



Supreme Court of Georgia

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SUMMARIES OF OPINIONS

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GOLDSTEIN, GARBER & SALAMA, LLC V. J.B. (S16G0744)

The Supreme Court of Georgia has reversed a Georgia Court of Appeals decision in a lawsuit against an Atlanta-area dental practice brought by a young woman who was sexually assaulted by a male nurse anesthetist while she was sedated.

With today's unanimous ruling, the high court has ruled that the **Fulton County** court erred in denying the dental clinic's motion asking the court to direct a verdict in its favor. Because the Court of Appeals upheld the trial court's ruling, it too erred, "and its judgment must be reversed," **Chief Justice P. Harris Hines** writes for the court.

According to briefs filed in the case, on Sept. 16, 2009, 18-year-old J.B. underwent a dental procedure at the offices of Goldstein, Garber & Salama, a dental clinic. In one phase of the procedure, Dr. Maurice Salama surgically installed a post for a tooth implant. Paul Serdula, a Certified Registered Nurse Anesthetist, administered anesthesia to J.B. In a subsequent phase, Dr. David Garber placed a temporary dental prosthetic device in place of the future implant. Between the conclusion of Salama's surgical procedure and the beginning of Garber's cosmetic procedure, Serdula kept J.B. in a heavily sedated state for about two hours. At some point, she was left alone with Serdula, who made three brief video recordings with his cell phone showing him sexually molesting her. The videos of J.B. were later discovered when Serdula's cell phone was found hidden under a bathroom sink where it had been recording employees using the restroom. Examination of the phone also revealed videotapes of Serdula sexually molesting other anesthetized female patients, including a 15-year-old girl, according to the briefs. Serdula eventually pleaded guilty to numerous charges, including aggravated sodomy and aggravated child molestation, and he was sentenced to life in prison.

J. B. sued the dental clinic, claiming among other things that Goldstein, Garber & Salama was liable for negligence and the infliction of emotional distress. The case proceeded to trial, where the plaintiff's expert witnesses presented evidence that the dental practice had violated statutory requirements for dentists supervising certified registered nurse anesthetists and had violated standards of care for monitoring patients under anesthesia. The trial court denied the dental clinic's motion asking the judge to direct a verdict in its favor on J.B.'s claims of medical malpractice and negligence, and the jury awarded \$3.7 million to J.B. The jury apportioned 100 percent of the liability to the dental clinic and none to Serdula. (While J. B. had initially sued Serdula, she dismissed him from the suit after he pleaded guilty and was sentenced to prison.) The dental clinic appealed, but in a split 4-to-3 vote, the Georgia Court of Appeals upheld the trial court's ruling. The clinic then appealed to the Georgia Supreme Court, which agreed to review the case.

In today's opinion, the high court has reversed the Court of Appeals' decision on two issues. The Court of Appeals found there was evidence that the dental clinic breached its duties to follow professional standards regarding the extent to which J.B. was anesthetized and supervised. But "in order to recover for any injuries resulting from the breach of a duty, there must be evidence that the injuries were proximately caused by the breach of the duty," the opinion says. (A "proximate cause" is a cause without which the event would not have occurred and one that is legally sufficient to result in liability.) "As this Court has stated, when a defendant claims that its negligence is not the proximate cause of the plaintiff's injuries, but that an act of a third party intervened to cause those injuries, the rule is that an intervening and independent wrongful act of a third person producing the injury, and without which it would not have occurred, should be treated as the proximate cause, insulating and excluding the negligence of the defendant." However, "this rule does not insulate the defendant 'if the defendant had reasonable grounds for apprehending that such wrongful act would be committed.'" In this case, there is no question that the injuries to J.B. would not have occurred without Serdula's criminal acts. "Thus, the question is whether Serdula's intervening criminal acts were foreseeable" to the dental clinic. The fact that the dental profession is aware that sexual assaults of sedated patients can possibly occur does not alone convert the dental clinic's alleged breach of its duty to properly supervise Serdula into liability on the clinic's part, the opinion says. Rather, for that breach to be considered the cause of J.B.'s injuries, "Serdula's criminal acts must be the 'probable or natural consequences' of that breach, and it must be the case that those criminal acts could 'reasonably have been anticipated, apprehended, or foreseen' by Goldstein, Garber & Salama. The evidence here simply does not show that Serdula's acts can be so considered," the opinion says. As a result, the trial court should have granted the dental clinic's motion for a directed verdict, and "it was error for the Court of Appeals to hold otherwise."

