we conclude that the State may carry its burden of proving supervisory or disciplinary authority by evidence of general *or* specific authority. Here, the State came forward with evidence that Morrow had some general supervisory or disciplinary over students in P.M.'s math class, and so, the Court of Appeals erred when it reversed his conviction on that ground. We also conclude, however, that the State failed to prove that Morrow was a 'teacher, principal, assistant principal, or other administrator of any school,' and for that reason, Morrow's conviction cannot stand. Accordingly, we affirm the judgment of the Court of Appeals."

As used in Georgia Code § 16-5-5.1 (b) (1), "'teacher' means a teacher, and it does not mean a paraprofessional or other educator," the opinion says. "The degree of specificity in the statutory identification of school administrators to whom the statute applies suggests that the statute does not use 'teacher' in a generic or unusually broad sense."

Even the State acknowledged that Morrow did not do work typical of teachers, such as grading work, instructing students or administering tests. "Moreover, River Ridge is a public

school, and any 'teacher' at a public school is required to be certified as such by the Georgia Professional Standards Commission," the opinion says. "For these reasons, the State failed to prove that Morrow was a person to whom § 16-5-5.1 (b) (1) applies, and his conviction must be set aside."

The Court notes in a footnote: "If the General Assembly desires to expand the scope of § 16-5-5.1 to include paraprofessionals (or other school employees such as bus drivers, cafeteria workers, and janitors), it certainly may do so by defining the persons to whom the statute applies in broader terms….But the statute currently applies only to teachers, principals, assistant principals, and other administrators, and this Court cannot judicially rewrite the statute."
Attorneys for Appellant (State): Shannon Wallace, District Attorney, Wallace Rogers, Jr., Asst. D.A., Cliff Head, Asst. D.A.
Attorney for Appellee (Morrow): T. Bryan Lumpkin

EVANS V. THE STATE (S16G0280)

In another case involving sexual contact with a child, the Supreme Court of Georgia has ruled that a man convicted of child molestation in **Cherokee County** does not qualify for a sentencing deviation and must serve at least the minimum sentence of five years in prison because he was also convicted of sexual exploitation of children.

At issue in this case is whether the phrase, "relevant similar transaction" as used in the statute that governs the sentencing of sexual offenders, includes sexual offenses that are charged in the same indictment as the crime for which the sentence is being imposed.

The Georgia Court of Appeals upheld the trial court's ruling that the phrase does include offenses charged in the same indictment and therefore the man could not be sentenced to any less than the minimum for child molestation. In today's unanimous opinion, written by **Presiding Justice P. Harris Hines**, the high court agrees, and it has upheld the ruling.

According to briefs filed in the case, sometime in 2005 or 2006, a little girl and her mother met Douglas Evans at church where Evans was involved with the youth group. The mother and her daughter, who was 4 or 5 at the time, became friendly with Evans and eventually the child, who referred to him as "Moose," began staying overnight at his house once a week. According to the facts at trial, during those overnight stays, Evans had the girl take a bath and after drying her off, had her lie on his bed while he rubbed lotion on her bottom, back and legs. On one occasion, he tried to rub lotion on the child's vagina, but she smacked his hand away and told him, "no." Evans also kissed the girl on her lips and bottom. In 2009, when she was 8 years old, the child told her teacher that "Moose" had kissed her and rubbed lotion on her vagina and bottom. Following the child's disclosure, a police officer conducted a forensic interview in which the child also revealed that Evans had taken pictures of her. Officers obtained a search warrant and upon searching his home, found electronic images of young children involved in sexual activities, including semi-nude photographs of the victim.

Following a "bench" trial (before a judge with no jury), the judge found Evans guilty of one count of child molestation regarding the improper touching and one count of sexual exploitation of children regarding the still images. Following the verdict, a separate sentencing hearing was held where Evans' attorney encouraged the judge not to impose a lengthy prison sentence. The State prosecutor argued that five years behind bars was the mandatory minimum for child molestation and under Georgia Code § 17-10-6.2, the judge was not authorized to

deviate from that mandatory minimum. The statute, which lays out the punishment for sex offenders, states that the defendant must be sentenced to the "minimum term of imprisonment specified in the Code section applicable to the offense." The statute also says that in its discretion, "the court may deviate from the mandatory minimum sentence…provided that:…(C) The court has not found evidence of a relevant similar transaction." The statute lists five other circumstances that must not exist for the judge to be able to deviate from applying the minimum prison sentence. Following the hearing, the judge sentenced Evans to 20 years with the first five to be spent in prison, consistent with the mandatory minimum sentence for child molestation. The judge found that under the statute, Evans' sexual exploitation of children conviction was a "relevant similar transaction," and noted, "I don't think I can meet the requirements of explaining a deviation." On appeal, the Court of Appeals agreed that Evans was disqualified from a sentencing deviation and upheld the trial court's decision. The appellate court found that "it seems implausible that the Legislature would allow a defendant convicted of more than one sexual offense to be eligible for a downward deviation from the mandatory minimum sentence simply because the offenses were tried together, rather than severed from one another." Evans then appealed to the Georgia Supreme Court, which agreed to review the case to determine whether the Court of Appeals was correct.

