



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Tuesday, October 3, 2017

10:00 A.M. Session

COOPER TIRE & RUBBER COMPANY V. KOCH ET AL. (S17G0654)

A tire manufacturer is appealing a Georgia Court of Appeals decision that allows a **Fulton County** lawsuit to go forward in which a woman claims her husband was killed in a car wreck caused by a defectively designed tire.

FACTS: On April 24, 2012, Gerald Raymond Koch was driving on Interstate 16 in his 2000 Ford Explorer when the tread on his left rear tire detached. According to the State of Georgia Traffic Crash Report, the Explorer swerved out of control and struck a guardrail, flipping over several times. Koch suffered serious injuries and was transported to the Medical Center of Central Georgia where he underwent surgery and remained in intensive care for several days. After regaining consciousness, he told his wife, Renee Koch, that the crash occurred when the “tire blew and the car flipped and rolled three or four times.” Gerald Koch never recovered from his extensive injuries and on June 3, 2012, he died.

The Ford Explorer was towed from the scene by Brown's Wrecker Service and placed in a storage yard. Before Koch's death, his wife talked to Edward Brown, the owner of the wrecker service, and learned she was being charged a daily storage fee for the vehicle. She told Brown she could not afford the costs, and he said he would not bill her if she would transfer title to him so he could sell the vehicle to a salvage yard for scrap. Renee Koch said she saw no reason to

keep the vehicle since it was totaled, so she agreed to transfer the title to Brown. However, before transferring the title, her husband told her to tell Brown to “save the tires.” Brown stored the left rear tire but all that remained was the sidewall portion that attaches to the rim; apparently the tread was never recovered from the accident scene. Brown then sold the vehicle and the remaining tires to be crushed for scrap.

Several weeks after Koch died, his daughter contacted a lawyer in Missouri where she lived. The lawyer contacted the wrecker service about preserving the tire and also recommended the daughter hire an attorney in Georgia. She and her mother did so, and that lawyer retrieved the tire from the wrecker service. In 2014, Renee Koch and the daughter sued **Cooper Tire & Rubber Company** for wrongful death, alleging that Cooper Tire’s defectively designed tire caused the fatal crash. Cooper Tire filed a motion asking the court to dismiss the case, arguing that its defense had been irreversibly damaged as a result of Renee Koch’s “spoliation” – or destruction – of relevant evidence, i.e. the vehicle and remaining tires. The Fulton County State Court judge denied the motion, ruling that, “this court does not find that the facts and circumstances give rise to litigation being reasonably foreseeable or that it should have been reasonably contemplated by the plaintiff so as to trigger the duty to preserve the subject vehicle.” Cooper Tire then appealed to the Court of Appeals, arguing that the trial court erred by focusing on whether Renee Koch knew that it was likely she would sue at the time she allowed the vehicle and companion tires to be destroyed. Instead, Cooper Tire’s attorneys argued, the trial court should have applied the objective standard set down in the Georgia Supreme Court’s 2015 decision *Phillips v. Harmon* to determine whether Koch’s wife knew, or should have known, that the evidence should be preserved for litigation. The *Phillips* decision lists a number of factors to consider in determining whether an injured party was contemplating litigation, which is when the duty arises to preserve evidence. Some of those factors include circumstances such as “the type and extent of the injury,” “the extent to which fault for the injury is clear,” and “any expression by the defendant that it was acting in anticipation of litigation.” The Court of Appeals, however, upheld the trial court’s decision, finding that the court applied the correct legal theory. Cooper Tire now appeals to the Georgia Supreme Court.

ARGUMENTS: Attorneys for Cooper Tire argue that the Court of Appeals and trial court were wrong to rule that Mrs. Koch had no duty to preserve the evidence. “Under *Phillips*, a party has a duty to preserve relevant evidence when litigation is reasonably foreseeable, that is, when that party objectively should have anticipated litigation,” the attorneys argue in briefs. “Following the accident here, Mr. Koch told his wife to ‘save the tires’ because he thought ‘something might have been wrong,’ but Mrs. Koch saved only part of one tire and destroyed all the other relevant evidence, including the tire tread, the other tires, the wheels, and the wrecked Explorer. By concluding the plaintiff did not [destroy] evidence because she did not in her own mind contemplate litigation until later, the Court of Appeals decided Mrs. Koch had no duty to preserve evidence when it was destroyed.” The Court of Appeals failed to apply the objective test and constructive notice factors required under *Phillips*. “The Court of Appeals applied the wrong legal standard to determine when a plaintiff’s duty to preserve evidence arises.” Instead, it sought to determine “what a reasonable person in the same circumstances as those in which the injured party has found himself would do.” “That allowed the court to focus on what Mrs. Koch said she understood at the time, without considering what the objective circumstances showed. But that is the wrong focus. Mrs. Koch was not the ‘injured party’ in the accident; her husband