Also at issue is the statute that governs when dentists may administer general anesthesia. J.B.'s negligence claim rested upon the clinic's violation of permitting requirements under that statute, Georgia Code § 43-11-21.1. "Although J.B. falls within the class of persons intended to be protected by § 43-11-21.1, the question is whether sexual assault is the type of harm the statute is intended to guard against," today's opinion says. While the Court of Appeals ruled it was the type of harm the statute is intended to guard against, "We disagree," today's opinion says. "Rather, the language of § 43-11-21.1 shows that its concern is to avoid medical

complications that may arise in a dental setting from improper use of anesthesia due to improper training and experience, or inadequate equipment.”

“Accordingly, the Court of Appeals also erred in denying Goldstein, Garber & Salama’s motion for directed verdict on the issue of negligence per se, and must be reversed on this basis as well.”

With today’s decision, it is unnecessary for the Court to address any question regarding the jury’s allocation of 100 percent of liability to the clinic and none to Serdula, the opinion points out.

Attorneys for Appellant (Goldstein, Garber & Salama): H. Lane Young, Matthew Barr, Jonathan Freiman, Tadhg Dooley

Attorneys for Appellee (J.B.): William Bird, Paul Hotchkiss, Michael Regas, II, Jenifer Jordan

SMILEY V. THE STATE (S16A1597)

The Supreme Court of Georgia has unanimously upheld the murder, aggravated battery and first degree cruelty to children convictions of Marcus Bernard Smiley, for permanently injuring the baby of one woman he dated and killing the baby of another woman he dated, all within months of each other.

According to briefs filed in the case, in June 2013, Smiley began dating Amanda Mitchell, who had three young children, including 7-month-old Tyre Mears. The two had known each other for years, and they began to date when Mitchell moved back to Cairo in **Grady County**. On June 4, Smiley babysat Mitchell’s children for about 45 minutes while she ran errands. In the middle of the night, Mitchell awoke after thinking she heard a cry. Both Smiley and Tyre, who had been sleeping in her room, were gone. Mitchell called out for Smiley, who returned with the baby, saying he had picked him up upon hearing him cry. The next day, Mitchell noticed bruises on Tyre’s stomach and buttocks, so she took him to the doctor. The doctor concluded one bruise seemed consistent with being made by a finger and since the bruises did not come from any disease or test, the doctor surmised that something had happened to the baby. Because of the possibility that someone might be hurting Tyre, Mitchell agreed to talk to a Department of Family and Children’s Services caseworker. Mitchell called the agency from the doctor’s office and made an initial report, but the agency never followed up on the report.

On June 13, Mitchell took Tyre to stay with his godmother, who often babysat him. She noticed he was acting abnormal, jerking his head and grabbing his ear. She took him to the emergency room, where he was diagnosed with an ear and throat infection. While still at the hospital, Mitchell and Smiley arrived, and when Smiley held the baby, Tyre cried and struggled against him until his godmother took him. Two days later, Smiley again babysat Tyre for several hours while Mitchell’s other two children stayed with Mitchell’s mother. When Mitchell returned, the baby was asleep and slept for an unusual length of time that day. Later, during the night, Mitchell noticed red marks on the right side of Tyre’s face, as well as marks on his rib cage and bruises on his abdomen. The next day, Tyre was cranky and clingy, but Mitchell assumed it was due to the earlier ear infection. On Monday, June 17, Tyre’s godmother again came and took Tyre to care for him. She noticed he was lethargic and not behaving normally. She also determined his head was swollen and “spongy,” so she again took him to the hospital. There physicians concluded that Tyre had suffered multiple skull fractures and rib fractures. Mitchell was contacted and went to the hospital, where law enforcement officers questioned her.

