



Supreme Court of Georgia

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SUMMARIES OF OPINIONS

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THE MERCHANT LAW FIRM, P.C. V. EMERSON, JUDGE ET AL. (S17A0039)

A law firm that sued a **Douglas County** judge to get copies of a court reporter's audio recordings has lost its appeal of the dismissal of its case under an opinion today by the Supreme Court of Georgia.

"Because all of the Firm's claims are barred, the trial court properly dismissed the Firm's complaint," Justice **Nels S.D. Peterson** writes for a unanimous court.

According to the record, in October 2015, attorney Ashleigh Merchant, in her capacity as a shareholder with the Merchant Law Firm, sent an email to Melinda Cantrell, a court reporter in Superior Court Judge David T. Emerson's courtroom in Douglas County. Merchant requested copies of audio tapes Cantrell had made during three preliminary hearings involving two criminal defendants Merchant was representing. Cantrell had made the recordings to help her prepare a certified transcript of the proceedings. The next day, Cantrell emailed Merchant and said she "ran this by Judge Emerson since this is not going to be a certified transcript from me. Judge Emerson said he would like for you to file a motion so this can be a formal request regarding a tape versus a certified transcript of a court proceeding." John Merchant, Ashleigh's law partner and husband, responded the same day to Cantrell's email, stating that "no such motion is needed, and any instruction that these tapes be withheld until a motion is filed (and presumably ruled upon) is contrary to the Court's rules and the long-established black-letter law in Georgia regarding the public's access to court records." On Oct. 11, 2015, Judge Emerson signed an order denying Ashleigh Merchant's request for copies of the tapes but making the

tapes available for her inspection. In the order, Emerson noted that “the court specifically will not require that Ms. Cantrell provide a copy of her recordings, and the court expressly orders that counsel is not allowed to record Ms. Cantrell’s recordings.” Two months later, the Merchant Law Firm sued Emerson, Cantrell and her court reporting firm, Ca-Bo Enterprises, Ltd. in Fulton County Court. In the complaint, the Merchant Law Firm sought a “writ of mandamus” to compel Emerson to order the court reporter to turn over copies of the tapes; a “declaratory” judgment, or a declaration by the court that the Merchants were entitled to copies of the audio recordings; and “injunctive” relief, also to compel the court reporter to provide copies of the tapes. Emerson and Cantrell filed motions asking the Fulton County Superior Court judge to dismiss the law firm’s lawsuit. Following a hearing, in May 2016, the Fulton judge entered a final order dismissing all the law firm’s claims. The firm then appealed to the state Supreme Court.

In its appeal, the law firm argued that it was entitled to the recordings because 1) Uniform Superior Court Rule 21 provides a clear legal right to “inspect and copy” the proceedings, 2) it lacked an “adequate legal remedy” to vindicate that right, and 3) public officials violated their public duties by refusing to allow it to make copies.

“But the procedures available under Rule 21, including an appeal from Judge Emerson’s order, constitute an adequate remedy at law,” today’s opinion says. “Accordingly, we affirm the dismissal of the Firm’s mandamus and injunctive claims, which require a showing that no such adequate remedy exists. We also affirm dismissal of the Firm’s claim for declaratory judgment, because such a claim cannot be used as a collateral attack on Judge Emerson’s order.”

Mandamus is “an extraordinary remedy” to compel a public officer to perform his or her duty when there is no other adequate legal remedy. But here there was a legal remedy: The Merchant Law Firm could have appealed Emerson’s order. “Because the Firm had its Rule 21 request denied in an appealable order, the Firm could not use mandamus to challenge Judge Emerson’s ruling,” the opinion says. “The availability of judicial review is an adequate legal remedy that eliminates the availability of mandamus relief.”

For the same reason, injunctive relief is also unavailable. “An injunctive remedy does not lie where one has a complete remedy at law,” the opinion says, quoting the Georgia Supreme Court’s 2001 ruling in *Glynn County Board of Tax Assessors v. Haller*.

The Merchants’ claim for declaratory relief is barred for another reason, however. Attorneys for Emerson and Cantrell argued the law firm was attempting to relitigate its claim that it had a legal right to copy the recordings, an issue Emerson had already adjudicated in his order denying the firm’s request to copy the recordings.