In today's opinion, the high court agrees that it was. "As the Court of Appeals found, a 'relevant similar transaction' under the statutory sentencing scheme can indeed be an offense contained in the same indictment when the trial court is sentencing the defendant for any specific count," today's 20-page opinion says. "Generally, evidence that a defendant has committed a crime or bad act other than one for which he is being prosecuted is irrelevant to that prosecution, and not admissible against him during that trial." However, under the evidence code in effect at the time of Evans' trial, "evidence of an independent act could be offered at trial to prove such things as motive, intent, bent of mind, course of conduct, plan, scheme or identity."

"When the court determines sentencing, there is no prohibition on its consideration of evidence presented during the trial," the opinion says. "And as to sentencing, each count stands alone; thus, when a trial court considers the appropriate sentence for Count 1 of an indictment, it is the only criminal charge at issue, and not any other counts in the indictment."

Therefore, under Georgia Code § 17-10-6.2, "when the trial court considers sentencing on any specific count, a similar act not included in that count is independent to it such that, even if it is charged in the same indictment, it can be a 'relevant similar transaction' so as to preclude a downward modification of sentencing."

Furthermore, "this Court is to 'look diligently for the intention of the General Assembly," which in passing § 17-10-6.2 stated that, "The General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety," the opinion says. "The General Assembly thus clearly expressed its concern with those who commit multiple separate sexual offenses and chose, as part of its remedy of incarcerating such offenders, to prohibit any downward deviation from the mandatory minimum sentence when the defendant is one who commits multiple separate sexual offenses."

"As the acts that Evans was convicted of committing were well separated in time and were not part of one sequence of events, the trial court was correct to consider the act of sexual

exploitation of a child to be a 'relevant similar transaction' that precluded a downward modification of sentencing for the crime of child molestation," the opinion concludes.
Attorneys for Appellant (Evans): Donald Roch, II, T. Jess Bowers
Attorneys for Appellee (State): Shannon Wallace, District Attorney, Jay Wall, Asst. D.A., Cliff Head, Asst. D.A.

MCHUGH FULLER LAW GROUP, PLLC V. PRUITTHEALTH, INC. (S16A0655)

The Supreme Court of Georgia has reversed a **Colquitt County** court ruling that prohibited a law firm from running advertisements soliciting abuse and neglect cases against a nursing home in Moultrie.

In today's opinion, **Justice David Nahmias** writes for a unanimous court that the single advertisement challenged in the lawsuit did not violate Georgia's trademark "anti-dilution" statute. "Accordingly, we reverse the trial court's injunction order."

According to briefs filed in the case, McHugh Fuller Law Group is a Mississippi-based law firm that specializes in nursing home abuse. In 2015, it began running a statewide advertisement campaign in Georgia against PruittHealth, Inc. to win business from people who "suspect that a loved one was NEGLECTED or ABUSED" at one of its nursing homes. One of the advertisements, which ran on March 15, 2015 in the Moultrie Observer, was a full-page color ad directed at the PruittHealth-Moultrie nursing home. The ad included PruittHealth's service marks and trade names, as well as bold-faced words such as "Bedsores," "Broken Bones," "Unexplained Injuries," and "Death."

PruittHealth sued McHugh Fuller under the state's trademark anti-dilution statute (Georgia Code § 10-1-451 (b)), which requires a court to issue an injunction (a court order requiring a certain action be halted) against anyone who uses someone's trade name without permission if there is even a "likelihood" that the use will injure the business reputation. The trial court entered a temporary restraining order against the law firm, scheduled a hearing and notified the parties that it intended to consider PruittHealth's request for a permanent injunction.

At a May 2015 hearing, PruittHealth's chief development officer in charge of branding testified that PruittHealth had made substantial investments in its marks and that by associating the marks with bold-faced words such as "death," McHugh Fuller was "tarnishing" PruittHealth's marks and business reputation. A law partner with McHugh Fuller testified that his firm relied on information from a federal government website to identify nursing homes the firm believed were likely to have residents who had been injured by negligence. He testified McHugh Fuller had filed about 11 negligence lawsuits against PruittHealth alleging that patients had suffered bedsores, broken bones, unexplained injuries, or death.