Initially, she speculated that her 3-year-old son may have caused the baby's bruises and also stated she'd seen him fall. When told such an incident would not have caused such severe injuries, she admitted she hadn't seen him fall and stated she believed Smiley may have caused the injuries. She later told an investigator she had been evasive in earlier interviews because she loved Smiley, thought she was pregnant with his child, and did not want people to think she was a bad mother for failing to protect her 7-month-old. As a result of his injuries, Tyre has severe neurological issues and motor function delays, according to the briefs. He can only say a few words, including the word, "help," and recently he was diagnosed with stage two autism.

Once Mitchell ended her contact with Smiley, he began dating Courtney Williams in early September 2013. Williams had a 2-month-old baby girl, Mia, and a 5-year-old, and Smiley often babysat them. Neither Mia nor Williams' other child had ever had any health issues or injuries, although the older child had been hospitalized once for asthma. Smiley frequently stayed overnight, and shortly after he came into their lives, Mia became increasingly fussy, difficult to feed, and often spit up her milk. On Sept. 25, while Williams was in the kitchen cooking, Smiley was alone in the front room with Mia. When the baby suddenly screamed, Williams ran in but Smiley said something must have startled the infant. Williams rocked her back to sleep with a bottle, but later that night, Mia became especially fussy. When she started twitching her head and exhibiting seizure-like movements, Williams called 911. When paramedics arrived, Mia had calmed down and her vital signs seemed normal, so Williams decided not to have her transported to the hospital. Smiley remained in the back bedroom the whole time paramedics were there. On Sept. 30, in the middle of the night, Williams awoke and noticed that Smiley and Mia were missing from her bedroom. She found them in the living room where Smiley said he had picked up the baby because she'd been crying. The next morning, after getting her older child ready for school, Williams found Mia moaning in her crib. The baby's head was arched back, her eyes wide open, and her hands balled up at her sides. She asked Smiley what he had done to the baby, and he denied hurting her. Williams called 911, and an ambulance took her to the hospital. Soon after she arrived, doctors decided to have her transported by Life Flight to Tallahassee Memorial Hospital. There doctors determined Mia had incurred trauma within the last 24 hours and that the injuries were caused by abuse rather than an accident. The baby had bleeding in her brain that was significantly more extensive than what was seen with Tyre, and her prognosis on intake was grim. She remained at the hospital for three days and was on life support for two. Life support was then removed and Mia died in her mother's arms. Smiley had not visited them in the hospital. The autopsy showed that Mia had retinal hemorrhages consistent with being squeezed so hard that the blood vessels in her eyes had burst. She had multiple rib fractures, also consistent with squeezing. Her head injuries were consistent with violent movement and violent impact of the head, and her death was ruled a homicide. During the investigation into her death, Williams shared her suspicion that Smiley had caused her 2-month-old baby's injuries. An investigator interviewed Smiley about Mia's death as well as Tyre's injuries. Smiley said he had no idea how either baby had been injured. After Mia's death, Smiley repeatedly went to Williams' home and threatened to kill her for accusing him of killing Mia. Twice, Williams called police.

Following a trial in March 2015, the jury convicted Smiley of malice murder, felony murder, cruelty to children in the first degree and aggravated battery for the death of Mia Williams and the aggravated battery of Tyre Mears. He was sentenced to life without parole. He

then appealed to the state Supreme Court, arguing that the evidence presented at trial did not exclude the possibilities that the death of Mia and the injuries to Tyre were caused by their mothers, by unknown persons, or by accident.

In today's opinion, written by **Chief Justice P. Harris Hines**, the high court disagrees. "There was evidence regarding Smiley's movements and behavior toward the victims at the relevant times, his behavior when paramedics arrived at Williams' home, his conduct after the injuries were inflicted upon the infants, and his behavior when discussing the infants' injuries with an investigator," the opinion concludes. "The evidence presented at trial authorized the jury to find Smiley guilty beyond a reasonable doubt of each of the crimes of which he was found guilty."