“We agree, and affirm the trial court’s dismissal of the declaratory judgment claim as right for any reason,” the opinion says. “The Declaratory Judgment Act is ‘not intended to be used to set aside, modify, or interpret judicial decrees or judgments,’ nor does it ‘authorize a petitioner to brush aside previous judgments of the same court, and seek a determination of his rights as if they had never been adjudicated. The only exception to this rule is where a petitioner is seeking to ascertain one’s rights and duties under a judgment that contains unclear or ambiguous language.”

But the law firm made no claim that the judge’s order was unclear or ambiguous. “The Firm may disagree with the merits of that ruling, but it may not use a declaratory judgment action to collaterally attack the decision specifically adjudicating the Firm’s claim,” today’s opinion says.

Attorneys for Appellants (Merchants): John and Ashleigh Merchant
Attorneys for Appellees (Emerson): Samuel Olens, Attorney General, Dennis Dunn, Dep. A.G., Russell Willard, Sr. Asst. A.G., Julia Anderson, Sr. Asst. A.G.

BRYANT V. THE STATE (S17A0388)

The Supreme Court of Georgia has reversed the **Fulton County** murder conviction of a young man who was 17 years old when he allegedly shot and killed a stranger who was asking for directions.

In today's opinion, **Justice Michael Boggs** writes for a unanimous court that the evidence against Avery Leon Bryant "was sufficient to enable a jury to find Bryant guilty beyond a reasonable doubt of the crimes for which he was convicted."

But the search warrant that was used to seize the only physical evidence against him was invalid because it failed to state with "particularity" the items that were to be seized, the high court has concluded. Because there is a "reasonable probability" that the outcome of the trial would have been different had the evidence been properly excluded, "we reverse Bryant's convictions," the opinion says.

According to the evidence at trial, on July 5, 2008, Bryant – then 17 years old – was sitting with his brother and three friends on a brick wall after playing basketball at a local recreation center in East Point, GA. Meanwhile Newton Gordon was driving in the area looking for a funeral home when he got lost. He pulled up to Bryant and his friends at the intersection of Harris Street and Washington Avenue to ask for directions. One of the teenagers, D.J., approached the car and told the man, "I don't know how to get there." Bryant then walked up to the car and for no apparent reason, shot the stranger five to seven times. Gordon, severely injured, slumped over as his foot jammed the accelerator, propelling the car into a telephone pole where it caught on fire. Gordon died from a gunshot wound to the chest. All five teenagers fled in different directions. After meeting up in a nearby neighborhood, one of the boys asked Bryant why he'd shot the man. Bryant replied, "I got my first body." The boys then walked to D.J.'s home. After D.J. told his mother what had happened, she sent him with a detective to make a statement. The next morning, officers arrived at Bryant's home in Marietta and arrested him. After obtaining a search warrant for Bryant's residence, they searched the entire home where officers found an empty box for .40 caliber ammunition in a drawer under Bryant's bed. Although the gun was never found, .40 caliber was the same caliber that killed Gordon.

Following a jury trial in 2010, Bryant was convicted of murder, aggravated assault with a deadly weapon, possession of a firearm during commission of a felony, and possession of a pistol by a person under 18. He was sentenced to life plus five years in prison and then appealed to the state Supreme Court.

In Bryant's appeal, his attorney argued that his trial counsel had been ineffective for failing to file a motion to suppress the fruits of the search warrant on particularity grounds.

"We agree," today's opinion says.

The Fourth Amendment of the U.S. Constitution "requires that a warrant particularly describe the place to be searched and the persons or things to be seized," the opinion says. In its 2004 decision in *Groh v. Ramirez*, the U.S. Supreme Court stated that, "A warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional."

“Here, the search warrant did not provide a list of items to be seized.” Rather it only provided a detailed description of Bryant’s home and the vehicles on the property. “It was therefore so ‘obviously deficient’ that ‘we must regard the search as warrantless within the meaning of our case law,’” the opinion says, quoting the *Groh* decision. “Because the executing officers did not have a warrant particularly describing the items they intended to seize, the search was presumptively unreasonable and unconstitutional under the Fourth Amendment.”

The only physical evidence connecting Bryant to the crime was the empty box of ammunition of the same caliber as the gun used to shoot Gordon. During trial, the credibility of the three eyewitnesses was substantially challenged with one of the boys having told a detective that another of their group had been the shooter. Although the State argued on appeal that it was highly unlikely the empty box swayed the jury’s verdict, it was clearly central to its case against Bryant. At trial, the State prosecutor told the jury in closing argument that the box was “almost a smoking gun” and described the discovery of the box as a “Law & Order moment.”