was.” “Even a lay person can see why Mr. Koch wanted the tires saved and checked out – to see whether there might be a claim against the tire manufacturer. It does not matter that Mrs. Koch subjectively testified that she had not decided to sue at the time she destroyed the evidence. Removing Mrs. Koch’s subjective views, the focus should be on the objective circumstances surrounding the accident – including Mr. Koch’s post-accident instructions – and whether they showed litigation was ‘reasonably foreseeable,’ as *Phillips* requires.” “Spoliation is the ‘destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.’” In this case, the destruction of the evidence has severely damaged Cooper Tire’s ability to defend itself, its lawyers argue. “It is all but impossible to determine what caused the accident.”

Mrs. Koch’s attorneys argue the trial court and Court of Appeals applied the correct objective legal standard in determining that no spoliation occurred. “Before a party can be sanctioned for failing to preserve evidence, *that party must have been under a duty to preserve the evidence at issue*,” the attorneys argue in briefs. In this case, the appropriate inquiry is what a reasonable person in the same circumstances as those in which the injured party has found himself would do. “The objective test does not require evaluation of the specific factors considered in *Phillips*.” Both the trial court and the Court of Appeals “properly determined litigation was not reasonably foreseeable to a person in Mrs. Koch’s position at the time the subject vehicle was lost,” the attorneys argue. Mrs. Koch did not contemplate any kind of litigation until weeks after the vehicle was destroyed. At the time, she was thinking “he is going to get better, come home,” she testified. She didn’t know why her husband wanted to keep the tire, but chalked it up to “curiosity” on his part. “I didn’t care about the tire honestly,” she testified. The first contact with an attorney was made by her daughter 58 days after the crash. “The Court of Appeals correctly held that the trial court properly evaluated relevant factors when making its finding that litigation was not reasonably contemplated at that time by Plaintiff, nor should it have been by a reasonable person in the same or similar circumstances as the Plaintiff, which is the appropriate standard under Georgia law,” Mrs. Koch’s attorneys contend.

Attorneys for Appellant (Cooper Tire): George Neuhauser, Clinton Fletcher, Laurie Daniel, Scott Smith

Attorneys for Appellee (Renee Koch): Katherine McArthur, Caleb Walker, Tracey Dellacona

THE MAYOR AND ALDERMEN OF GARDEN CITY V. HARRIS ET AL. (S17G0692)

The Mayor and Aldermen of Garden City, GA are appealing a ruling by the Georgia Court of Appeals allowing a lawsuit to go forward against them that was brought by the parents of a child who fell through the bleachers at a city-owned stadium.

FACTS: In November 2012, **Willie and Kristy Harris** took their children to an annual youth football tournament at the Garden City Stadium, which is owned and maintained by the City. The Harris’ son was playing in the game. The stadium is surrounded by a high fence and there is a locked gate at the entrance, with a ticket booth adjacent to the gate. Spectators older than 6 years old were charged an admission fee of \$2 for an adult and \$1 for a student. The Harris paid the fee for themselves and one of their older children. They did not have to pay a fee for two of their younger children, including 6-year-old Riley. During the game, Riley and her siblings left their seats on the upper section of the bleachers to go to the concession stand. After buying a pickle, Riley returned to where her parents were sitting. As she walked across the

bleachers, Riley slipped and fell through the bleachers about 20 feet to the ground below. Riley was transported by ambulance to Memorial Health University Medical Center in Savannah, **Chatham County** where she spent five days in the hospital with a broken arm, ruptured spleen and collapsed lung.

Willie and Kristy Harris filed a lawsuit, individually and on behalf of Riley, against the Mayor and Aldermen of Garden City, seeking to recover damages for their daughter's injuries. They claimed the stadium bleachers were in a dangerous condition caused by Garden City's negligence and its failure to comply with applicable codes.

At issue in this case is the interpretation of Georgia's Recreational Property Act. That Act states in section 51-3-23 that "an owner of land who...invites or permits without charge any person to use the property for recreational purposes does not thereby:...2) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed." Section 51-3-25 of the same Act states, "Nothing in this article limits in any way any liability which otherwise exists:...2) For injury suffered in any case when the owner of land charges the person or persons who enter or go on the land for the recreational use thereof...."

Garden City filed a motion asking the court for "summary judgment" in its favor, arguing in part that it was shielded from liability by the Recreational Property Act. (A judge grants summary judgment after determining that a jury trial is unnecessary because the facts are undisputed and the law falls squarely on the side of one of the parties.) Following a hearing, the trial court denied Garden City's motion for summary judgment. Garden City then appealed the pre-trial ruling to the Court of Appeals, which in November 2016 upheld the trial court's decision. Specifically, the Court of Appeals concluded that, "the admission fee charged by the City for entrance into the stadium was a charge within the meaning of the Recreational Property Act." The appellate court further found that "notwithstanding that the City chose not to charge very young children, including Riley, to enter the facility, the stadium was not open to the public without charge." Garden City now appeals to the Georgia Supreme Court, which has agreed to review the case to determine whether the Court of Appeals erred.