On June 1, 2015, the trial court issued a permanent injunction, prohibiting the law firm from running any more ads that used PruittHealth's trade names, service marks, or logos. The trial court found that the firm's use of PruittHealth's marks in its advertisements "likely tarnish Plaintiff's and its affiliates' business reputation [and] likely dilute those marks and names…." The law firm then appealed to the Georgia Supreme Court, asking the high court to vacate the trial court's order that granted PruittHealth a permanent injunction. (In a 2015 case, the same law firm appealed a court ruling that concluded it had engaged in "false and misleading" advertising about a PruittHealth nursing home in Toccoa, Georgia. In that case, the state Supreme Court

threw out the permanent injunction awarded to PruittHealth based on a procedural error and remanded the case to the Stephens County court.)

Today's opinion points out that the Georgia Supreme Court has addressed § 10-1-451(b) on several occasions. "However, this case presents a scenario that we have not previously encountered, where one business (McHugh Fuller) is using the marks of a second business (PruittHealth) not to identify its own goods or services, but rather to identify the goods or services of the second business," the opinion says.

Under Georgia Code § 10-1-451 (b), trademark dilution can take two forms: "The first is a 'blurring' or 'whittling down' of the distinctiveness of a mark," the opinion says. "The second type of dilution is tarnishment, which occurs when a defendant uses the same or similar marks in a way that creates an undesirable, unwholesome, or unsavory mental association with the plaintiff's mark." At issue in this case is tarnishment.

"However, not every unwelcome use of one's trademark in the advertising of another provides a basis for a tarnishment claim," the opinion says. "Tarnishment can occur 'only if the defendant uses the designation as its own trademark for its own goods or services. Cases in which a defendant uses the plaintiff's mark to refer to the plaintiff in a context that harms the plaintiff's reputation are not properly treated as tarnishment cases.'"

"Here, McHugh Fuller was advertising its legal services to individuals who suspect that their loved ones have been harmed by negligent or abusive nursing home services at a specific PruittHealth nursing home," the opinion says. "The ad did not attempt to link PruittHealth's marks directly to McHugh Fuller's own goods or services. McHugh Fuller was advertising what it sells – legal services, which are neither unwholesome nor degrading – under its own trade name, service mark, and logo, each of which appears in the challenged ad."

"In short, the ad very clearly was an ad for a law firm and nothing more," the opinion says. "Contrary to PruittHealth's assertion in the trial court, trademark law does not impose a blanket prohibition on referencing a trademarked name in advertising." Furthermore, interpreting the statute "expansively to prohibit the use of PruittHealth's marks to identify its facilities in any way, as the company urges, would raise profound First Amendment issues."

"Much useful social and commercial discourse would be all but impossible if speakers were under threat of an infringement lawsuit every time they made reference to a person, company or product by using its trademark."

"Accordingly, the trial court erred in entering the permanent injunction against McHugh Fuller based on § 10-1-451 (b)," the opinion concludes. "If PruittHealth believes that McHugh Fuller's advertisments are untruthful or deceptive, the company must seek relief under some other statutory or common-law cause of action."

Attorneys for Appellant (McHugh Fuller Law Group): Shannon Sprinkle and Tyler Wetzel of Carlock, Copeland, & Stair, LLP, and Charles Peeler of Flynn, Peeler, & Phillips, LLC.
Attorneys for Appellees (PruittHealth): Jason Bring, Richard Mitchell, and J. Ryan Hood of Arnall, Golden, Gregory, LLP, and Gregory Talley of Coleman Talley, LLP.

MOONEY V. WEBSTER, TRUSTEE (S16Q0895)

Under a Georgia Supreme Court opinion, a woman who filed for bankruptcy in federal court has lost her argument that based on Georgia law, her health savings account is off limits to creditors because it acts as a substitute for wages.

In an opinion today, written by **Presiding Justice P. Harris Hines**, the Georgia Supreme Court has unanimously ruled that a Georgia statute does not exempt health savings accounts from the bankruptcy estate and that such accounts do not provide income as a substitute for wages.