(Because the crime of aggravated battery against Mia should have been merged into the malice murder of Mia for sentencing purposes, the trial court erred by sentencing Smiley separately for that count of aggravated battery. With today's opinion, the high court has thrown it out.)

Attorney for Appellant (Smiley): Ronald Parker

Attorneys for Appellee (State): Joseph Mulholland, D.A., Moruf Oseni, Asst. D.A., Samuel Olens, former Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Meghan Hill, Asst. A.G.

JONES V. THE STATE (S16A1742)

In another baby killing, the Supreme Court of Georgia has upheld the **Glynn County** conviction of Daryl Keon Jones for the murder of his girlfriend's 17-month-old daughter by repeatedly slamming her head against the floor.

In today's unanimous opinion, written by **Justice Michael Boggs**, the court finds that the evidence "was sufficient to authorize a rational jury to find beyond a reasonable doubt that Jones was guilty of the crimes of which he was convicted."

According to briefs filed in the case, in October 2008, Kimberly Hester and her baby girl, 17-month-old Brianna Hester, moved into the apartment of Kimberly's boyfriend, Daryl Keon Jones, in Brunswick, GA. Also living there were Jones' three children from a previous relationship, including his son, 8-year-old A.J. On April 30, 2009, Kim's father, Glenn Hester, went to Jones' apartment to visit his granddaughter and stayed about three hours. He later testified Brianna seemed fine, although he did notice bruising above the toddler's right eyebrow and on the top of her head. He had been concerned for a while about Brianna's "constant bruising" and even had sent an email to his daughter and Jones the week before. Sometime after Hester left, Kim Hester left to attend an evening class at a school in Jacksonville, FL, leaving Jones alone in the apartment with Brianna and his three children. The older children were playing outdoors. Jones' son, A.J., later testified that when he came back inside, he saw his father hit Brianna's head on the ground in the living room five or six times. He testified that he had seen his father choke the baby and hit her head on the floor before, but he had not told anyone because he was scared. A.J. said he went to his room but came back when he heard a "big boom." He saw Brianna "on the ground and she wouldn't blink and her eyes were open." Brianna was transported by ambulance from the hospital in Brunswick to Memorial Hospital in Savannah where she was admitted by a pediatric intensivist, Dr. Mary Carol Lytle. When Brianna arrived at the hospital, she was still breathing but was "nearly brain dead," according to

Dr. Lytle. The physician later testified that a CT scan of the baby's head showed massive cerebral swelling and bleeding and that the baby "would have had to take multiple, repetitive beatings to the head" to cause the injuries she observed in her brain. She said the bleeding was the type she had seen in cases involving abuse or "very, very high speed car accidents where a child has been ejected and rolled." Dr. Lytle also observed bruises around Brianna's ears, face, and scalp, as well as retinal bleeding, usually caused by repetitive back-and-forth force. While Jones and Kimberly Hester said the baby had a history of falling, Dr. Lytle testified that Brianna's injuries were not consistent with those sustained in a normal fall or household accident. Rather, she testified they were consistent with her head being slammed repeatedly into a flat surface. After life-saving measures were discontinued with the mother's agreement, within a few moments, Brianna died.

The Georgia Bureau of Investigation forensic pathologist who performed the autopsy testified he found 58 external injuries, primarily bruises – 36 of which were on the child's face and head. Most were recent but some were in the healing stage. An internal examination revealed that the right side of the baby's brain was flattened, and the corpus callosum, which connects the two hemispheres of the brain, was completely severed. There was also hemorrhaging along the baby's optic nerves and retina. He too concluded that Brianna's collective injuries were caused by trauma and could not have been caused by an underlying medical condition. He listed the cause of death as multiple blunt force injuries.

Jones testified at trial and denied killing Brianna, claiming that he would have been physically unable to hurt her because he was weak from having had dialysis that morning. He also suggested that his wife from whom he was getting a divorce had told A.J. to say that Jones killed Brianna, and he implied that A.J. was responsible for the baby's death. His attorney hired a medical expert who reviewed the results of Brianna's autopsy and testified her injuries were caused by cerebral venous sinus thrombosis (CVST), a rare medical condition that affects six in 1 million children a year.

