



## Supreme Court of Georgia

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## CASES DUE FOR ORAL ARGUMENT

### Summaries of Facts and Issues

**Please note:** *These summaries are prepared by the Office of Public Information to help news reporters determine if they want to cover the arguments and to inform the public of upcoming cases. The summaries are not part of the case record and are not considered by the Court at any point during its deliberations. For additional information, we encourage you to review the case file available in the Supreme Court Clerk's Office (404-656-3470), or to contact the attorneys involved in the case. Most cases are decided within six months of oral argument.*

**Monday, June 19, 2017**

### **10:00 A.M. Session**

#### **COLUMBUS BOARD OF TAX ASSESSORS ET AL. V. MEDICAL CENTER HOSPITAL AUTHORITY (S17G0091)**

The Board of Tax Assessors in Columbus, GA is appealing a ruling by the Georgia Court of Appeals and **Muscogee County** Superior Court. In this complex taxation case, both courts ruled that the Medical Center Hospital Authority's interest in a retirement facility that serves wealthy elderly people qualifies as "public property" and is therefore exempt from ad valorem property taxation.

**FACTS:** Spring Harbor at Green Island is a continuing care retirement facility built on 40 acres of land owned by Columbus Regional Healthcare System, Inc., which is not a party in this case. In 2004, the Medical Center Hospital Authority issued \$74.66 million in revenue bonds to finance construction of Spring Harbor. It refinanced the bonds in 2007. On June 1, 2004, the Hospital Authority entered into a lease agreement with Columbus Regional so the Hospital Authority could "construct, own, and operate" Spring Harbor and lease the real estate owned by Columbus Regional for a term of 40 years. For \$10, the Hospital Authority leased the land. In May 2007, the Hospital Authority sued the Columbus Board of Tax Assessors, the City of Columbus, and the tax commissioner for Muscogee County, seeking a declaration by the Muscogee County court that its interest in Spring Harbor under the lease was not subject to ad

valorem property taxation. It contended that its interest was public property, that the use and income from the interest furthered its legitimate functions as a hospital authority, and that therefore its interest in Spring Harbor was exempt from ad valorem taxation under Georgia Code § 48-5-41 (a) (1). In the alternative, it argued that its interest was exempt from property taxation as a nonprofit home for the aged under § 48-5-41 (a) (12) (A). The superior court ruled in favor of the Hospital Authority on the ground that its “property interest in the facilities and improvements constituting Spring Harbor qualifies as public property, and therefore, it is exempt from ad valorem property taxation.” The trial court rejected the alternative ground, concluding that the home for aged exemption applies only to nonprofit corporations, not hospital authorities created under the Hospital Authorities Law. The tax board then appealed to the Court of Appeals, arguing that the Hospital Authority’s interest in the property was not exempt as public property. But the appellate court affirmed the lower court’s ruling, finding that it was bound by the earlier superior court bond validation orders. “In our recent opinion involving the same parties but different properties, we held that hospital authority property is exempt from property taxes ‘as long as the use of the property or its income furthers the legitimate functions of the hospital authority,’” the Court of Appeals said in its opinion. “In this case, that issue has been decided in the superior court bond validation orders.” Specifically, the Court of Appeals explained, the 2007 order validating the refinancing of the bonds stated that “Spring Harbor is a wonderful community asset and one which does address a public need of an identifiable class of citizens, the elderly....Therefore, the court does find as a matter of law and as a matter of fact this ‘residential retirement community’ is a project contemplated under the Hospital Authorities Law....” “Hospital authority property is public property and therefore exempt from ad valorem taxation, as long as the use of the property or its income furthers legitimate functions of the hospital authority,” the Court of Appeals ruled. The Columbus Board of Tax Assessors now appeals to the Georgia Supreme Court, which agreed to review the case to determine whether the Court of Appeals was wrong in determining that the bond validation orders conclusively determined that the property is “public property” and therefore exempt from ad valorem taxation.