“Under these circumstances, we hold that Bryant has shown a reasonable probability that the outcome of the trial would have been different had the empty ammunition box been excluded,” the opinion says. “Accordingly, we reverse Bryant’s convictions.”

The opinion does point out, however, that because the Court concluded the evidence was sufficient to support the convictions, double jeopardy does not bar the State from retrying Bryant.

Attorney for Appellant (Bryant): Andrew Fleischman

Attorneys for Appellee (State): Paul Howard, Jr., District Attorney, Paige Whitaker, Dep. D.A., Joshua Morrison, Sr. Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Youn, Asst. A.G.

CITY OF RICHMOND HILL ET AL. V. MAIA (S16G1337)

In an 8-to-1 decision, the Supreme Court of Georgia has ruled in favor of a police officer sued by the mother of a 14-year-old girl who committed suicide after the officer showed his own daughter photographs from the girl’s earlier suicide attempt.

The high court has reversed a decision by the Georgia Court of Appeals which would have allowed the lawsuit against Sgt. Douglas Sahlberg and the Mayor and City of Richmond Hill to go to trial. With today’s decision, written by **Justice Carol Hunstein**, the Supreme Court has concluded that while Sahlberg’s disclosure of the photos was wrong and may have contributed to Sydney Sanders’s decision to kill herself, “under longstanding Georgia law, Sanders’s suicide acted as an intervening cause that extinguished any causal connection between Sahlberg’s wrongful conduct and Sanders’s death.”

On Feb. 14, 2011, Laura Lane Maia’s 14-year-old daughter, Sydney, attempted suicide by cutting her neck, chest and abdomen. According to briefs filed in the case, Lt. Dana Strickland and Sgt. Douglas Sahlberg, officers with the Richmond Hill Police Department in **Bryan County**, responded to the hospital call requesting they investigate because Sydney did not initially acknowledge that the wounds were self-inflicted. Strickland took four photos of Sydney’s injuries. While she was in the hospital, news of her suicide attempt spread at her high school. According to her boyfriend, “everybody knew after a couple of days what happened.” Later that month, Officer Sahlberg’s daughter, K.S., who attended school with Sydney, expressed concern to her father about why someone like Sydney would attempt suicide.

Concerned that his daughter did not appreciate the finality of suicide and might actually copy Sydney by hurting herself, he logged into his password-protected work computer and showed K.S. the photos he had taken of Sydney's injuries. Sahlberg later testified that he did not print the photos for her, allow her to copy them, or show them to anyone else. But one of Sydney's classmates said that K.S. showed her and at least two other classmates photos of the injuries to Sydney's breast and abdomen. When Sydney returned to school at the end of February, and learned that the photos of her had been shown among her classmates, she was "mortified" and "screaming and yelling and gasping for breath and crying," her mother said. On April 1, 2011, Lt. Strickland learned that Sahlberg had shown the photos to his daughter and that she in turn had told others about them. Strickland informed Sahlberg he'd violated department policy in disclosing the pictures, and he was subsequently disciplined for the infraction. On April 5, 2011, Sydney stated to her mother and her softball coach, Angie Hummeldorf, that "she didn't want to be here anymore," and wished her suicide attempt had been successful. Hummeldorf privately asked her why and Sydney expressed several frustrations, including that "those pictures are going around." After the discussion, Hummeldorf told Sydney's mother that the girl "wasn't doing so good" and should not be left alone. Later that night, while Sydney was at home and her mother was still at work, mother and daughter talked by phone at 7:49 p.m. Maia later said she was not concerned that Sydney was going to harm herself. When Maia returned home less than an hour later, she found her daughter had committed suicide by hanging herself.