Jones was indicted by a grand jury for three felonies: malice murder, felony murder while committing cruelty to children, and cruelty to children. Each charge in the indictment stated Jones committed it "by inflicting multiple blunt force injuries to her head and face." At a December 2010 trial, the jury acquitted Jones of malice murder but could not reach a verdict on the other two charges, and the judge declared a mistrial. In February 2012, Jones filed a "plea in bar" to prevent the State from retrying him on the felony murder and child cruelty counts, arguing that would constitute double jeopardy. The judge denied his plea. In August 2012, Jones was retried by another jury and found guilty of felony murder and cruelty to children. He was sentenced to life in prison. After his motion requesting a new trial was denied, Jones appealed to the Georgia Supreme Court.

On appeal, his attorney argued that the trial court erred in denying his "plea in bar" because double jeopardy prohibited his retrial. Because the jury acquitted Jones of malice murder, it necessarily determined "the issue of ultimate fact" – that he did not inflict "multiple blunt force injuries to the head and face" of Brianna, the attorney argued. Therefore, he could not be retried for the other two offenses that allege the same fact.

In today's opinion, the Georgia Supreme Court has rejected Jones' argument. In light of evidence that Jones attempted CPR to prevent the baby's death and testified that he loved her, a rational jury could have based its acquittal of malice murder in the first trial "on a finding that

Jones did not have ‘malice aforethought,’ or an intent to kill B.H.,” the opinion says. However, “we conclude that Jones has not met his burden of proving that whether he ‘inflict[ed] multiple blunt force injuries to [the] head and face [of B.H.]’ was ‘actually and necessarily decided in his favor,” so double jeopardy did not prohibit his retrial.

“Judgment affirmed,” the opinion concludes. “All the Justices concur.”

Attorney for Appellant (Jones): James Yancey, Jr.

Attorneys for Appellee (State): Jackie Johnson, District Attorney, Andrew Ekonomou, Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Aimee Sobhani, Asst. A.G.

THE STATE V. TROUTMAN (S16A1858)

Under a ruling today by the Georgia Supreme Court, when Andrew Troutman goes on trial in **DeKalb County** for the murder of Earl Clemons, there is a strong chance jurors will never hear that during a police interrogation, he confessed to the crime.

In today’s unanimous opinion, written by **Justice Carol Hunstein**, the high court has upheld a DeKalb County judge’s ruling that because Troutman was in police custody but had not been read his *Miranda* rights when he made his incriminating statement, it cannot be introduced as evidence except in very limited circumstances. At the same time, the Supreme Court has reversed the trial judge’s ruling that the statement was “involuntary,” which would prohibit the statement coming in as evidence under any circumstance.

According to the facts at trial, detectives investigating the stabbing death of Clemons discovered through phone records that the day he was killed, he may have met with Troutman, a 21-year-old who was still in high school and had learning disabilities. In January 2014, detectives picked up Troutman at his home and transported him to the DeKalb Police Department headquarters, telling him they were hoping to gather information from him. He rode in the front seat of a passenger vehicle driven by plain-clothes detectives. He was not in handcuffs and was not considered a suspect. Because he was not considered a suspect, he was never advised of his *Miranda* rights. (“You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you.”) Troutman intimated that he knew he was not under arrest at the time he was transported to the police station and that he knew he could have refused to go with the officers. But he indicated that if he had refused, that would have made him seem more suspicious and “stupider.”