**ARGUMENTS:** “This case presents the question of whether a retirement community that serves only healthy and wealthy people – who can pay six-figure ‘entrance fees’ and annual five-figure ‘monthly fees’ – is exempt from Georgia ad valorem property taxation based on the assertion that all the buildings and other improvements comprising the retirement community are ‘public property’ owned by a hospital authority,” attorneys for the Board of Tax Assessors argue. The purpose “underlying hospital authorities is to help carry out the state’s duty to its indigent sick,” the attorneys argue. In return for providing indigent care, the hospital authority receives such advantages as property tax exemption. “A hospital authority obviously is not limited to serving just the indigent, but exemption from taxation as ‘public property’ when the only people who can gain admittance to Spring Harbor are neither indigent nor sick thwarts the law underlying hospital authorities’ entitlement to property tax exemption. Spring Harbor is a retirement community for only the wealthy which does not fulfill this indigent care mission, and the structure under which it is operated does not support exemption from Georgia ad valorem property taxation on grounds that Spring Harbor’s facilities are ‘public property.’” To exempt Spring Harbor, “would extend the ‘public property’ tax exemption to a far-reaching place this Court has never approved,” the attorneys argue in briefs. The Court of Appeals decided there could be no legal challenge to the property tax exemption for one reason: “The bond validations

concluded that Spring Harbor furthers a legitimate function of the Authority.” But the “plain language of Georgia’s bond validations statutes supports the conclusion that bond validation proceedings do not conclusively determine whether property is exempt from ad valorem property taxation.” The Georgia Supreme Court should follow its 2010 ruling in *Sherman v. Fulton County Board of Assessors* in which it concluded that “the restriction on challenging matters addressed in bond validation proceedings only attaches to those matters that are referenced and adjudicated in those proceedings.” “It is indisputable that the issue of exemption from ad valorem taxation for the Spring Harbor property was never referenced and adjudicated in the bond validation proceedings which occurred initially in 2004 and also upon refinancing in 2007,” the tax assessors’ attorneys argue. “Columbus respectfully submits that bond validations such as occurred in this case and which do not adjudicate the issue of exemption from property taxation should not be binding and conclusive as to that issue.”

Attorneys for the Medical Center Hospital Authority argue that “the particular findings of the prior bond validation proceedings were forever conclusive and beyond collateral attack.” Contrary to the tax assessors’ contention, however, the Court of Appeals did not rule that the bond validation proceedings determined or adjudicated the taxability of Spring Harbor. The Board of Tax Assessors’ brief “is full of superfluous ‘facts,’” and “is rife with mischaracterizations and misstatements that have no bearing on this appeal,” the attorneys argue in briefs. Under the Hospital Authorities Law, Spring Harbor is a valid project, and “in carping about Spring Harbor’s amenities and the financial prerequisites for residency,” the tax assessors “ignore that Spring Harbor is prohibited from being operated ‘for profit.’ Pursuant to the Authorities Law, no project of a hospital authority may be operated or constructed for profit.” Indeed, Spring Harbor’s operation has not been profitable in recent years. “The Authorities Law grants property tax exemption to hospital authorities such as Appellee [i.e. Medical Center Hospital Authority],” the attorneys argue. And the Hospital Authority’s property interest in Spring Harbor qualifies as “public property” that is exempt from ad valorem taxation. Spring Harbor is a project that furthers the public purpose for which the Hospital Authority was established. The 2004 and 2007 bond validation proceedings conclusively established the legitimate purpose of Spring Harbor, and the Court of Appeals correctly summarized in one sentence the legal effect of those proceedings: “Consequently, the bond validation proceedings conclusively established that Spring Harbor furthers a legitimate function of the Hospital Authority,” the attorneys argue.

**Attorneys for Appellants (Tax Assessors):** Charles Palmer, Kevin Meeks, Robert Lomax

**Attorneys for Appellee (Hospital Authority):** Jerome Rothschild, Andrew Rothschild, J. Randolph Evans, Keshia Lipscomb

**LEMCON USA CORPORATION V. ICON TECHNOLOGY CONSULTING, INC.**  
**(S17G0141)**

In this complex procedural case, a company is appealing a Georgia Court of Appeals ruling that dismissed its appeal of a **Fulton County** court decision. Simply, Lemcon USA Corporation is appealing the Fulton County State Court’s denial of Lemcon’s motion asking the court to set aside a judgment against it that was decided by a Missouri court and later filed in Fulton County seeking enforcement of the “foreign judgment.”