In September 2014, Maia filed suit in Bryan County Superior Court against the Mayor and City of Richmond Hill, and against Sgt. Sahlberg in his individual and official capacities, seeking compensatory and punitive damages for wrongful death, intentional infliction of emotional distress, invasion of privacy and for the girl's pain and suffering. In response, the City and Sahlberg filed a motion asking the court for "summary judgment" in their favor. (A trial court grants summary judgment upon deciding that a jury trial is unnecessary because the facts are undisputed and the law falls squarely on the side of one of the parties.) In 2015, the trial court denied their motion, finding there remained questions of fact that should be determined by a jury. The City and Sahlberg appealed to the Georgia Court of Appeals, which in March 2016 reversed the trial court's denial of summary judgment on all of Maia's claims except the wrongful death claim against the City, and the wrongful death, survival, and punitive damage claims against Sgt. Sahlberg. The majority concluded there was a question of fact whether Sahlberg's actions were the "proximate cause" of Sydney's suicide, which should be decided by a jury. (A proximate cause is one that directly produces an event and without which the event would not have occurred.) Three judges dissented, writing that, "Maia may not recover for her wrongful-death and survival claims because, under well-established Georgia law, Sanders' tragic suicide was an unforeseen intervening cause of her death, which absolves Sahlberg and the City from liability for such claims." The City and Sahlberg then appealed to the state Supreme Court, which agreed to review the case to determine whether the Court of Appeals erred "by holding that suicide was not an intervening act that would preclude liability against a negligent tortfeasor." (A "tortfeasor" is the alleged wrongdoer in a civil lawsuit – in this case, Sahlberg.)

In today's opinion, "we conclude that [Maia] cannot demonstrate proximate cause and, therefore, reverse the decision of the Court of Appeals."

"Because Georgia law generally deems suicide an unforeseeable intervening cause that breaks any causal connection between alleged negligent conduct and the resulting death, and,

because the narrow exceptions to that rule do not apply here, we agree with Appellants [i.e. Sahlberg and City].”

There are two exceptions to the rule. The first, the “rage-or-frenzy exception,” applies when “the tortfeasor’s wrongful act causes the injured party to kill himself during a rage or frenzy, or in response to an uncontrollable impulse.” Here, “neither Sanders’s continued distress regarding the disclosure of the photos nor her subsequent ‘rampage’ wherein she ranted to her softball coach about the various stressors in her life, is sufficient to evidence that Sanders killed herself during a rage or frenzy, or in response to an uncontrollable impulse,” today’s opinion says. “In fact, the record indicates that Sanders’s final conversation with her mother was calm and rational. Accordingly this exception does not apply.”

The second exception applies when there is a “special relationship” between the wrongdoer and the person who kills herself in which the wrongdoer has a duty to protect the person from harm, such as in a doctor-patient relationship. “This special relationship may also exist between a police officer or jailer and his detainee or prisoner, because a duty to protect arises under such circumstances,” the opinion says. However, “At the time of the alleged negligent conduct and at the time of the subsequent suicide, Sahlberg had no ability to supervise Sanders, to make decisions about her healthcare, or to exercise custody or control over her,” the opinion says. “As such, the special-relationship exception does not apply here.”

In a special concurrence, **Justice Harold Melton** writes that he agrees with the majority’s bottom-line decision that Sahlberg and the City were entitled to summary judgment in their favor. But, “I write separately to express my concern that the majority may be making too much of the idea that a ‘special relationship’ did not exist between Sahlberg and Sanders simply because Sahlberg had no ability to supervise her or exercise control over her.”

“Indeed, Sahlberg did have some duty to Sanders based on police policies that prohibited him from revealing injury photos from Sanders’s attempted suicide to others.”

The one dissent in this case was from Superior Court **Judge Clarence Seeliger** of DeKalb County who sat by designation in place of Justice Nels Peterson. In his dissent, Judge Seeliger writes, “A jury should hear this case,” and states he would uphold the trial court’s decision denying summary judgment to Sahlberg and the City. Here, “a jury could find that Sahlberg should have known that if the pictures of Sanders’s self-inflicted wounds were disseminated that it was ‘probable’ that Sanders would again attempt suicide, especially given that she had attempted suicide just the previous month. The specific facts of this case should not be limited by the two exceptions set by prior precedent where a defendant knew of the previous attempted suicide and committed flagrant acts of negligence against a known policy of confidentiality within close proximity to the prior attempted suicide.”

Attorneys for Appellants (City): Patrick O’Connor, Benjamin Perkins, Lauren Meadows

Attorneys for Appellee (Maia): Billy Jones, Carl Varnedoe

MATTHEWS V. THE STATE (S17A0462)

A man convicted of killing his girlfriend’s 2-year-old son by fracturing his skull, and of assaulting her 4-year-old son by fracturing his spine and perforating his intestine, will remain in prison for the rest of his life with a decision today by the Georgia Supreme Court.