During his interviews, Troutman told investigators that he was dyslexic and had a special education plan at school, although he later bragged that he was very intelligent for someone with learning disabilities. During the approximately nine hours that he was at police headquarters, investigators conducted three separate interviews in three different interview rooms. (Switching rooms is considered an “interview technique.”) The three interviews lasted a total of about 2 hours and 45 minutes and were audio recorded. Troutman said that early on, one of the detectives asked for and kept his cell phone. He said that between two of the interviews, a second detective also asked for and kept his shoes. And he said that he had advised the detectives he had not slept in days, had not showered, and had not had anything to eat or drink. Twice during the interviews, Troutman told them he wanted to call his mother. Those calls never occurred. During the second interview, he asked how long it would be before he could go home. Hours to days? The detective

answered, “I don’t see days. A little while longer.” During the same interview, one of the detectives told him to follow him. “I can go?” Troutman asked. “No,” the detective replied. “We’re changing rooms.” It was during the third interview, after giving incomplete and inconsistent information in the first two interviews, that Troutman made incriminating statements, first stating that he had seen the stabbing, then acknowledging that he had stabbed Clemons with a razor during a struggle.

Following his indictment for murder, Troutman’s attorney filed a motion to suppress his statements when the case goes to trial. Following a hearing, the trial court granted Troutman’s motion and entered two orders. In the first, the trial court concluded that Troutman was in fact in custody before the start of the third interview and that Troutman’s subsequent incriminating statements were made without the benefit of being advised of his *Miranda* rights. In the second, the trial court concluded that Troutman’s confession was involuntary because it was the result of police coercion. Specifically, the trial court found: “Defendant was interrogated for 2 hours and 45 minutes, held at the police station for nearly 9 hours, was held incommunicado throughout, had his phone and shoes removed by police, was kept in isolation in a non-public area of the police headquarters and, on two occasions, was told that he was not free to leave on his own. Moreover, he was 21 years old and still in high school, was dyslexic and told detectives he had not slept in three days.” The State then appealed to the Georgia Supreme Court.

In its appeal, the State – represented by the DeKalb County District Attorney’s office – argued that *Miranda* warnings were unnecessary because Troutman was not in custody.

“We disagree,” today’s opinion says.

A person is considered to be in custody and *Miranda* warnings are required when the person is 1) formally arrested, or 2) restrained to the degree associated with a formal arrest, the opinion says. Here, the record supports the trial court’s findings that Troutman was kept at the station for nearly nine hours; that he was never advised of his rights or told he was free to leave; and that he was explicitly told he could not leave. Given these circumstances, “we cannot say that the trial court erred in its determination that a reasonable person in Troutman’s position would have believed that he was in custody before the start of the third interview and thus, that Troutman’s unwarned statement given during that third interview was due to be suppressed.”

However, the high court agrees with the State that these facts are insufficient to conclude that Troutman’s statement was involuntary under constitutional due process standards. A statement that is involuntary cannot be used at trial for any purpose, while a statement that was not “*Mirandized*” may be used in limited circumstances, such as to “impeach” the defendant or challenge his credibility.

“Coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause of the Fourteenth Amendment” of the Constitution, today’s opinion says, quoting the 1986 U.S. Supreme Court ruling in *Colorado v. Connelly*. “However, the investigators’ mere failure ‘to administer *Miranda* warnings does not mean that the statements received have actually been coerced, but only that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised.” Therefore, statements obtained in violation of the *Miranda* requirements may be found voluntary under due process standards. In this case, “the circumstances of the investigation and arrest in the case reveal none of the extreme tactics identified as the hallmarks of coercive police activity offensive to fundamental notions of due process,” the opinion says. They are hallmarks that he

was in *custody* and his freedom was restrained, but they do not rise to the extreme tactics of coercive police activity such as physical deprivation, brutality or deception that are calculated to break the will of the suspect. “Accordingly, the trial court’s findings of fact regarding the conduct of investigators in this case are insufficient to support the legal conclusion that Troutman’s statement was a result of coercive police activity and thus involuntary,” the opinion says.

Attorneys for Appellant (State): Sherry Boston, District Attorney, Lenny Krick, Asst. D.A.
Attorney for Appellee (Troutman): Timothy Cook, Office of the Public Defender

SOUTHERN STATES-BARTOW COUNTY, INC. ET AL. V. RIVERWOOD FARMS HOMEOWNERS ASSOCIATION ET AL. (S16A1716)

A company’s plan to construct a landfill in **Bartow County** has cleared another legal hurdle under a ruling today by the Supreme Court of Georgia.