**FACTS:** According to the Court of Appeals ruling, the record shows that Icon Technology Consulting, Inc. filed a lawsuit against Lemcon for breach of contract for professional services in a St. Louis, Missouri court. The Missouri court entered a “default judgment” in the amount of \$52,589 against Lemcon and in Icon’s favor on Jan. 27, 2015. (A default judgment is a judgment in favor of a party based on some failure to take action by the other party – usually by not responding to a summons or failing to appear in court.) On May 7, 2015, Icon filed a complaint in Fulton County State Court seeking enforcement of the judgment under the Uniform Enforcement of Foreign Judgment Law (Georgia Code § 9-12-130). The clerk of the Fulton County court verified that the attachments to the suit complied “with the law as regards to the [enforcement] of foreign judgments pursuant to the provisions of...Georgia Code § 9-12-132.” On July 3, 2015, Lemcon filed a motion to set aside the default judgment, claiming that although its registered agent, CT Corporation, apparently had been served with the Missouri lawsuit Dec. 3, 2014, a misunderstanding over the proper address for sending documents to Lemcon meant that Lemcon was not aware of the lawsuit until well after the default judgment was obtained against it. Lemcon argued in its motion that because its motion was filed in the same term of court in which the judgment was rendered, it was within the inherent power of the State Court of Fulton County, in the exercise of the trial judge’s discretion, to vacate the judgment. Alternatively, Lemcon argued that the Fulton County court was authorized to set aside the judgment under Georgia Code § 9-11-60 (d), which states that a motion to set aside may be brought to set aside a judgment based on “accident or mistake.” The Fulton court denied the motion to set aside the judgment. Lemcon then filed a direct – or automatic – appeal with the Court of Appeals, as opposed to filing an application to appeal requesting it be permitted to appeal to that court. Despite Lemcon’s claim to the contrary, the Court of Appeals concluded that Lemcon did not file its motion within the same court term as the term in which the judgment was rendered.

The Fulton court has six court terms each year, beginning on the first Mondays of January, March, May, July, September and November, the appellate court explained in its opinion. The default judgment was rendered Jan. 27, 2015, and the January term ended when the new term began March 2, 2015. Yet, Lemcon did not file its motion to set aside the judgment until July 3, 2015. “Because Lemcon filed its motion to vacate the default judgment after the end of the term of court as the term in which the judgment was rendered, it failed to invoke the trial court’s inherent power to set aside the judgment for any meritorious reason,” the Court of Appeals concluded. And because Lemcon failed to file an application for discretionary appeal and improperly filed a direct appeal, the Court of Appeals concluded it lacked the authority to consider Lemcon’s direct appeal and therefore dismissed it. Lemcon now appeals to the Georgia Supreme Court, which agreed to review the case to determine whether the appellate court ruled correctly.

**ARGUMENTS:** Lemcon’s attorneys argue the Court of Appeals erred in dismissing its appeal because the motion to set aside the judgment was in fact filed in the same term of court as the default judgment. “The inherent power of a Georgia court to set aside a judgment in the term of court within which the judgment was entered extends to a foreign judgment domesticated under Georgia Code § 9-12-130 et seq.,” the attorneys argue in briefs. The judgment should not be deemed to be entered on the date that it was originally entered by the “foreign,” or out-of-state, court, but rather on the date that it was filed in the Georgia court. The Court of Appeals,

however, concluded that the Missouri judgment, which was not filed in the Fulton County State Court until May 7, 2015 “was somehow by some legal fiction retroactively entered in the Fulton County State Court in January of 2015 when it was entered in the Missouri court,” the attorneys argue. The judgment in this case “could not have been ‘entered’ prior to the time it was actually filed.” “A judgment, although signed by a judge, is not ‘entered’ until it is filed with the court clerk.” Furthermore, Georgia Code § 5-6-31 states that the “filing with the clerk of a judgment, signed by the judge, constitutes the entry of a judgment” for the purposes of an appeal. “Prior to May 7, no action could have been taken to appeal said judgment in Georgia, no action could have been taken to move to set aside said judgment in Georgia, and no action could have been taken by the Plaintiff [i.e. Icon] to collect on the judgment in Georgia,” Lemcon’s attorneys argue. “Prior to May 7, 2015, the judgment did not exist in Georgia.”