ARGUMENTS: The Court of Appeals' ruling goes against the Georgia Legislature's intent in passing the Recreational Property Act, the City's attorneys argue. As the introduction to the Act states: "The purpose of this article is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting the owners' liability toward persons entering thereon for recreational purposes." The Court of Appeals erred as the City clearly is shielded in this case by the Act. "Because Riley Harris was not charged to enter the recreational facility, and Georgia Code § 51-3-23 expressly states that an owner of land who permits without charge any person onto his land does not thereby confer upon **such person** the status of someone to whom a duty of care is owed, Garden City is entitled to Recreational Property Act immunity," the attorneys argue in briefs. The Court of Appeals ignored that by using the specific modifier, "**such person**," the legislature precisely communicated that if an individual is permitted onto property without charge, then the premises owner has no liability to "such person." "Had the legislature intended otherwise, it would have made clear that the 'without charge' rule does not apply unless 'all persons' are allowed use of the property without charge," the attorney argues. "This the legislature did not do." Georgia case law establishes that Garden City's collection of minimal fees from some individuals other than Riley should not be considered a "charge" within the meaning of the Act that disqualifies the City from liability

protection. The small amount collected on behalf of Garden City – an incidental sum of \$225 – was revenue collected to pay for property maintenance and public services, and was not “profits in the ordinary sense of the word,” the City’s attorneys argue. In the last eight years, the City has in fact lost more than \$146,000 by operating the Garden City Summary. “This Court should thus reverse the Court of Appeals and hold that Plaintiff’s [i.e. the Harrises’] claims of negligence and negligence per se are barred by the Recreational Property Act.”

“This is a case where it is undisputed that Garden City failed to comply with applicable safety codes related to stadium bleachers and, as a direct result of such failures, a little girl was seriously injured when she fell through dangerous, code-violating gaps in its bleachers that should not have existed,” the attorney for the Harrises argues in briefs. The language of the Act could not be clearer: If a landowner charges any persons, i.e. the public, for entry upon property for recreational purposes, then the landowner loses all protections afforded by the Recreational Property Act. “Garden City now seeks to escape liability for its undisputed negligence by attempting to misapply Georgia’s Recreational Property Act based on strained arguments which are contrary to the Act’s express language and purpose and over decades of precedent.” Garden City proposes a “novel application” of the Recreational Property Act, and is asking this Court to conclude that, “although the general public was required to pay an admission fee to enter the Garden City Stadium, Riley herself did not pay the charge due to her young age and is now barred from the courthouse. Thus, the question presented is whether a landowner may charge a fee for the recreational use of his/her land by the general public, but exempt children from paying such a fee, and in so doing, absolve his/her liability as to that vulnerable group when his negligence causes them harm.” Garden City also asks this Court “to find that the thousands of dollars that spectators were required to pay to enter the stadium was ‘nominal’ and not an ‘admission charge’ because Garden City failed to realize a profit from such revenue,” the attorney argues. “Both the trial court and the Georgia Court of Appeals have summarily rejected Garden City’s arguments on this issue. These lower courts’ rulings were based upon a reasonable and proper construction of the plain language of the Recreational Property Act and were consistent with decades of precedent that allow Riley and her parents to proceed with legal action to recover their damages caused by Garden City’s negligence.” The Georgia Supreme Court should therefore uphold the Court of Appeals decision, the attorney argues.

Attorneys for Appellant (Garden City): Patrick O’Connor, James Gerard, David Mullens
Attorney for Appellee (Harrises): C. Dorian Britt

GRADY V. BENNETT (S16G1758)

A man who is trying to legitimate a child as his biological son is appealing a Georgia Court of Appeals ruling that dismissed his case for failure to follow the proper filing procedure.

FACTS: Steven Grady and Brittney Bennett had a son together in 2013; they were not married and the baby remained with his mother. Two years later, Grady filed a “Petition for Legitimation and Child Custody” in **Forsyth County** Superior Court. Bennett objected based on “abandonment of the opportunity interest” by the father. Before granting a petition to legitimate, a court must determine whether the father has abandoned his opportunity to develop a relationship with the child. A biological father’s interest begins at conception and may endure through the child’s minor years, but the unwed father may abandon his interest if he doesn’t pursue it in a timely fashion. Factors that may support a finding of abandonment include the

father's inaction during pregnancy and birth, a delay in filing a legitimation petition, and a lack of contact with the child. In September 2015, the Forsyth court issued a Final Order, finding that Grady had abandoned his interest in the minor child and dismissing his petition for legitimation. Grady then filed a "direct" appeal to the Georgia Court of Appeals, as opposed to a "discretionary" appeal. In a direct appeal, the party has an automatic right to appeal based on the type of case it is. For instance, all those convicted of murder have a right to a direct appeal. In a discretionary appeal, however, the party must file an application and the appellate court decides whether it will accept the application and review the case. In May 2016, the Court of Appeals also dismissed Grady's case, stating that "appeals in domestic relations cases must comply with the discretionary appeal procedure, and a legitimation action is a domestic relations case." Grady now appeals to the state Supreme Court, which has agreed to review the case to determine whether an application for discretionary review is required to appeal from an order on a petition for legitimation.