According to briefs filed in the case, Denise E. Mooney of **Ben Hill County** is a self-employed physical therapist and the sole owner of Rehab Specialists of the South GA, Inc. She claims she has worked in the healthcare field for 37 years and has no current plans to retire. In June 2013, Mooney filed for bankruptcy in the U.S. Bankruptcy Court for the Middle District of Georgia in Albany, GA. In her petition, she listed as an asset a "Health Savings Account" (HSA) containing $17,570.93. On Schedule C of the petition, she claimed the HSA and its entire balance were exempt and out of reach of her creditors under Georgia Code § 44-13-100. Under the Georgia "exemption statute," a debtor is allowed to exempt certain property from the bankruptcy estate. The purpose for exemptions is to further one of the goals of bankruptcy, which is to give honest, unfortunate debtors the chance at a fresh start. The statute exempts from creditors' claims social security benefits, unemployment compensation, public assistance benefits, retirement benefits, disability, illness or unemployment benefits, alimony, support or separate maintenance, and payments under a pension, annuity or similar plan or contract. The language of the Georgia statute mirrors the language of the federal bankruptcy exemption statute which is designed to insure that debtors who receive regular income from sources other than wages are also assured a fresh start.

At issue in this case is whether a HSA is considered an exemption under the statute. Mooney opened the health savings account in 2008 to help pay for medical expenses not covered by her health insurance. Health savings accounts are set up through an individual's tax-deductible contributions, allowing people with high-deductible health insurance plans to use the funds for future medical expenses that may not be covered by their insurance plans. After Mooney filed for bankruptcy, Joy R. Webster, who was appointed Chapter 7 Trustee of her estate, filed an "Objection to Claim of Exemptions," arguing that a health savings account (HSA) cannot be exempted under Georgia Code § 44-13-100. Following a hearing, in January 2014, the Bankruptcy Court agreed with the Trustee, finding that the "illness benefits" from a HSA are not "wage substitutes." The Bankruptcy Court relied on the Georgia Supreme Court's 2013 decision in *Silliman v. Cassell,* in which the state Supreme Court concluded that the pertinent question in regard to exemption is whether the entity in question "provides income as a substitute for wages." Mooney appealed the Bankruptcy Court's ruling to the U.S. District Court for the Middle District of Georgia, and in February 2015, that court upheld the Bankruptcy Court's ruling. It too relied on *Silliman* and found that the HSA was not exempt under the law. "Mooney's HSA is not a substitute for wages; it is a place to park wages that, if used for qualified healthcare expenses, allows favorable tax treatment," the District Court explained, pointing out that "unlike every other payment vehicle" listed as exemptions in § 44-13-100, a HSA "consists of a person's own earned wages," as opposed to set monthly payments from third parties that replace income. In March 2015, Mooney appealed to the U.S. Court of Appeals for the Eleventh Circuit in Atlanta. That Court certified three questions to the state Supreme Court, asking for its interpretation of Georgia Code § 44-13-100 before making a final decision in the case.

"As a threshold matter, § 44-13-100 (a) does not contain any express exemption for HSAs; this is so even though the statutory provision specifies numerous exemptions including those for precisely identified 'benefits,'" today's opinion says. "The General Assembly has had ample opportunity to expressly add HSAs to the lengthy list of exemptions, but has chosen not to do so; in fact, the General Assembly has amended the exemption statute four times since the authorization of HSAs in 2008."

"The next step in the analysis is the consideration of whether a HSA is a 'disability, illness, or unemployment benefit' for the purpose of the exemption provided in § 44-13-100 (a) (2) (C)." Based on the state Supreme Court's *Silliman* decision, "the relevant inquiry becomes whether a HSA…is intended as a substitute for wages. And, plainly it is not."

"This Court concludes, as did the District Court, that a HSA is not a substitute for wages, but rather is 'a place to park wages that, if used for qualified healthcare expenses, allows favorable tax treatment." Consequently, the exemptions in § 44-13-100 "do not apply."
Attorneys for Appellant (Mooney): Ward Stone, Jr., Matthew Cathey, Thomas McClendon
Attorney for Appellee (Webster): Robert Matson

<u>THE STATE V. BAXTER</u> (S16G0184)

The Georgia Supreme Court has ruled that a 16-year-old who has been charged with the aggravated sexual battery of a 3-year-old will be returned from juvenile court to adult superior court for prosecution, where if found guilty, he likely will face harsher punishment.

With today's unanimous ruling, written by **Justice Keith Blackwell**, the high court has reversed a decision by the Georgia Court of Appeals that had upheld a **Bryan County** superior court's decision transferring the case of the 16-year-old to juvenile court.

According to briefs filed in the case, on Feb. 4, 2014, Jason Baxter was arrested for the alleged aggravated sexual battery of his 3-year-old stepsister. Baxter, 16, was locked up at the Regional Youth Detention Center, i.e. youth jail, in Claxton, GA. According to Georgia law, a person commits aggravated sexual battery when he "intentionally penetrates with a foreign object the sexual organ or anus of another person without the consent of that person." Because of the seriousness of his alleged crime, Baxter was charged as an adult in superior court.