In today’s unanimous opinion, the high court has reversed a Bartow County court decision that found that the right of Southern States-Bartow County, Inc. to build the landfill on its property had lapsed under a local zoning ordinance.

“Because the zoning provision is unconstitutional as applied to Southern States, we reverse the judgment of the trial court and remand for proceedings consistent with this opinion,” **Justice Carol Hunstein** writes for the court.

The facts of the case date back 30 years. According to briefs filed in the case, Southern States owns a tract of property near the intersection of Euharlee Road and Hodges Mine Road in unincorporated Bartow County. In 1989, Southern States applied to the Georgia Environmental Protection Division for a permit to operate a sanitary waste landfill. Less than a year later, Southern States requested that Bartow County issue a certificate of land use approval, which the State required before issuing a permit. The County denied the request, stating that the zoning ordinance then in effect did not allow a landfill on the site. Southern States sued the County but before that case was resolved, the Georgia Supreme Court ruled in another Bartow County case that the zoning ordinance in effect had to be thrown out because it failed to follow minimum procedures set out in Georgia’s Zoning Procedures Act. Following the Supreme Court’s ruling, in 1993, the County adopted a new zoning ordinance. Section 6.1.4 of that new ordinance stated: “Any intended non-conforming use for which a vested right was acquired prior to the adoption of this ordinance...shall be prohibited unless such is actually commenced within one year of the adoption of this ordinance...” In 1994, the Bartow Superior Court ruled in Southern States’ favor, finding that, “Plaintiffs have a vested right to obtain a certificate of the right to use their real property without county land use restrictions...” Two months later, Southern States requested and obtained a zoning certification letter from the County’s zoning administrator to give to the Environmental Protection Division as part of its landfill permit application. However, according to the County and nearby property owners, it was another eight years before Southern States in 2002 gave the “go-ahead...to proceed with a full hydrogeological site assessment, wetland evaluations, and other work necessary to move the pending solid waste application forward through the Environmental Protection Division landfill permitting process.” Eventually, in 2013, the Environmental Protection Division issued a solid-waste handling permit to Southern States, allowing the development of the landfill to go forward.

In May 2013, the Riverwood Farm Property Owners Association, a group of private property owners near the proposed landfill site, sued Southern States, asking the court to order the company not to go forward with the landfill until they could get a hearing on whether the site was “suitable for a landfill and would cause irreparable harm should such permit be granted.” The property owners argued that under section 6.1.4 of the zoning ordinance, Southern States’ vested right as recognized by the court in its 1994 order expired as a result of the company’s failure to start using the property as a landfill within one year of the adoption of the ordinance. In response, Southern States filed a motion arguing that section 6.1.4 of the 1993 ordinance was unconstitutional. In December 2013, the Bartow Superior Court ruled that Southern States’ vested right to operate a landfill on the property had lapsed under section 6.1.4 of the ordinance as a result of the failure to begin using the property as a landfill. On appeal, the Georgia Court of Appeals upheld the ruling, but it remanded the case to the trial court to consider Southern States’ constitutional challenge to the ordinance. On remand, Southern States argued section 6.1.4 is unconstitutional because it violates the constitutional prohibition against the enactment of retroactive laws and it eliminates a vested right by legislative fiat even when the holder of that right does not consent. In February 2016, the trial court ruled that the 1993 ordinance was constitutional. Southern States then appealed to the Georgia Supreme Court, arguing the ordinance was unconstitutional as applied to them.

In today’s opinion, the high court agrees with Southern States and has reversed the trial court’s ruling. “Our Constitution prohibits a legislative exercise of the police power that results in the passage of retrospective laws which injuriously affect the ‘vested rights’ of citizens,” the opinion says. “This prohibition against retroactive impairment of vested rights extends to the enactment of zoning regulations, which is an exercise of police powers.”