ARGUMENTS: Grady's attorney argues that the trial court's final order denying the legitimation and denying any custody of his child "essentially terminated the Father's parental rights." Georgia Code § 5-6-35 (a) (2) requires an application to appeal "from judgments or orders in divorce, alimony, and other domestic relations cases...." But the Court of Appeals has ruled that an appeal from a termination of parental rights does not fall under this statute and is therefore directly appealable. Furthermore, Georgia Code § 5-6-34 (a) (11) is the statute that applies in this case, and it permits a direct appeal of all "judgments or orders in child custody cases awarding, refusing to change, or modifying child custody...." This case does not involve divorce or alimony, to which Georgia Code § 5-6-35 (a) (2) applies, "and therefore the direct appeal should not have been dismissed" by the Court of Appeals. Here, Grady filed for a change in custody from the mother having sole legal and physical custody to having joint legal and physical custody, Grady's attorney argues. Although the Court of Appeals' 2013 ruling in *Cloud v. Norwood* "appears at first blush to support the position that a discretionary application is necessary in a legitimation action, this case appears to be an outlier in its position," the attorney argues. "Moreover, it is in direct contrast to later holdings and an abundant number of other cases." If anything, this case demonstrates the conflict in the law under court rulings and demonstrates the need for clarity. "The underlying issue in the present case is a child custody determination and a termination of parental rights," Grady's attorney argues. The dismissal order in this case "should have been directly appealable and not subject to the discretionary application procedure."

Although Grady argues that this matter is a child custody case, the order on appeal "involves the sole issue of legitimation," Bennett's attorney argues. More than 30 years ago, in *Brown v. Williams*, the Court of Appeals made it explicit that, "A legitimation proceeding is a type of domestic relations case" that is subject to discretionary appeal. The only time custody was even mentioned at the legitimation hearing was when Bennett's trial attorney talked about the "bright line rule" articulated in the Georgia Supreme Court's 1987 ruling in *In re: Baby Girl Eason*. In that decision, the court stated that, "there is a distinction between the degrees of protection that are afforded to unwed, biological fathers who have lived with children and assumed their roles as parents, and unwed biological fathers who have never had custody of their children or participated as a parent." Bennett's attorney then went on to point out that Grady is the latter type of father, "having never provided any support for his child and never having even

met his child.” Although his petition stated in the title that it was for “Legitimation and Child Custody,” the petition’s contents “do not support such a grand title,” the attorney argues. The question of whether this matter is subject to application or direct appeal is whether it is a domestic relations case – mandating an application – or a child custody case – allowing for direct appeal. “Georgia courts have been consistent in their interpretation of legitimation actions being a type of domestic relations case subject to the application requirements,” Grady’s attorney argues. Legitimation is a precondition to establishing custody rights. “The Georgia Legislature is clear that custody of a minor illegitimate child is in the mother alone prior to legitimation.” Prior to a judgment of legitimation, the father has no custodial rights and no standing to raise the issue of custody. “The Final Order does not make a custody determination because Appellant [i.e. Grady] had no legal rights to the minor child upon which to base a custody determination,” her attorney argues. Similarly, “The denial of a legitimation petition does not constitute a termination of parental rights.”

Attorney for Appellant (Grady): Lindsay Haigh

Attorney for Appellee (Bennett): Joann Williams

2:00 P.M. Session

TAYLOR V. THE STATE (S17G0501)

A **Gwinnett County** man convicted of the sexual molestation of 16 children is appealing his convictions on the ground that the search warrant used to collect evidence from his computer was invalid. He argues the Court of Appeals was wrong to uphold the trial court’s denial of his motion to suppress the evidence.

FACTS: According to state prosecutors, **Harry Brett Taylor** sexually molested 16 children. Each child’s ordeal is detailed in briefs filed by the Gwinnett County District Attorney. Most of the children were 8 or 9 years old when the abuse began, although some were as young as 6. “Appellant [i.e. Taylor] began molesting C.T. when C.T. was between 8 and 9 years old and continued to do so until C.T. was between 12 and 13 years old,” according to briefs filed by the State. “Appellant had C.T. insert his penis into Appellant’s anus on three to four occasions, Appellant attempted to insert his own penis into C.T.’s anus, Appellant performed oral sex on C.T., Appellant had C.T. perform oral sex on him, and Appellant had C.T. touch Appellant’s penis. When Appellant attempted to insert his own penis into C.T.’s anus, C.T. stated his anal cavity was too small for Appellant’s penis. These acts comprised Counts One through Six of the Indictment.”