Icon’s attorney argues the Court of Appeals correctly dismissed Lemcon’s appeal for lack of jurisdiction, or authority, to review the case. “The argument propounded by Lemcon will create a situation where a party seeking to set aside a foreign judgment in the same term of court will have the ability to choose the most favorable forum: the originating court or the domesticating court, or perhaps even both simultaneously,” the attorney argues in briefs. “Lemcon thus appears to be advocating (intentionally or otherwise) for an interpretation that promotes and encourages improper ‘forum-shopping.’” (A “domesticating court” is a court in another jurisdiction from the originally-ruling court.) The appropriate interpretation of Georgia Code § 9-12-132 “is to limit its application, such that any inherent power vested in a trial judge to set aside a judgment within the same term of court is restricted to the originating court **only**,” the attorney argues. Regardless, “Lemcon’s claim is moot because the **applicable** term of court had expired,” as the Court of Appeals explained. “There is no dispute that the underlying default judgment in this action was entered in the Missouri court on Jan. 27, 2015. This is the **only** measuring point for determining the appropriate term of court. Domestication of a foreign judgment does not create a ‘new’ judgment. Rather, domestication is the means by which an **existing** foreign judgment is legally recognized.” As the U.S. Supreme Court stated in its 1998 decision in *Baker by Thomas v. General Motors Corp.*, “a final judgment in one state, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.” In this case, “Lemcon seeks to have this Court adopt an extreme interpretation that not only creates a conflict of law, but also encourages and facilitates improper forum shopping, and creates the very real possibility of unending litigation,” the attorney concludes.

**Attorneys for Appellant (Lemcon):** Michael Solis, David Wood

**Attorney for Appellee (Icon):** Brad McDonald

### **MEADOWS V. BEAM, CAVEATOR ET AL. (S17A1305)**

In this contentious battle among siblings over the validity of their deceased mother’s will, a woman who claims her mother wanted her to inherit the bulk of her mother’s estate is appealing a **Gwinnett County** jury verdict against her.

**FACTS:** Dorothy Rita Beam lived in Norcross and turned 91 years old on July 11, 2013. She died the following month on Aug. 31, 2014. Beam had four adult children: Dorothy Marian Meadows, who is the youngest, John Beam, Jr., Margaret “Peggy” Beam, and Jayne Heggen. Only John Beam lives in Georgia while the three daughters live in other states. For 20 years,

John and his wife had weekly meals with his mother, vacationed with her, and tended to her house and yard. In 2004, Dorothy Beam appointed John as her Power of Attorney, so he also eventually paid her bills for her. In 2013, when Dorothy Beam was hospitalized for a month, her daughter Jayne took a six-week leave of absence to attend to her mother's needs while in the hospital, recuperating at the Golden Living facility, and preparing for her mother to return home.

In October 2004, Dorothy Beam executed a will sharing her estate equally among all her children. On April 9, 2014, she executed a new will, and on July 10, 2014, she signed a "codicil," or a supplement to the will in which she left essentially her entire estate to Dorothy Meadows, her youngest daughter, who only recently had begun visiting her mother with any frequency. Following her mother's death, in October 2014, Dorothy Meadows submitted her mother's 2014 for "probate," or authentication, to the Gwinnett Probate Court. In November 2014, her three siblings filed a "caveat," challenging the will as invalid and alleging their mother's lack of "testamentary" or mental capacity, the undue influence of their sister, and "mistake, duress and fraud."

At trial, there was testimony that following Dorothy Beam's hospitalization, people began noticing a change in her personality. She became confused in talking to her daughters, forgetting with which one she was speaking. She became paranoid, accusing her daughter Jayne of stealing and giving away her clothes, forgetting she had instructed her to get rid of clothing she could no longer wear. And she accused John of stealing her Certificates of Deposit. She also suffered delusions, believing she had been offered a part-time position at a Kroger that was no longer there. She had conversations with her daughter Jayne, suggesting Jayne come back home so she could finish her college degree. Jayne had obtained her degree 40 years earlier.

Following an eight-day trial that ended Aug. 3, 2016, the jury ruled against Dorothy Meadows, finding that Dorothy Beam had lacked the mental capacity to execute a new will that left everything to her youngest daughter and nothing to her other three children. The court also awarded Meadows' three siblings \$68,605.73 in attorney's fees to help pay their legal expenses. Dorothy Meadows now appeals to the Georgia Supreme Court.