Under Georgia's Juvenile Code, the superior court has "exclusive original jurisdiction over the trial of any child 13 to 17 years" alleged to have committed any of eight violent crimes, one of which is aggravated sexual battery. On March 13, 2014, Baxter's attorney met with State prosecutors in the judge's chambers to discuss the case. The meeting was not transcribed, but the Assistant District Attorney later testified that there was some discussion about whether Baxter's case could be transferred to juvenile court once he was indicted. As a result, Baxter's attorney indicated Baxter would waive his right to be indicted within 180 days to give the State and defense more time to investigate. Georgia Code § 17-7-50.1 states that any child charged as an adult under the jurisdiction of the superior court "who is detained shall within 180 days of the date of detention be entitled to have the charge against him or her presented to the grand jury." The statute says the State may be granted one 90-day extension and if the case is not presented to the grand jury within the time limitations of the statute, "the detained child's case shall be transferred to the juvenile court." On March 17, the day Baxter's case was due to go to the grand jury, Baxter's attorney filed a "Waiver of Statutory Right to Indictment Within 180 Days." As a result, the State did not present Baxter's case to the grand jury.

On Oct. 3, 2014, Baxter's attorney filed a Motion for Bond and Preliminary Hearing. He also filed a Motion to Transfer to Juvenile Court, arguing that Baxter had been held in the youth jail for 237 days. On Oct. 15, State prosecutors informed Baxter's attorney that they would be bringing additional charges against Baxter involving the same 3-year-old child. That same day, Baxter's attorney amended the motion to transfer the case, stating that because Baxter had been incarcerated more than 180 days, under the language of Georgia Code § 17-7-50.1, the transfer was "mandatory, not permissive, directing that the case 'shall' be transferred to juvenile court if not indicted within 180 days of the juvenile's incarceration." On Oct. 16, the State filed a motion requesting a time extension to present the case to the grand jury. At a hearing, Baxter's attorney argued the previous waiver of the 180-day time limit was invalid because Baxter was still in custody. The State argued "unclean hands," i.e. bad faith, on the part of the defense attorney for agreeing to the waiver and then seeking a transfer to juvenile court when it was too late for the State to do anything about it.

Following arguments, the trial court transferred the case to juvenile court and denied the State's motion for an extension of time. Referring to the strong language of the statute, the judge commented, "I don't think the Court had any option." The word, "shall," the trial judge noted, was a "magic word." The Court of Appeals agreed that under "the plain language of the statute, it was therefore mandatory that the case be transferred to the juvenile court." It also agreed that the State's motion for an extension could not be granted because the State filed it more than 180 days after Baxter was detained. Finally the appellate court ruled that the waiver of the 180-day time limit was invalid, rejecting the State's argument that the time limit is merely a procedural statute of limitation, which is subject to being waived, as opposed to a change in the court's jurisdiction (or its authority to consider a case), which cannot be waived. "The crucial distinction here is that the 180-day requirement does affect the court's jurisdiction – if the State does not present a juvenile's case to the grand jury within the time limit or obtain a timely extension to do so, the superior court loses jurisdiction," the Court of Appeals wrote in its decision. The State then appealed to the Georgia Supreme Court, which agreed to review the case to determine whether the Court of Appeals was correct that under § 17-7-50.1, a juvenile cannot waive the 180-day time limitation for the State to obtain an indictment.

"In our view, the Court of Appeals went astray when it understood Georgia Code § 17-7-50.1 (a) to absolutely require presentation to the grand jury within 180 days of detention (unless the time is extended by the superior court for good cause)," today's opinion says.

Under the statute, "even with an extension, the child is entitled to have his case presented no later than 270 days after his detention," the opinion says. "That does not, however, prohibit the child from simply choosing to forgo prompt presentation. Viewing the statute in this light, a waiver of prompt presentation – at least so long as it is executed prior to the expiration of the time in which the child is otherwise entitled to have the case presented – does not amount to an improper attempt to confer jurisdiction upon the superior court by agreement or consent."

In a footnote, the high court points out that in some cases, "there may be good reasons for a detained child to consider forgoing a prompt presentation to the grand jury." For example, if "more time for investigation might lead to the discovery of facts that would cause the district attorney to elect to proceed in juvenile court, it may be in the interest of a detained child to forgo prompt presentation."

"If the child waives prompt presentation before the time has expired, the condition that divests the superior court of jurisdiction – the expiration of the time – never comes into being," the opinion says. "The Court of Appeals misunderstood § 17-7-50.1 when it concluded that the statute does not permit a detained child to waive presentation within 180 days of the date of detention. For that reason, the Court of Appeals erred when it affirmed the transfer from the superior court to the juvenile court."