“Appellant molested A.C. when A.C. was 8 years old. Appellant inserted his penis into A.C.’s anus and inserted his finger into A.C.’s anus. These acts comprised Counts Sixteen and Seventeen of the Indictment.”

In a number of the incidents, Taylor photographed the children nude, according to prosecutors. “Appellant molested A.M. before A.M.’s tenth birthday,” the State’s briefs say. “Appellant touched A.M.’s penis when A.M. was at Appellant’s residence. Appellant touched A.M. three times before A.M. went swimming. Appellant also photographed A.M. when A.M. was nude, both before and after swimming at Appellant’s residence.” The State later introduced as evidence the photos of A.M. and others that were located as a result of the search warrant.

At issue in this appeal is the search warrant, and specifically, the affidavit that was signed to obtain the warrant.

Taylor was arrested on July 24, 2008. The same day, Detective D.M. King of the Gwinnett County Police Department applied for, and obtained, a search warrant for Taylor's home. Although the affidavit stated that the search would be conducted at 1751 Bergen Court in Lawrenceville, GA, it did not say that address was Taylor's. The issue is whether the warrant lacks probable cause because the affidavit executed by King did not establish a "nexus" – or connection – between the place to be searched and the suspect or the suspected criminal activity.

The warrant authorized the search at 1751 Bergen Court of cameras, computers, and electronic storage devices for evidence of child molestation and sexual battery. In 2009, Taylor was indicted for a number of crimes. In 2013, his attorney filed a motion to suppress the evidence obtained by the search warrant. The trial court denied the motion, ruling that since the affidavit included a specific address, "the issuing Magistrate Judge had a substantial basis for concluding that a sufficient nexus, or connection, between the items sought and the place to be searched, existed..."

Following a 2014 bench trial (before a judge with no jury), the judge found Taylor guilty of Aggravated Child Molestation (six counts), Aggravated Sexual Battery, Child Molestation (11 counts), Criminal Attempt to Commit Aggravated Child Molestation, Sexual Exploitation of Children (11 counts) and Sexual Battery. Taylor was sentenced to two consecutive life prison sentences plus 10 years. Taylor appealed to the Court of Appeals, and in October 2016, the appellate court affirmed his convictions. Taylor now appeals to the Georgia Supreme Court, which has agreed to review the case to answer this question: Must an affidavit that is executed to obtain a search warrant authorizing the search of a particular address explain why evidence of criminal activity is likely to be found at that address?

ARGUMENTS: "Georgia should follow the majority of jurisdictions that have decided this precise issue and held that a search warrant is fatally defective when the supporting affidavit fails to explain why evidence of criminal activity is likely to be found at the specific address to be searched," Taylor's attorney argues in briefs. "In her affidavit, Detective King provided absolutely no indication as to how 1751 Bergen Court was connected to 'Mr. Taylor,' 'the Taylor residence,' or the offenses that allegedly took place." Typically statements in the affidavit would say 1) that the address to be searched is the suspect's home and 2) how police learned that the suspect lives at the address, e.g. witness statements, utility records, etc. "Without this information, the Magistrate had no basis upon which to issue a warrant for the search of 1751 Bergen Court." As the Court of Appeals acknowledged in its opinion, there is no Georgia case that deals directly with this issue. However, six other jurisdictions have addressed this precise issue. "In four of these jurisdictions, the courts held overwhelmingly that where a supporting affidavit fails to explain why evidence of criminal activity is likely to be found at the specific address to be searched, the search warrant is fatally defective," Taylor's attorney asserts. The state Supreme Court should reverse Taylor's convictions and remand his case to the trial court for further proceedings.

The State, represented by the District Attorney's office, argues that "the courts should apply a common-sense approach to the search warrant application," just as the Georgia Supreme Court has "long instructed." The rule established by the Court of Appeals, which the State calls "the *Taylor* rule," is a "narrow rule that furthers the policy of common-sense decisions," the state