**ARGUMENTS:** Meadows' attorney argues the jury and trial court erred in finding that Mrs. Beam lacked testamentary capacity at the time she executed her new will and codicil. Mrs. Beam was a former bookkeeper and office manager. "She was meticulous, smart, independent, strong minded, articulate, attentive and alert," Meadows' attorney argues in briefs. Less than two months after she signed her new will, Dr. Lee Herman, her physician since 1997, examined Dorothy Beam and found her "alert, coherent, no signs of confusion and no unusual behavior." "Mental competency is one of his specialties," the attorney says about the physician. Dorothy Beam changed her will because she believed that all her children, with the exception of Dorothy Meadows, had abandoned her and were merely interested in getting her money. "In the final analysis, a combination of factors over a period of time seems to have led Mrs. Beam to decide Appellees [i.e. siblings] were just waiting for her death so they could inherit her estate," the attorney argues. "This was a woman, who sadly concluded that Appellees were waiting for her demise." There was no evidence that Mrs. Beam was delusional and the verdict is contrary to, and unsupported by, the facts, the attorney argues. The trial court erred in denying Meadows' motion asking the judge to direct a verdict in her favor. "At best, Appellees showed Mrs. Beam experienced normal memory lapses for one her age," the attorney argues. "However, after her September, 2013 hospitalization, Appellees confirmed she was able to deal with a variety of

financial and other matters, contradicting their own claims that she lacked the capacity to make a will.” The court also erred in not striking the testimony of Dr. Norman, since he relied in part on hospital records that were never supported as evidence, making them hearsay. And the trial court erred in allowing the jury to consider attorney’s fees. Here “there was no evidence to support an award of attorney’s fees and expenses” or that Meadows “had acted in bad faith or was stubbornly litigious.” Meadows “was not involved and did not participate in the preparation or signing of the will and codicil,” her attorney argues.

“Only after her mother was in a weakened condition, both physically and mentally, did Mrs. Meadows begin visiting her mother with any frequency and her purpose was clear,” the siblings’ attorneys argue. “Appellant’s [i.e. Meadows’] callous and divisive behavior in this case appears to stem from not only a desire to enrich herself, but also from a venomous hatred of her own brother.” “After becoming aware of her mother’s paranoia, confusion, and mental instability, Appellant decided to come to Atlanta to visit her mother, ostensibly in an effort to ‘defuse’ the situation, in spite of the fact that she had previously had little or nothing to do with her mother for years.” “The majority of Appellant’s brief is nothing more than a thinly-veiled attempt to invite the [Supreme] Court to invade the province of the jury by making its own judgments as to the weight and credibility of the evidence presented at trial and to substitute its judgment for that of the jury,” the attorneys argue. Here, the sole question before this Court is whether there is sufficient evidence to sustain the jury’s verdict. The evidence at trial “was sufficient for the jury to find lack of testamentary capacity,” and therefore, the trial court properly denied Meadows’ motion for a directed verdict in her favor. The trial court also properly allowed the testimony of Dr. Matthew Norman. Admissibility of expert testimony “rests in the broad discretion of the court, and consequently, the trial court’s ruling thereon cannot be reversed absent an abuse of discretion.” Finally, the trial court properly allowed the jury to consider the award of attorney’s fees. “The record contains ample evidence which would support the jury’s award of expenses of litigation in this case,” the siblings’ attorneys argue. For instance, Meadows’ argument at trial that she was unaware of her mother’s intent to make a new will in 2014 and that she had nothing to do with it, “is absolutely false,” the attorneys argue. “The uncontroverted evidence showed that Appellant had accompanied Mrs. Beam to Mr. [Stanley] Lefco’s office prior to the preparation of the 2014 will and codicil and was even provided a copy of the draft of the 2014 will by Mr. Lefco just seven days prior to its execution.”

**Attorney for Appellant (Meadows):** Stanley Lefco

**Attorneys for Appellee (Beam):** Gerald Davidson, Jr., Christopher Holbrook

**2:00 P.M. Session**

**OCMULGEE ELECTRIC MEMBERSHIP CORPORATION, ET AL. V. MCDUFFIE (S17G0038)**

Ocmulgee Electric Membership Corporation is appealing a Georgia Court of Appeals ruling that employers must prove that suitable employment is available before suspending an employee’s workers’ compensation benefits, even if that employee’s condition has improved and no longer qualifies as a compensable injury under the Workers’ Compensation Act.