In today’s unanimous opinion, written by **Justice Robert Benham**, the high court has upheld a **Clayton County** court’s conviction of Kemra Nesta Matthews for the 2012 murder of

2-year-old Jaden Harvey and the aggravated assault of 4-year-old Ashton Capers, for which Matthews was sentenced to life in prison without any chance of parole. At the time, there was an open child protective services case on the family by the Department of Family and Children Services.

According to the facts, Kemra Matthews was living with Ashley Harvey, who had four children – Ashton Capers, then 4 years old; twins Jaden and Jaylan Harvey, then 2; and Kemra Matthews, Jr. an infant. Only the infant was Matthews' child, and Harvey was pregnant with a fifth child, also belonging to Matthews. In 2012, the family moved to the Grand Marquis apartments on Tara Boulevard in Clayton County, according to briefs filed in the case. Harvey regularly worked from 8:30 a.m. to 4:30 p.m. at Value Village and when he was not also working, Matthews took care of the children. When they were both scheduled to work, Harvey's cousin, Chynna Martin, who lived in the same complex, or her live-in girlfriend, Latrice Aikens, looked after the children.

On July 11, 2012, Harvey got up and went to work, leaving the children with Matthews. At about 10:30 a.m., Matthews took all four children to Martin's apartment so he could go out. Aikens was on her way out when he arrived with the children as she had a medical appointment. Ashton walked slowly into the apartment and vomited when he arrived. After Matthews left, Ashton continued to vomit while Jaden slept on the couch. Less than an hour later, Matthews returned and picked up the children. He told Martin, "they going to get a whipping" for vomiting (Ashton) and having diarrhea (Jaden).

When Aikens returned from her appointment at 1:20 p.m., she went over to Matthews' apartment to check on Ashton. The child was sitting on the dining room floor with a plate of untouched ravioli and a trash bag next to him because he was still throwing up. The baby was crying on the couch and Jaylan was sitting next to him. Jaden was standing in the corner facing the wall. Aikens later testified the toddler looked "tired," as if he'd been standing there for some time, and she said his eyes were rolled back into his head. When Aikens asked Matthews why the child was standing there, Matthews said because "this little n----- just 'boo-booed' on hisself." Regarding Ashton, he said, "this little n----- keep throwing up." Aikens left after a few moments, leaving the children with Matthews.

According to prosecutors, after Aikens left, Matthews struck both Ashton and Jaden in the stomach for throwing up. He also struck Ashton in the penis and on the leg, fracturing his tibia. He struck Jaden in the mouth and shoved him against the wall before slamming the toddler's head into the wall, fracturing his skull and causing him to lose consciousness.

At about 3 p.m., Matthews showed up at the apartment leasing office, carrying an unresponsive Jaden. The leasing agent called 911, then went to Matthews' apartment to get the other children. There she found two small children in the living room and an infant in a crib. She picked up the infant and told the other two to follow her back to the leasing office. She later testified Ashton was holding his stomach and having trouble walking, saying his leg hurt. Due to the little boy's distress, the assistant property manager picked them up and drove them back to the leasing office. On the way, Ashton passed out in the back seat of the car. Meanwhile, the fire department, police and an ambulance had arrived.

Paramedics found Jaden in cardiac arrest. They continued CPR on the toddler while transferring him to Southern Regional Medical Center where he was pronounced dead. A medical examiner with the Georgia Bureau of Investigation, who performed the autopsy, found

scarring on Jaden's forehead and bruises on his back and elbow, consistent with having been shoved against a hard surface like a wall. He also found bloody fluid in his abdominal cavity, consistent with having been punched in the stomach, and a small laceration in his mouth, consistent with a blow to the mouth. There was a large bruise on the back of Jaden's skull and 10 smaller bruises, some recent, some not. He had a linear skull fracture and hemorrhaging in the optic nerve sheath of both eyes. The medical examiner concluded that Jaden died as the result of head injuries.

A paramedic testified that after finding Ashton unconscious, he "grabbed" him and put him in an ambulance while rendering aid. Ashton was transported to Eggleston hospital in Atlanta where emergency exploratory surgery revealed a tear of the child's small intestine and a hematoma, consistent with blunt force trauma to his abdomen. Spinal compression fractures were consistent with having been slammed down on his buttocks, and a "buckle" fracture of his left tibia was also consistent with a forceful injury to his left leg.