Attorney for Appellant (State): Sandra Dutton, Assistant District Attorney
Attorney for Appellee (Baxter): Cheryl Quick, Public Defender's Office

WOLFE V. REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA ET AL. (S16A1201)

Under an opinion today by the Georgia Supreme Court, a tenured professor who was fired by the president of Georgia Southern University for sexually harassing a female graduate student has lost his appeal of a **Fulton County** court ruling upholding his termination.

Justice David Nahmias writes for a unanimous court that Lorne Wolfe failed to follow the proper procedure in seeking review of his case by the state's highest court, and that procedural error has cost him his case and resulted in the dismissal of his appeal.

According to briefs filed in the case, Wolfe was a tenured professor of biology at Georgia Southern University from 2005 until his termination May 9, 2014. Because Wolfe had an employment contract with the Georgia Board of Regents, which oversees the public colleges and universities that make up the state's University System, he could only be terminated for cause, including for violations of policies of the university or the Board of Regents.

On Oct. 16, 2013, graduate student E.J. spilled a cup of coffee on herself in a break room in the Biological Sciences building on campus. While she was attempting to dry off her shirt, Wolfe said to her, "It's okay; you can dry your breasts off in front of me." The student looked at Wolfe, conveying she did not appreciate his comment. He apparently understood, responding, "Well, f--- you then." Wolfe then turned to a male student in the room and began speaking with him loudly enough so E.J. could hear. "Who are you scoring with?" Wolfe asked the young man. "Undergrad? Grad?" He went on, asking the student if he was "scoring" with E.J. "She's loose," Wolfe said. "She's hot…Now her breasts are hot."

E.J. filed a sexual harassment complaint against Wolfe, stating she could not complete her work that day "because I was distraught about the incident." "I have never been so offended in such a short amount of time," she stated, adding that the incident "created a hostile and intimidating environment."

Georgia Southern has a published policy against sexual harassment, which is defined as "unwelcome conduct of a sexual nature." The policy states that the university will take any "appropriate action" to prohibit sexual harassment, "up to and including termination or dismissal." Two days after the encounter, Wolfe emailed Gary Gawels, the university's Title IX coordinator. Title IX is a federal statute that prohibits sex discrimination in the educational system and guarantees girls and women the same opportunities as boys and men. In his email, Wolfe wrote, "I realize that once again I have said inappropriate things….If I am going to be reprimanded or fired I would rather know now….It is very difficult to deal with…this new situation that I have put myself in." Gawels investigated the graduate student's complaint,

finding that "considering the past complaints against Dr. Wolfe, it appears that a hostile environment was created for [E.J.] by Dr. Wolfe in violation of University policy."

The matter proceeded to Jean Bartels, the university's Vice President for Academic Affairs, who accepted Gawel's findings, initiated disciplinary proceedings, and placed Wolfe on administrative leave, providing him a "Notice of Removal Proceedings." The notice stated that "an internal investigation was recently conducted regarding serious charges that you have created a hostile environment based on gender" and informing Wolfe that "the university must take steps to protect the community from further instances of harassment." Under university policy, the matter was referred to a faculty committee. Following a two-day hearing, the faculty panel submitted its findings and recommendations to university President Brooks A. Keel. The panel stated it did "not find that the one incident on Oct. 16, 2013 constitutes creation of a hostile environment," and while the committee found that Wolfe had engaged in a "lack of collegiality and lack of professionalism," he had not committed a "dismissible offense." A Board of Regents policy states that the "president may or may not follow the recommendations of the committee," and if he disagrees, he should put his reasons in writing. Keel disagreed with the panel, and wrote that he planned to proceed with Wolfe's termination. "Regardless of whether a hostile environment was created or whether training was received, the record reflects that Dr. Wolfe admits to engaging in repeated behavior that he knew to be inappropriate." Keel concluded that Wolfe had engaged in unwanted conduct of a sexual nature in violation of the university's policy against sexual harassment and that he had therefore violated the Board of Regents policy against disruptions of "teaching, research, administrative, disciplinary, public service or other authorized activity." Keel told Wolfe he was terminating him.

Wolfe then appealed Keel's decision to the Board of Regents, which declined to consider the matter, leaving Keel's decision intact. In September 2014, Wolfe sued Keel and the Board of Regents in Fulton County Superior Court, alleging breach of his employment contract with the Board of Regents and seeking a "writ of mandamus" against Keel, to force Keel to reinstate him as professor. Following a hearing, the trial court ruled in favor of the Board of Regents, finding that it had not breached Wolfe's employment contract and that Keel had not abused his discretion in firing Wolfe. Wolfe then appealed to the Georgia Supreme Court.