**FACTS:** Kasabian McDuffie injured his knee in 2002 while working for Eastman Youth Detention Center in **Dodge County**. McDuffie settled his claim for workers' compensation benefits with his employer and by July 2003, he had undergone three knee surgeries. McDuffie admitted in his settlement agreement that he was partially disabled, his condition would not improve, and there was no possibility of his being able to perform the same type of gainful employment on a regular basis in the future. McDuffie's doctor placed him on permanent sedentary work restrictions. As a result, McDuffie was out of work from 2002 until 2006. In March 2007, McDuffie applied for a job at Ocmulgee EMC and was hired to work as a meter reader/right-of-way laborer. When filling out his job application, McDuffie failed to disclose his 2002 injury, his employment with the youth detention center, or his permanent sedentary work restrictions. He also indicated he was physically able to perform the job, which required him to stand, walk, and carry parts, as well as be able to get an injured person off a pole quickly. In September 2009, while on the job for Ocmulgee, McDuffie stepped in a hole and re-injured his right knee. McDuffie's indemnity benefits began shortly after his injury. In March 2010, however, Ocmulgee discovered that McDuffie had provided false information on his job application by saying he could physically do the job and by failing to disclose his prior injury and sedentary work restrictions. Ocmulgee fired McDuffie and suspended his indemnity benefits. In February 2011, when McDuffie's doctor recommended an additional surgery, Ocmulgee reinstated his indemnity benefits. Following the surgery in March 2011, his doctor released McDuffie to return to work with sedentary restrictions. In July 2011, his doctor stated his opinion that McDuffie had been restored to his pre-injury "baseline," i.e. his knee had been restored to the extent that he had no work restrictions other than the permanent sedentary work restrictions he was under when he was hired by Ocmulgee in 2007. Another physician also offered his opinion that McDuffie's knee had been restored to its pre-2009 injury status. As a result, Ocmulgee again suspended McDuffie's indemnity benefits.

Following a hearing, an administrative law judge on the State Board of Workers' Compensation denied McDuffie's request for reinstatement of his indemnity benefits and the Board's Appellate Division and the Dodge County Superior Court upheld the ruling. McDuffie then appealed to the Court of Appeals, which in July 2016 found that the evidence supported the administrative law judge's finding that McDuffie had experienced a change in condition for the better. However, the appellate court ruled that Ocmulgee could not suspend McDuffie's benefits without showing that McDuffie could return to work because of that change and that Ocmulgee offered McDuffie suitable work. The Court of Appeals sent the case back to the trial court for additional findings. Ocmulgee now appeals to the Georgia Supreme Court, which agreed to review the case to determine whether an employer must show the availability of suitable employment to justify suspension of workers' compensation benefits after already establishing that an employee's work-related aggravation to a pre-existing condition has ceased to be the cause of the employee's disability.

**ARGUMENTS:** Ocmulgee's attorneys argue the Court of Appeals was wrong in ruling that an employer must show the availability of suitable employment to justify suspending benefits when the employer has already established that the employee's compensable aggravation of a pre-existing condition has ceased to be the cause of his disability. "Once an employer has established that an employee's aggravation of a pre-existing condition has ended, the availability of suitable employment is irrelevant to suspension of benefits," they argue in

briefs. Referring to the Court of Appeals' 1985 decision in *Pierce v. AAA Cabinet Co.*, the Board's Appellate Division correctly stated that "if an Employer/Insurer can show by a preponderance of the competent and credible evidence that an Employee no longer suffers any disability due to his work-related injury, then the Employer/Insurer need not show the specific availability of suitable employment to justify suspending temporary total disability benefits for change of condition," Ocmulgee's attorneys contend. The Court of Appeals' erroneous decision imposes an improper burden of proof on Ocmulgee. "In order to prevent a profound incongruence between the language of and the intent behind Georgia's Workers' Compensation Act and how workers' compensation injuries will be defined in Georgia, Appellants [i.e. Ocmulgee and Georgia Administrative Services] respectfully request a ruling vacating the Court of Appeals' decision and instructing the Court of Appeals to issue a new opinion affirming the Superior Court." The Court of Appeals also has improperly amended Georgia Code § 34-9-1 (4), essentially rewriting the entire Workers' Compensation Act. Specifically, Georgia Code § 34-9-1 (4) says that "injury" and "personal injury" "shall include the aggravation of a pre-existing condition by accident arising out of and in the course of employment, but only for so long as the aggravation of the pre-existing condition continues to be the cause of the disability; the pre-existing condition shall no longer meet the criteria when the aggravation ceases to be the cause of the disability." Here, "the intent of the Legislature was clearly to define an end to entitlement to benefits simultaneously with the end of a work-related aggravation," the attorneys argue. "In fact, an aggravation of a pre-existing condition no longer even qualifies as an 'injury' under the Act when it ceases to be the cause of the employee's disability," Ocmulgee's attorneys argue.