argues in briefs. Specifically the rule states: “When the affidavit 1) describes only one place connected to the suspect, such as a residence, and 2) lists the specific address to be searched, a connection between the address described where the evidence can be found and the probable cause outlined in the affidavit ‘is the only logical conclusion supported by a common-sense reading of the affidavit.’” “In setting forth the *Taylor* rule – that when a search warrant application describes one location and lists an address, then the connection or nexus between the two can be the only logical conclusion – the Court of Appeals looked to the Seventh Circuit Court of Appeals and the Supreme Court of New Mexico.” Taylor “manipulates and distorts the decisions in other jurisdictions to create the impression that Appellant’s position is the ‘majority view,’” the State argues. “In fact, a careful analysis of the cases cited by Appellant and the rule stated by the Court of Appeals reveals that only one court differs from the Court of Appeals’ rule, not four courts as cited by Appellant.” The affidavit here “establishes a nexus between Appellant, the location and the evidence likely to be found. If the Court finds that an affidavit must explain why evidence of criminal activity is likely to be found at that address, the search warrant at issue clearly so explains.” In her sworn statement to the Magistrate Judge, Detective King stated no fewer than six times that the reported crimes occurred at “the Taylor residence” and specified that the crimes occurred “in the bathroom” or other rooms. The detective concluded her statement asking “that the search warrant be granted so that **the crime scene** might be processed, photographed, and the evidence of the crime documented and seized.” “It is the most basic transitive logic that because Mr. Taylor’s house is the crime scene and that the crime scene is the Bergen Court residence, that Mr. Taylor’s house is the Bergen Court residence,” the State argues. “Thus, the nexus between Taylor’s residence and the Bergen Court residence is satisfied.” Even if the warrant affidavit does not establish an adequate connection, “the harm does not merit reversal of Appellant’s convictions,” the State argues, as “sufficient evidence remains to affirm Appellant’s convictions in twenty-one of the counts.”

Attorney for Appellant (Taylor): Bernard Brody

Attorneys for Appellee (State): Daniel Porter, District Attorney, Lee Tittsworth, Asst, D.A.

EJC6, LLC V. CITY OF JOHNS CREEK (S17A1598)

A developer is appealing a **Fulton County** court decision that backs the City of Johns Creek’s denial of the developer’s rezoning application. The developer is challenging the enforcement of a local ordinance as an unconstitutional taking of its property.

FACTS: In 2012, **EJC6, LLC** paid a bank \$850,000 for a 6.7-acre property in Johns Creek that was in foreclosure. The land was part of a 42-acre tract that a decade earlier, before the City of Johns Creek was incorporated, had been zoned as a “MIX District” by the Fulton County Board of Commissioners after the property owner successfully petitioned for rezoning. The rezoning application included a letter of intent and site plan indicating the intended use for each parcel of the tract. Upon incorporation, the City of Johns Creek adopted the County’s MIX zoning classification, which is now found in Section 8.2 of Ordinance 2010-05-08. The ordinance says that the MIX District “mandates a residential component of single-family dwellings, duplexes, triplexes, quadruplexes, townhouses, multifamily dwellings or any combination thereof along with at least two of the following: commercial, office or institutional uses.” The ordinance makes clear that construction in the MIX District is subject to certain conditions not in the zoning ordinance. These conditions are found in the site plan and letter of

intent, and under the conditions, EJC6's property is apparently zoned for an office development or residential use limited to 75 units. The property is adjacent to a hospital and office buildings, including medical offices.

In June 2013, EJC6 submitted an application to rezone its property to allow it to develop a 250-unit multifamily community with a small portion set aside for retail and general office use. EJC6 had a contract with an apartment builder who was going to pay \$7.5 million for the rezoned property. Following public meetings, the City's Planning Commission recommended approval, but the City Council denied EJC6's rezoning request.

In October 2013, EJC6 filed a lawsuit in Fulton County Superior Court, arguing that the City Council's decision was arbitrary and capricious and that the current zoning conditions "pose a substantial and insurmountable hardship on EJC6 without any public gain, and are therefore unconstitutional as applied." EJC6 also claimed that, "By refusing to grant EJC6's application, defendants are denying EJC6 reasonable economic use of the property," and their actions "therefore constitute a taking" of EJC6's property. The City's actions are unconstitutional because they "operate as a substantial detriment to EJC6," the developer claimed.

Following an October 2016 bench trial (before a judge with no jury), the judge signed an order denying EJC6 its requested relief. The judge explained that although EJC6 had shown that it would make "a tidy profit" if the property were rezoned, "There was no showing that the current zoning would yield a lower price than what it paid (i.e. generate an actual loss, rather than a lesser gain) or that the property had been sapped of all economic value." The judge found that the findings of EJC6's expert were significantly undercut by the testimony of the City's witnesses. Particularly compelling, the judge said, was testimony that there is currently a shortage of high-quality office space in Johns Creek, "making a commercial build-out on EJC6's property particularly attractive." Furthermore, the medical office building on the adjacent parcel is at full occupancy, suggesting that an office building on EJC6's land "would in fact fare well." In conclusion, the judge said, EJC6 "has failed to provide clear and convincing evidence of significant detriment."