In this case, section 6.1.4, enacted in 1993, affects “rights which accrued before it became operative,” and it “impairs vested rights acquired under existing laws or creates a new obligation,” the opinion says. “Here, the one-year requirement imposed by Section 6.1.4 is not a minimal condition on Southern States’ vested rights. Indeed, Section 6.1.4 acts to *eliminate* a previously acquired vested right if the non-conforming use is not commenced within one year – i.e., if the land is not actually *used* for the non-conforming purpose within that time frame.” That time limit under the ordinance applies regardless of the feasibility of using the land within that time frame. The evidence in this case “plainly established that commencing use of the Bartow County property as a landfill within the full year was simply unfeasible. Consequently, as applied, Section 6.1.4 is retrospective and injuriously impairs Southern States’ vested right to develop its land free from county use restriction.” As a result, “we are required to declare it unconstitutional as applied to Southern States, and the trial court erred in concluding otherwise,” the opinion says.

Attorneys for Appellants (Southern): David Flint, Mark Forsling

Attorneys for Appellees (Riverwood): Brandon Bowen, Sarah Martin

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

- * Timothy G. Cain (Richmond Co.) **CAIN V. THE STATE (S16A1725)**
- * Brandon Harrington (Crisp Co.) **HARRINGTON V. THE STATE (S16A1545)**
 (The Supreme Court has upheld Harrington’s murder conviction and life-without-parole prison sentence, but it has thrown out his armed robbery conviction due to insufficient evidence. Also, due to a merger error, the Supreme Court is remanding the case to the trial court to additionally sentence Harrington for burglary.)
- * Kajul Tawice Harvey (Clayton Co.) **HARVEY V. THE STATE (S16A1667)**
 (The Supreme Court has upheld Harvey’s murder conviction and life-without-parole prison sentence in connection with the death of her mother, but it has thrown out her conviction and sentence for hindering the apprehension of a criminal as she could not be convicted of both that crime and malice murder.)
- * Carol Hornbuckle (Tift Co.) **HORNBUCKLE V. THE STATE (S16A1439)**
- * Roy McKinney (Fulton Co.) **MCKINNEY V. THE STATE (S16A1509)**
- * Derrick L. Stanley (Laurens Co.) **STANLEY V. THE STATE (S16A1636)**
- * Tamario Wise (Fulton Co.) **WISE V. THE STATE (S16A1661)**

IN DISCIPLINARY MATTERS, the Georgia Supreme Court has **disbarred** the following attorneys:

- * Morris P. Fair, Jr. **IN THE MATTER OF: MORRIS P. FAIR, JR.**
(S17Y0815, S17Y0816)
- * Lawrence Edward Madison **IN THE MATTER OF: LAWRENCE EDWARD MADISON**
(S16Y1679)
- * Ted H. Reed **IN THE MATTER OF: TED H. REED**
(S17Y0420)

The Court has accepted a petition for voluntary discipline and ordered the **public reprimand** of attorney:

- * David J. Farnham **IN THE MATTER OF: DAVID J. FARNHAM**
(S17Y0531)

The Court has accepted a petition for voluntary discipline and ordered the **Review Panel reprimand** of attorney:

- * Gary Lanier Coulter **IN THE MATTER OF: GARY LANIER COULTER**
(S17Y0814)

The Court has **rejected a petition for voluntary discipline**, disagreeing with the State Bar's recommendation of a one-year suspension with conditions as an appropriate sanction for attorney:

* Shannon Briley-Holmes **IN THE MATTER OF: SHANNON BRILEY-HOLMES**
 (S17Y0668)

The Court has **rejected a petition for voluntary discipline**, disagreeing with the State Bar's recommendation of a Review Panel or public reprimand as an appropriate sanction for attorney:

* John Michael Spain **IN THE MATTER OF: JOHN MICHAEL SPAIN**
 (S17Y0010)

The Court has granted the application for **certification of fitness** to be readmitted to the Georgia Bar upon satisfaction of all other requirements to the following attorney, who was disbarred in 1999:

* Joseph Byron Ervin **IN THE MATTER OF: JOSEPH BYRON ERVIN**
 (S17Z0882)