McDuffie's attorneys argue the Court of Appeals was correct that the administrative law judge and the lower court failed to "provide the factual findings required by law to support the suspension of Workers' Compensation benefits of the Appellee [i.e. McDuffie]." Pre-existing aggravations are not a new occurrence in Workers' Compensation, the attorneys say in briefs. "However, like most statutes they are ambiguous in order to allow flexibility. This is echoed in the purpose behind the Act itself. In order to attain the 'beneficent' purpose, over time, the courts have interpreted the definition of 'injury,' especially 'aggravations of pre-existing injuries,' so the Act now works as a bridge instead of a barrier, thus achieving the legislative intent." In the *Pierce* decision, "benefits were suspended based upon findings that the employee was medically able to return to work *without restrictions*, and the need for indemnity benefits were no longer present." "However, in light of the remedial nature of the Workers' Compensation Act, *Pierce* was too rigid and went too far because it did not encompass nor consider the 'grey area' of pre-existing conditions, causes and aggravations." In McDuffie's case, "the necessity warranting termination of benefits is not present," his attorneys argue. "Here, unlike *Pierce*, Appellee [i.e. McDuffie] has not been medically released back to employment without restriction. More to the point, Appellee has not even been released to any type of duty other than sedentary restriction." The Court of Appeals correctly placed the burden upon Ocmulgee to show available suitable employment. As the Court of Appeals ruled in 1994 in *Freeman v. Continental Baking Co.*, "To terminate compensation because of a change in condition, an employer must show a change in the wage earning capacity, physical condition... and employer must show the ability to return to work and that suitable work is available." Although no requirement exists that employment must actually be offered, "there must be factual findings by the administrative law judge in the record that illustrates suitable employment was available," McDuffie's attorneys argue. Since 1981, the

courts have continuously held that before suspending benefits, employers have the burden of proving three elements: They must illustrate that the employee has undergone a “change in condition for the better,” meaning a change in earning capacity, physical condition or status; they must illustrate that the employee is able to return to work; and they must illustrate that suitable employment was made available to the employee at the time he was able to return to work. “It is at this point that the Court of Appeals held the Appellant did not shoulder this burden,” the attorneys argue. The state Supreme Court should order Ocmulgee to reinstate McDuffie’s indemnity benefits or remand the case to the lower courts for further findings that demonstrate the availability of suitable employment.

**Attorneys for Appellant (Ocmulgee):** Fred Hubbs, Jr., David Dix

**Attorneys for Appellee (McDuffie):** Blake Smith, David Ricks

### **DAVIS V. THE STATE (S17A0949)**

A young man is appealing his **Fulton County** murder conviction and life prison sentence for shooting to death the owner of an Atlanta tattoo parlor.

**FACTS:** According to state prosecutors, on Jan. 16, 2013, Armond Gibson, Rolandus White, and Clifford Harris got together at Harris’s apartment, smoked marijuana and discussed how they could make money on a “hot,” or stolen, television. Harris needed to sell it quickly to pay for his probation. They piled into a red Pontiac Grand Prix owned by Harris’s sister-in-law and Harris drove them around looking for a buyer. After failing to sell the TV to a restaurant employee Gibson knew, the three ran into Darius Jamal **Davis** and another man who said they were about to rob someone who sold marijuana and “Molly,” a concentrated form of the drug Ecstasy. Harris later said Davis told them the robbery would be “sweet,” i.e. easy. The group then walked toward a nearby tattoo parlor, Celebrity Status Tattoos, the business owned by their target, Anton “AJ” Johnson. Gibson offered to go in first, scoping out whether Johnson had a firearm while Harris returned to the car and the other two waited nearby. Johnson, who had been shot in a robbery attempt three weeks earlier, kept the door to the parlor locked and his employee, Jamal Makanjuola, had to let Gibson in. Inside the shop, three female college students and one male were inside looking at tattoos when Gibson entered and started asking Johnson about his rates. Makanjuola later recalled that at some point, Gibson pulled out his phone and was talking to someone. Phone records showed he was talking to Harris. Within several minutes, two men then knocked on the door, and Makanjuola let them in. Once inside, one of the men brandished a firearm saying, “Give it up.” When Johnson reached for a gun he kept in the shop, he was shot dead in the head and torso. Makanjuola was also hit in the shoulder. Makanjuola later identified Davis as the shooter and Gibson as the first man in the store who inquired about pricing. A woman sitting at a stoplight when the shooting occurred, called police after hearing the gunshots and seeing three men run from the scene and get into a red car. She provided the license number and later identified Harris in a photographic line-up as the driver. She circled the faces of two others, including Davis, saying they “looked familiar” and were possibly among the three running away. As the men sped from the scene, Gibson and White asked Davis why he’d shot Johnson. “He moved,” Davis replied according to the witnesses. “That’s the procedure when you move.” Police found the red car, and all four men were eventually arrested; Davis was located by a fugitive squad while he was staying in a motel under an alias.