In February 2017, EJC6 filed a notice that it planned to file a direct appeal with the state Supreme Court. At the same time, it filed an application for a discretionary appeal. (Under the law, some appeals are automatically granted while for others, the appellate court has the discretion to accept or reject the application to appeal.) The state Supreme Court agreed to review the case, with particular interest in hearing arguments about whether a party seeking to appeal a superior court's ruling on an "inverse condemnation" claim is required to file a discretionary application if that claim is based on a local board's zoning decision. ("Inverse condemnation" is a legal term describing a government's taking of private property but failing to pay the compensation required by the Fifth Amendment of the Constitution, so the property's owner has to sue to obtain proper compensation.)

ARGUMENTS: EJC6 was not required to file an application to appeal the superior court's decision, the developer's attorneys argue. Since the Georgia Supreme Court's 1989 decision in *Trend Development Corp. v. Douglas County*, this Court has clarified that a direct appeal is proper where "a zoning case does not involve superior court review of an administrative decision." However, an appeal of a constitutional issue, such as this appeal, is the first time a court sits in an appellate position, and therefore the underlying dispute is being reviewed for the first time. Therefore, EJC6 is entitled to a direct appeal because it filed this

lawsuit in the trial court alleging that the zoning ordinance is unconstitutional as applied. Also, the trial court erred in finding that EJC6 did not suffer a significant detriment from the zoning ordinance, the attorneys argue. A zoning classification is unconstitutional as applied and must be declared void when “the damage to the owner is significant and is not justified by the benefit to the public.” Finally, the trial court erred in failing to find that the zoning ordinance is not related to the public health, safety, morality or welfare of the City, the developer’s attorneys argue.

Attorneys for the City of Johns Creek argue that in its 2017 decision in *Schumacher v. City of Roswell*, the Georgia Supreme Court ruled that a stand-alone lawsuit challenging an ordinance as invalid, when it is not connected to a determination about a particular property, is not a “zoning case” and does not require a discretionary application. However, the *Schumacher* decision did not alter the longstanding rule that “zoning cases” must come to the appellate courts by way of application, and this is a zoning case. Also, generally a plaintiff can establish a significant detriment with “clear and convincing evidence of a substantial decrease in the value of the property” for its use of the property as it has been zoned. Here, EJC6 put forth no evidence of the property’s current value as compared to when it was initially purchased, and the evidence showed it made no attempts to market the property for the use permitted by the zoning, the attorneys argue. Finally, as this Court has previously ruled, it is presumed that the City’s zoning classification is substantially related to the health, safety, morality, and general welfare of the public. EJC6 did not meet its burden of overcoming this presumption by clear and convincing evidence, the City’s attorneys argue.

Attorneys for Appellant (EJC6): Aaron Kappler, D. Andrew Folkner, Christine Lee

Attorneys for Appellee (City): Dana Maine, Connor Bateman

SMITH V. THE STATE (S17A1490)

A man convicted in **Fulton County** of killing his wife by shooting her in the back of the head is appealing his conviction and life prison sentence.

FACTS: Orlando and Demetra **Smith** were married in Las Vegas in February 2010 and lived in an apartment on DeLowe Drive in Atlanta. According to prosecutors with the State, Orlando was very controlling and abused his wife, prohibiting her from talking on the phone or going anywhere without him. One of Demetra’s friends said he would choke her if she used the telephone. The friend said she once accompanied Demetra to the hospital after the couple got into an altercation. At one point, Demetra asked another friend, Ali Hassan, for money so she could go to a hotel for the night to get away from her husband. After that, she rented a storage room and gradually began moving her belongings out of the apartment, hoping he would not notice. On May 24, 2010, Demetra told Hassan she could not remain any longer with Orlando. Hassan later testified that he told her she was welcome to stay with his family. She said she needed to go back to the apartment to get more of her things, but she would be back. Hassan never saw her again. Hassan also testified that although Demetra regularly carried a gun, she told him she was missing her gun that day. Around 6:30 p.m., a neighbor who lived next door to the Smiths, saw both Orlando and Demetra at the apartment.

According to prosecutors, sometime between midnight and 1:00 a.m. on May 25, Orlando took his wife’s semi-automatic pistol and shot her in the back of the head, killing her. The bullet that killed Demetra was fired from a Beretta or a Taurus pistol, both of which have the same rifling structure. Demetra owned a .40 caliber Taurus pistol, but her pistol was never recovered.

According to the State, before leaving the crime scene, Orlando set off the apartment alarm, then went to his daughter's house. Police arrived at the apartment, but found no sign of forced entry and did not enter the apartment. The next morning, the couple's daughter told her father she had to go to school. He told her to stay with him, and if anyone asked, to say he had been with her since 5 p.m. the previous evening. Orlando then drove his daughter back to the apartment and while he went inside, she waited outside. He called his daughter into the apartment, and she then called 911. Police found Demetra dead from a close-range bullet that had entered through the back of her head and exited through the forehead. After obtaining a search warrant, Atlanta Police Sergeant Liane Lacoss found the victim's wedding ring and a bloody wash rag in the sink. At the time, police had no suspects and no sign of a burglary. Police asked the father and daughter to come to the police station to talk.