At issue in this case is how he appealed.

Wolfe's attorneys argued he was entitled to a "direct," or automatic appeal, and was not required first to apply to appeal and get the Supreme Court's permission to proceed. They argued Wolfe was entitled to a direct appeal "because he did not seek review of any agency decision." The Attorney General's office, representing the Board of Regents and President Keel, argued that Wolfe's appeal should be dismissed because he failed to follow proper appeals procedures. Wolfe was not entitled to a direct appeal, they argued, but rather he was required to file an application to appeal as part of the discretionary appeals process because "he seeks to challenge the superior court's decision reviewing the decision of a state agency."

In today's decision, the high court agrees with the Attorney General. "Because Wolfe did not file a discretionary application, this Court lacks jurisdiction to consider the merits of his case," the opinion says. "Accordingly, we dismiss the appeal."

Georgia Code § 5-6-35 (a) (1) requires an application to appeal "from decisions of the superior courts reviewing decisions of the State Board of Workers' Compensation, the State

Board of Education, auditors, state and local administrative agencies, and lower courts by certiorari or de novo proceedings."

"To begin with, it is clear that the Board of Regents is a state administrative agency for purposes of § 5-6-35 (a) (1)," the opinion says. Furthermore, the Board of Regents under Georgia statutes has the authority to appoint professors, remove them from their positions, and make rules and regulations for the performance of duties. Therefore, in firing Wolfe, the Board of Regents "was acting as a state administrative agency for purposes of § 5-6-35 (a) (1)."

It is also clear that the Board of Regents made a judicial-like decision in terminating Wolfe, by means of holding hearings, gathering evidence, weighing the facts, and applying the rules to the facts before making its ruling.

"Wolfe's complaint asked the superior court to review a decision of a state administrative agency; the superior court reviewed that decision, denying relief; and Wolfe is now appealing the decision of the superior court," today's opinion says. "Under this Court's precedents, these determinations dictate that Wolfe was required by § 5-6-35 (a) (1) to bring his appeal by way of an application for discretionary appeal and that his failure to do so requires the dismissal of his direct appeal."

Attorneys for Appellant (Wolfe): Andrew Coffman, David Weisz
Attorneys for Appellee (Regents): Samuel Olens, Attorney General, Dennis Dunn, Dep. A.G., Annette Cowart, Sr. Asst. A.G., Bryan Webb, Sr. Asst. A.G., Courtney Poole, Asst. A.G.

DAWSON V. THE STATE (S16A0786)

The Supreme Court of Georgia has unanimously upheld the convictions and life prison sentences given to Lonnie Lamon Dawson for the 2006 brutal stabbing murder of his wife, Lisa Dawson, and the man she had begun dating, Kenneth Sands.

In today's opinion, written by **Justice Harold Melton**, the high court has rejected Dawson's arguments that the trial court made errors related to the evidence and that his trial attorney was ineffective in numerous ways in violation of his constitutional right to effective counsel.

Lisa Dawson was a victim witness advocate for the **Clayton County** Solicitor General's Office, where she worked with victims of domestic violence. According to the evidence at trial, she and Lonnie Dawson married in September 2002 and Dawson moved into her home in Jonesboro. During the next three years, he became increasingly jealous and possessive of his wife. The couple argued over her involvement in her son's school and the PTA. In June 2004, Lisa made a frantic call to a friend, who went to the Dawson's home where she observed visible injuries to Lisa's neck. Lisa asked her friend not to tell anyone about the abuse because she did not want her son to know Dawson had struck her. Following another argument in the summer of 2005, Dawson again struck her, and Lisa asked him to move out. It was during their separation that Lisa completed a degree program and was hired as a victim witness advocate by the Clayton County Solicitor General, ironically working with victims of domestic violence. Her plan was to divorce Dawson but she was waiting for her tax refund to pay for the legal proceedings, according to briefs filed in the case. Meanwhile, she began dating Kenneth Sands and had already introduced Sands to co-workers. She also told Dawson she was moving on with her life and had met someone new.

The night of March 21, 2006, Lisa and Sands went on a date. The next day, March 22,

Lisa did not show up for work. After police were notified, they discovered Lisa's and Sands' bodies in the bedroom of Lisa's home. Lisa's body was on top of Sands', wedged between the wall and the bed. The medical examiner counted 62 stab wounds to Lisa's body, which excluded the number of shallower "cut" wounds. Sands had been stabbed 71 times.

A detective found Dawson's black Mazda pick-up truck outside his sister's home. Blood, later identified as Dawson's, was found on the steering wheel, gear shift, and seat belt. A DNA analysis determined that a blood swab found on the outside back door by the deadbolt of Lisa's home had the DNA profiles of Dawson and the two victims. Blood collected from Dawson's jeans also contained the profiles of Lisa and Sands.