All four men were indicted for Johnson's murder. Prior to trial, Harris and White agreed to plead guilty in exchange for their testimony and a lighter sentence; the morning of jury selection Gibson also pleaded guilty, leaving only Davis to go to trial. At his trial, Davis's mother and sister testified that he had been staying in the family's home in January 2013, and the family had a daily routine which involved his mother taking Davis, who was around 20 years old at the time, to school because he had no car. However, Davis's uncle testified that there was a restraining order against Davis who had a long history of beating up his mother and sister, and that Davis was not permitted in the family's home. A woman testified Davis had been staying at her house where she had seen him the morning of the shooting.

Following his 2014 trial, a jury found Davis guilty of all counts, including malice murder, aggravated assault with a deadly weapon, and attempted armed robbery. Davis was eventually sentenced to life plus 15 years in prison. He now appeals to the state Supreme Court.

**ARGUMENTS:** Davis's attorney argues the trial court made a number of errors, including by permitting State prosecutors to cross-examine Davis's alibi witnesses – his mother and sister – about his prior altercations with his family. State law allows evidence of “other crimes, wrongs, or acts” to be admitted, but only for limited purposes and not for the purpose of proving the “bad character” of the defendant. Davis's attorney objected to the admissibility of the evidence, arguing, “I think it is just a way for the State to try to get in the bad character, which is prejudicial of my client in past events.” The trial court incorrectly ruled that all 14 of Davis's prior altercations were relevant to impeach the witnesses and call into question their credibility. The trial judge also “plainly erred by failing to issue a limiting instruction to ensure that the jury did not consider evidence related to Mr. Davis's prior altercations with his family and the police as evidence of his guilt,” the attorney argues. Among other errors, the trial court abused its discretion by admitting the statement made by the woman who had been sitting at a stoplight when she heard the gunshots and saw three men running to the red car. Her “identification” of Davis merely because Davis “looked familiar” was “minimally probative” and should have been excluded. Finally, Davis's trial attorney provided ineffective assistance of counsel, in violation of his constitutional rights, by doing a number of things, including by failing to object to the State's failure to provide notice that prosecutors planned to use police reports to impeach Davis's alibi witnesses. The attorney also failed to adequately investigate Davis's alibi defense prior to calling his mother and sister to testify. She admitted she had seen his criminal history record and his numerous booking reports from the Fulton County jail which showed arrests and convictions for terrorist threats, simple battery, Family Violence Act Battery, and disorderly conduct. The fact that several of the arrests happened at the family home should have indicated to trial counsel that there were issues that could impact the alibi testimony. “Because she failed to investigate the case, both alibi witnesses testified, and the State both impeached their testimony and introduced evidence that showed that their entire account was false,” Davis's attorney argues. “This likely impacted the jury's decision to convict Mr. Davis of the charges against him.” The trial attorney's performance in having the mother and sister testify was deficient because it opened the door to “incredibly harmful and prejudicial evidence.”

The District Attorney and Attorney General, representing the State, argue that the trial court properly permitted the State to cross-examine Davis's mother and sister about his prior altercations with his family and interactions with police. At the time, the State argued to the judge that the answers the State hoped to elicit was relevant to show the witnesses' credibility

and to show that the mother “was afraid of physical consequences by the hand of her son if she did not testify favorably to the defense.” As the trial court correctly found, the State’s questions were not asked to prove the bad character of Davis. Rather they were used to impeach the witnesses. “As ultimately revealed through other witnesses, Appellant [i.e. Davis] was actually not living with the family at all leading up to January 16, 2013, and instead had been kicked out because of these family altercations.” Also, because Davis’s trial attorney never requested a limiting instruction on this issue at trial, it can only be reviewed on appeal if it amounts to “plain error,” which is a legal error that is so prejudicial that an appeals course should address it despite the party’s failure to raise a proper objection. No such error has been demonstrated here, the State contends. The trial court also properly permitted testimony that Davis “looked familiar,” the State argues. Finally, Davis’s trial attorney provided effective legal assistance. Davis has failed to show that his attorney’s actions were “outside the wide range of professionally competent assistance.”

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