At the station, Orlando said he had been with his daughter since 5 p.m. the day before. In a separate interview, the daughter said the same thing, but later told investigators that her father came to her place around 2:00 a.m. but had told her to say he had been with her since 5 p.m. She said he had changed clothes since he first came to get her. She subsequently helped police retrieve an orange bag her father had her throw out the car window on their way to the apartment. Inside, investigators found Orlando's jeans with blood on them that was later determined to be Demetra's. Police also obtained phone tower records showing that Orlando had made calls between 5 p.m. and 1:30 a.m. at or near the apartment where Demetra was killed. Witnesses confirmed that he was at their apartment after 5 p.m.

A Fulton County grand jury indicted Orlando Smith for malice murder, felony murder, aggravated assault and gun charges. Following an October 2011 trial, the jury convicted Smith of all charges except malice murder and aggravated assault. He was sentenced to life in prison plus five years for the gun charges. Smith now appeals to the Georgia Supreme Court.

ARGUMENTS: Smith's attorney argues that key evidence was obtained in violation of Smith's Fourth Amendment rights, the exclusion of which would have altered the outcome of the trial. The search warrant obtained by Atlanta police to search his apartment did not satisfy the "particularity" requirement of the Fourth Amendment. "The first search warrant is invalid on its face because it failed to state with particularity the items to be seized," the attorney argues in briefs. The initial search, based on a warrant that lacked any specified probable cause that evidence of a crime would be found, recovered wedding rings in the sink with blood on them, as well as a shell casing. That led to further search warrants for subsequent searches of electronics, which subsequently led to a photograph of Smith holding a gun. "The outcome of the trial would have been different had the wedding rings and the photograph of Appellant [i.e. Smith] holding a gun been excluded." Furthermore, the State's firearms expert's testimony did not establish that either of the firearms depicted in the photograph was the murder weapon. The photograph is therefore inadmissible, the attorney argues, as it is not relevant and it is "extraordinarily prejudicial," or damaging to Smith's case. "The image of Appellant brandishing a weapon during a murder trial involving the shooting death of his wife is a damning one that must have inflamed jurors, raising an impermissible risk of a verdict based on emotion rather than evidence," Smith's attorney argues. The trial court also erred when it admitted "inadmissible and unreliable hearsay statements from witnesses whose statement lacked trustworthiness." Ali Hassan made "highly prejudicial statements" characterizing Smith "as violent, aggressive, controlling, drug-dealing," and describing alleged acts of domestic violence perpetrated by Smith against his wife. The trial

court also erred in denying Smith's motion for a mistrial after the jury heard inadmissible hearsay statements identifying Smith as a drug dealer. Finally, the evidence was insufficient to convict Smith of felony murder and gun possession, his attorney contends. "Here, the jury clearly had reasonable doubt as to whether the lone individual was in fact the defendant, as is evidenced by the acquittal of Appellant for murder and aggravated assault."

The State, represented by the District Attorney's and Attorney General's offices, argues that the trial court properly admitted evidence found based on the search. Procedurally, Smith failed to bring this issue up at the trial court level, and therefore he may not bring it up for the first time on appeal. Regardless, the argument that the warrant lacked particularity is without merit because "the warrant was particular enough to cover the items at issue, specifically the bloody wedding ring," the State argues. Also, the picture of Smith holding the gun was highly relevant evidence. In response to the defense attorney arguing at trial that the photo should be excluded as irrelevant, the prosecutor responded that, "What you see there in [the photograph] is him holding the gun that the State believes was used in the murder of Demetra Smith in the room that she was murdered in. I don't know how much more – I mean, it is very probative [i.e. tends to prove] that he is holding the murder weapon." The trial court did not abuse its discretion by admitting the hearsay testimony of Ali Hassan and others about Smith's relationship with his wife and his treatment of her. "The statements were material to show a pattern, the State showed she confided in the hearsay witnesses, and the statements were material and reliable," the State's attorneys argue. The trial court also properly denied the motion for mistrial following a witness's fleeting reference to Smith selling drugs. The judge made clear to jurors that Smith was not under suspicion of being a drug dealer. Finally, "There was more than sufficient evidence for a rational trier of fact to find Appellant guilty," the State contends.

Attorney for Appellant (Smith): Jessica Seares, Office of the Public Defender

Attorneys for Appellee (State): Paul Howard, Jr., District Attorney, Lyndsey Rudder, Dep. D.A., Joshua Morrison, Sr. Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., S. Taylor Johnston, Asst. A.G.