While Ashton was recovering in the hospital, he told his maternal grandmother that "Kem" had hit him in the stomach with his fist, that he had struck Jaden, and that he was "a bad person." When she later took him to the apartment to get clothing, the child refused to get out of the car and go into the apartment for fear that Matthews would be there. A police investigator testified Ashton told her Matthews had him in the stomach because he had vomited and that he had also hit him in the genitalia. Ashton also testified at Matthews' trial, stating that "Kem" had hit him in the stomach, "it felt bad," and he had to go to the hospital.

Following a March 2014 trial, the jury convicted Matthews of all charges, including felony murder and cruelty to children stemming from the beating death of Jaden Harvey and the severe beating of Ashton Capers. The judge sentenced him to life without parole. Matthews then appealed to the state Supreme Court, arguing the evidence was insufficient to convict him.

"We disagree," today's opinion says. The evidence at trial "was sufficient to authorize a rational trier of fact to find [Matthews] guilty beyond a reasonable doubt of the crimes for which he was convicted."

Matthews also argued that his trial attorney had rendered "ineffective assistance of counsel" in violation of his constitutional rights by failing to present an expert witness at trial to counter testimony by the State's expert witnesses. But here too, the Court has rejected his argument, finding Matthews "failed to meet his burden of showing his counsel's performance was deficient."

"Judgment affirmed," the opinion says. "All the Justices concur."

Attorney for Appellant (Matthews): Vernon Smith

Attorneys for Appellee (State): Tracy Lawson, District Attorney, Kathryn Powers, Dep. Chief Asst. D.A., Elizabeth Baker, Dep. Chief Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., S. Taylor Johnston, Asst. A.G.

CLEMENTS V. THE STATE (S17A0088)

A man convicted in **Houston County** and sentenced to life without parole for hiring a friend and his son to kill his wife has lost his appeal under a decision today by the Georgia Supreme Court.

In this high-profile murder-for-hire case, James Edward Clements argued on appeal that the evidence was insufficient to convict him of murder and other crimes.

But in today's unanimous opinion, written by **Justice Harold Melton**, the high court has upheld the lower court's ruling, finding that, "The evidence was sufficient to enable a rational trier of fact to find Clements guilty of all the crimes of which he was convicted beyond a reasonable doubt."

According to the facts at trial, in 2006 James "Eddy" Clements told co-workers at the Warner Robins Air Force Base that he was sick of his wife, Joni. He asked one co-worker if he knew of anyone who would kill for money, that man later testified. A friend of Clements, Miranda Rights, also testified that he had been quite candid in telling her he was "tired" of being with Joni Clements and looking for somebody who "could take care of her."

In October 2010, Clements told his good friend, Robert Sybert, that he would pay him \$5,000-to-\$10,000 to kill his wife. Robert got his son, Richard Sybert, involved in the plot, and Richard agreed to do the hit after Clements offered him \$1,000, a car, and a date with a stripper.

The Tuesday before the killing, Richard went to the house with the intention of killing Joni and let himself in the front door with the key Clements had given him. When Richard discovered that Joni was not at home but her daughter was, he ran. A week later, Clements called the Syberts and let them know his wife was home alone and now was the time to kill her.

On Feb. 8, 2011, Robert took Richard to Clements' house, and Richard let himself in, armed with his father's sawed-off .22 caliber rifle and a homemade silencer fashioned out of PVC pipe, black foam and electrical tape. Richard called out to Joni, saying he had an extra key that her husband wanted her to have. When Joni, 47, came downstairs, Richard led her by gunpoint back upstairs to the bedroom. After she pleaded for her life, he shot her five times, including two fatal shots to her chest and heart. Robert then drove his son back to their trailer where the two men buried the rifle and a box of ammunition, which law enforcement eventually drug up.

Soon after the shooting, the boyfriend of Clements' daughter came to the house and found Joni's body upstairs. He called 911. Clements and his daughter returned home shortly after police arrived on the scene. When an officer asked Clements what had happened, Clements responded, "I've been at work, I have to clock in, I have to clock out, and I've got coworkers to say I was there."