Following his arrest, Dawson told his cellmate, Marvin Amey, that he had driven his truck to Lisa's house early that morning around 3 or 4 a.m. and parked down the road. He used a key to get in through the back door, and was carrying a knife. Once inside, he also grabbed a steak knife from the kitchen. Unseen, Dawson said he waited for Lisa and Sands to go to sleep, then heard Sands snoring, which angered him. He went into the bedroom and stabbed Lisa in the chest and cut her throat after she called his name. He also stabbed Sands, who tried to fight back but was too weak from blood loss. Dawson continued to stab Sands as he tried to escape under the bed. Lisa crawled onto Sands' body as she died. Dawson said he then cleaned up the room, left the same way he had entered around 5 or 6 a.m., and drove to a gas station near his sister's house. He threw the knife away and wiped down his car. Neighbors later said they had seen his black truck near Lisa's house around the time of the crimes.

On April 23, 2010, a jury found Dawson guilty of two counts of malice murder, felony murder, burglary and possession of a knife during the commission of a crime. He was sentenced to two consecutive life prison terms plus 30 years for the other crimes.

"This evidence was sufficient to enable the jury to find Dawson guilty of the crimes with which he was charged beyond a reasonable doubt," today's opinion says.

On appeal, Dawson argued the trial court erred by excluding testimony from a hospital employee who helped administer a mental and physical evaluation on Dawson following the murders. Dawson was there for treatment of his bleeding hand, and he claimed the employee's testimony would have supported his contention that he had committed the less serious crime of voluntary manslaughter, as opposed to murder. Dawson's defense was not that he didn't kill Lisa and Sands, but that he did so in the heat of passion. "We find no abuse of the trial court's broad discretion in choosing to exclude this testimony," the high court concludes, and it finds that "the evidence that Dawson actually did commit the murders of Lisa and Sands was overwhelming."

Dawson has presented a number of other arguments as to why his convictions and sentences should be reversed, including that he was denied a fair trial because a number of the State's witnesses were allowed to use the term "murder" during their testimony. "We disagree," today's opinion says, rejecting this and Dawson's other arguments.

"Judgment affirmed," the opinion says.

Attorneys for Appellant (Dawson): Keith Martin, Sean Joyner

Attorneys for Appellee (State): Tracy Lawson, District Attorney, Elizabeth Baker, Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Elizabeth Haase, Asst. A.G.

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IN OTHER CASES, the Supreme Court of Georgia has upheld **murder** convictions and life prison sentences for:

* Devonni Manuel Benton (Fulton Co.)	**BENTON V. THE STATE (S16A1085)**
* Jacobey Sean Carter (Clayton Co.)	**CARTER V. THE STATE (S16A1263)** *
* Christopher Cushenberry (Douglas Co.)	**CUSHENBERRY V. THE STATE (S16A1039)**
* Anthony Herrington (Burke Co.)	**HERRINGTON V. THE STATE (S16A0745)**
* Eugene Lupoe (Clayton Co.)	**LUPOE V. THE STATE (S16A1261)** *
* Cleve Michael McCain (Haralson Co.)	**MCCAIN V. THE STATE (S16A1546)**
* Hannibal Wayne McMullen (Newton Co.)	**MCMULLEN V. THE STATE (S16A0937)**
* John Philpot (Fulton Co.)	**PHILPOT V. THE STATE (S16A0767)**
* Rodney Gordon Shepard (Clarke Co.)	**SHEPARD V. THE STATE (S16A0960)**
* Shauna Smith (Fulton Co.)	**SMITH V. THE STATE (S16A0835)** **
* Anthony L. Williams (Terrell Co.)	**WILLIAMS V. THE STATE (S16A1158)**
* Gregory Williams (Fulton Co.)	**WILLIAMS V. THE STATE (S16A0834)** **
* Kyshawn Williams (Clayton Co.)	**WILLIAMS V. THE STATE (S16A1262)** *
* Cornelius Wright (Richmonod Co.)	**WRIGHT V. THE STATE (S16A1035)**

* Carter, Lupoe, and Kyshawn Williams were co-defendants who were tried together. While the state Supreme Court has upheld their murder convictions and life prison sentences, the judge erred by "merging" their guilty verdicts for armed robbery, burglary and gang activity into their convictions for malice murder. As a result, they were not sentenced for those crimes, and the high court is therefore sending their cases back to the trial court for additional sentencing.

** Smith and Gregory Williams were co-defendants who were tried together. The high court has upheld their convictions and sentences.