In the days following the murder, Travis Sybert, Robert's nephew, became suspicious that he and his cousin, Richard, may have been involved in the murder. When he told Clements of his suspicions, Clements instructed him not to call police. Jonathan Sybert, Robert's youngest son and Richard's brother, also grew suspicious. When he told Clements that he thought his father and brother might have been involved in his wife's death, Clements told him to keep that information quiet. Instead, Jonathan went to the Warner Robins Police Department. Subsequently, police got a warrant to wiretap Clements' phone. They discovered 134 calls between Clements and the Syberts in the weeks leading up to the killing and three phone calls at 6:30 p.m., 7:30 and 11:00 on the day of the murder.

In June 2011, Clements was indicted for a number of crimes, including malice murder, aggravated assault, and use of a sawed-off rifle and a silencer to commit murder. Robert and Richard Sybert were also indicted for multiple crimes. The State announced it would seek the death penalty against Richard for the murder of Joni Clements. Prior to trial, Richard signed a consent agreement with the State agreeing to plead guilty and testify truthfully in exchange for a sentence of life without parole in prison. Robert, who was charged with criminal attempt to

commit the murder of Joni Clements, also agreed to plead guilty and testify in exchange for a prison sentence of 30 years. Following an August 2012 trial, the jury found Clements guilty of all counts, and he was sentenced to life without parole plus five years for the gun charge. Clements then appealed to the Georgia Supreme Court.

In addition to arguing on appeal that the evidence was insufficient, Clements also claimed that his trial attorney was ineffective in violation of his constitutional rights and that the trial judge erred in denying his motion to suppress a wiretapped phone conversation between him and a detective. But in today's opinion, the high court has rejected all his arguments.

"Judgment affirmed," the opinion concludes. "All the Justices concur."

Attorney for Appellant (Clements): Jonathan Waters

Attorneys for Appellee (State): George Hartwig, III, District Attorney, Daniel Bibler, Dep. Chief Asst. D.A., Samuel Olens, former Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Vanessa Meyerhoefer, Asst. A.G.

RESURGENS ORTHOPAEDICS, ET AL. V. ELLIOTT (S16G1214)

The Supreme Court of Georgia has ruled in favor of an orthopedic surgery practice and reinstated a jury's verdict in its favor.

In today's unanimous decision, written by **Justice Carol Hunstein**, the high court has reversed a Georgia Court of Appeals decision that would have ordered a new trial in this **Fulton County** medical malpractice lawsuit brought by a man who was permanently paralyzed following back surgery.

According to **the Court of Appeals opinion**, on Dec. 1, 2009, Dr. Tapan K. Daftari performed spinal surgery on Sean Elliott at Wellstar Kennestone Hospital after diagnosing him with degenerative disc disease. The surgery went as planned with no complications and Elliott was discharged within three days. About two weeks later, Elliott's fiancé arrived home to find him "unconscious or in an altered state of consciousness." He was rushed to the emergency room and "intubated or placed on a ventilator" in "very critical condition." Cultures revealed his surgical wound was infected, and he was admitted to the hospital for post-operative treatment. On Dec. 16, 2009, Daftari performed a drainage procedure to clean out any infections in Elliott's surgical wound and neck. On Dec. 19, Elliott underwent another surgery to ensure nothing was collecting in his spinal cord and for final closure of his wound. According to hospital records, on Dec. 21, 2009, Daftari operated on another patient from 8:09 a.m. until 11:03 a.m. and later visited Elliott's hospital room at around 11:30 a.m. At that time, Daftari discovered Elliott had decreased movement in his legs but did not consider it an emergency. Nevertheless he ordered that a cervical magnetic resonance imaging (MRI) be done "as soon as possible." While waiting for the results, Daftari performed a second surgery on a different patient that lasted nearly five hours and concluded at 5:30 p.m. At 5:20, a nurse notified Daftari that Elliott's temperature was increasing and his inability to move his lower extremities was worsening. After completing his second surgery, Daftari visited Elliott's bedside, and upon learning that the first MRI was negative, he ordered a second of Elliott's thoracic and lumbar spine. That test showed a dangerous expansion of Elliott's spinal cord. After consulting with a neurosurgeon, Daftari performed a thoracic laminectomy to make more room for Elliott's expanding spinal cord. In doing the operation, which began at 9:30 p.m. and ended at midnight, Daftari discovered an

abscess on Elliott's spinal cord. Despite the surgery, Elliott was unable to recover any neurologic function, and he was permanently paralyzed from the waist down.

About two years later, in December 2011, Elliott filed a medical-malpractice lawsuit against Resurgens and Daftari, alleging that his paralysis was caused by Daftari's negligent treatment of his post-operative spinal infection. Resurgens and Daftari denied liability. Following an extended "discovery" – the pretrial process during which the parties disclose documents and information about their case in response to the opposing side's questions – the case proceeded to jury trial.

When Daftari testified during cross-examination that he had not been at Elliott's bedside at 9 a.m., as stated in a nursing entry in Elliott's electronic hospital records, Elliott's attorney attempted to call nurse Savannah Sullivan as his next witness. According to the attorney, Sullivan was prepared to testify that she had been with Daftari at Elliott's bedside at 9:00 a.m. on Dec. 21, 2009. Daftari's attorneys objected to allowing Sullivan to testify, arguing her name had not been disclosed during discovery and was not listed in the Pretrial Order. The trial judge granted Daftari's motion to exclude Sullivan's testimony "to allow for a trial to proceed without surprise, without ambush."

Following the 2015 trial, the jury returned a verdict in favor of Daftari and Resurgens. Elliott then appealed to the Court of Appeals which reversed the decision and ordered a new trial, ruling that Sullivan's testimony should not have been excluded "because doing so was not an appropriate remedy for Elliott's alleged failure to properly comply with discovery." The appellate court ruled that the exclusion of "probative" evidence – or evidence that tends to prove or disprove something – "is not an appropriate remedy for curing an alleged discovery omission." Daftari and Resurgens then appealed to the Georgia Supreme Court, which agreed to review the case to determine whether the Court of Appeals was wrong to reverse the trial court's decision.

In today's opinion, "we conclude that the Court of Appeals' decision was in error, and we therefore reverse the judgment below."

"It is well established that, where a party receives an evasive or incomplete answer to a discovery request, in order to obtain an answer upon which it can rely, or sanctions for failing to produce the same, the party must 'file a motion to compel, obtain an order from the court compelling answer, and then seek sanctions if the responding party still refuses to comply.'"

However, where a party has provided "false or intentionally misleading responses to written discovery, including deliberately suppressing the name of a material witness," the aggrieved party may seek sanctions under Georgia Code § 9-11-37, which authorizes sanctions for discovery abuses.

"Here, we are confronted, not by an evasive discovery response, but by the deliberate suppression of the name of a material witness," today's opinion says. "Yet, instead of applying the legal analysis associated with providing a false or intentionally misleading discovery response, it appears that our Court of Appeals applied the standard for a party providing an evasive or incomplete answer."

"Therefore, to the extent our Court of Appeals held that the only appropriate remedy available to a party seeking relief after receiving false or intentionally misleading interrogatory responses, such as where a witness' name has been deliberately suppressed, is to postpone a trial or declare a mistrial, such a holding is error."

Furthermore, the trial court did not abuse its discretion in imposing sanctions, the opinion says. “A trial court has broad discretion to control discovery, including the imposition of sanctions.”

“For these reasons, we reverse the decision of the Court of Appeals and affirm the trial court’s ruling excluding Sullivan as a witness at trial pursuant to § 9-11-37 (d).”

Attorneys for Appellants (Resurgens): Paul Weathington, Tracy Baker, David Hanson

Attorneys for Appellee (Elliott): Andy Clark, Eric Hertz

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

* Benjamin Johnson (DeKalb)

JOHNSON V. THE STATE (S17A0313)

* William Clifford Speziali (Jeff Davis Co.)

SPEZIALI V. THE STATE (S17A0357)

* Samuel Steplight (Richmond Co.)

STEPLIGHT V. THE STATE (S17A0296)

(The Supreme Court has upheld Steplight’s convictions for felony murder and possession of a knife during the commission of a crime and his sentence for life without parole, but it has reversed his conviction and five-year prison sentence for terroristic threats due to a lack of evidence.)

IN DISCIPLINARY MATTERS, the Georgia Supreme Court has **rejected a petition for voluntary discipline** as too weak from attorney:

* S. Quinn Johnson

IN THE MATTER OF: S. QUINN JOHNSON

(S16Y1153, S16Y1154, S16Y1155, S16Y1156, S16Y1157)