Supreme Court of Georgia
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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Monday, September 11, 2017

10:00 A.M. Session

<u>COOPER TIRE & RUBBER COMPANY V. KOCH ET AL.</u> (S17G0654)

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

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

The Ford Explorer was towed from the scene by Brown's Wrecker Service and placed in a storage yard. Before Koch's death, his wife talked to Edward Brown, the owner of the wrecker service, and learned she was being charged a daily storage fee for the vehicle. She told Brown she could not afford the costs, and he said he would not bill her if she would transfer title to him

so he could sell the vehicle to a salvage yard for scrap. Renee Koch said she saw no reason to keep the vehicle since it was totaled, so she agreed to transfer the title to Brown. However, before transferring the title, her husband told her to tell Brown to "save the tires." Brown stored the left rear tire but all that remained was the sidewall portion that attaches to the rim; apparently the tread was never recovered from the accident scene. Brown then sold the vehicle and the remaining tires to be crushed for scrap.

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

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

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

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

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

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

<u>CAHILL V. UNITED STATES</u> (S17Q1559)

At issue in this case is whether the Internal Revenue Service may attach a tax lien to all of the property owned by a couple who subsequently divorced, or only to the half owned by the husband who failed to pay several hundred thousand dollars in income taxes after the divorce.

FACTS: The U.S. District Court for the Northern District of Georgia is asking the Georgia Supreme Court to answer a question about Georgia law before it rules in a case before it. According to the facts of the case, Robert Hall, Jr. and Cathleen Mary Cahill married in 1999. At the time, Hall owned property on Old Course Drive in Roswell, GA. In 2005, he transferred the property to both of them through a "quitclaim" deed. Under the deed, Hall and his wife became "Joint Tenants with Right of Survivorship." In estate law, such an arrangement means the couple would share equal ownership of the property until one of the joint tenants died, at which time the

deceased person's share of the property would transfer to the survivor, and the survivor would own all the property. The couple lived together on the property until they separated.

On Nov. 3, 2008, Hall and Cahill divorced, and their divorce decree incorporated a settlement agreement they had negotiated. The agreement provided that Cahill would "continue to have exclusive use and possession" of the property; both parties would remain on the title until its sale; the property would be sold when Cahill turned 66 years old (in February 2015); and the net proceeds from the sale would be "equally divided between the parties."

Cahill continued to live on the property, but two months after her 66th birthday, in April 2015, she died. The home was never placed on the market prior to her death.

Subsequent to the divorce, Hall failed to pay more than $300,000 in federal income taxes, and in 2013, the IRS filed a notice of federal tax lien against "all property and rights to property belonging to" Hall. A dispute arose as to whether the government's lien could encumber all of the property based on the right of survivorship, or only half of it. Cahill's heirs subsequently filed a lawsuit against the United States in the U.S. District Court in Atlanta, seeking to "quiet title" the Cahill estate's portion of the property in their name. They argued that the divorce decree and settlement agreement clearly severed any rights of survivorship at the time of the divorce decree. The federal judge presiding over the case then certified a question about Georgia law to be answered by the Georgia Supreme Court. "There is no dispute that neither Cahill nor her estate is liable for Hall's unpaid tax liabilities; the lien attaches to property only to the extent it 'belong[s] to' Hall," the federal judge wrote in his order certifying the question. At issue here is whether the government's tax lien can encumber all of the Old Course Drive property or only half of it, the judge wrote. And the answer to that depends on what effect the divorce decree had on Cahill's and Hall's joint tenancy and right of survivorship. "If, as the Government contends, the divorce did not sever the joint tenancy and right of survivorship, then Hall acquired a full interest in the property upon Cahill's death in 2015," the federal court's order states. "But if Cahill's estate is correct in arguing that the divorce did sever the joint tenancy, then Hall has only a half interest in the property that can be encumbered by the Government's tax lien." "Georgia's own courts have not addressed the issue, and those jurisdictions that have done so have not been consistent in their approaches," the order says. Both parties now appeal to the Georgia Supreme Court.

ARGUMENTS: The Cahill estate's attorney argues that her share of the property is intact, because the divorce decree and the incorporated settlement agreement severed the right of survivorship. The Georgia Code contains basic rules for contract construction, including instructions to assist with the interpretation of ambiguities. Georgia divorce agreements are to be interpreted by finding the "intent of the parties…in the light of circumstances as they existed at the time the agreement was made," the attorney argues in briefs. "Intent is key to determining the meaning of a contract." "To conclude that Ms. Cahill and Mr. Hall had intended for the right of survivorship to exist following the divorce decree is to completely ignore the language and circumstances of the settlement agreement." Furthermore, "it should not be lost on the Court that if Mr. Hall had passed first, the Government would have taken a position exactly opposing their current position, arguing that the right of survivorship had been severed and the entirety of the interest in the property had not passed to Ms. Cahill. The Government's position defies both logic and the settlement agreement. Mr. Hall and Ms. Cahill were divorcing. They had agreed to split the proceeds from the coming sale of the property. They clearly understood their interests in

the property to have been severed, not to be restored by the untimely death of one of them." "This Court should find that the right of survivorship was severed by the settlement agreement and answer the Northern District's question accordingly," the Cahill attorney argues.

The U.S. government, represented by the U.S. Attorney General's office and attorneys with the Department of Justice, argues that the state Supreme Court should rule that given that the couple's divorce decree "makes no express reference to severance or retention of the joint tenancy, the divorce decree does not affect the joint tenancy with right of survivorship under Georgia law." A divorced person may sever a joint tenancy by simply filing an affidavit with the superior court clerk attesting to his or her divorce and intention to sever the joint tenancy. "Since a joint tenancy does not depend upon a marriage between the co-owners, a divorce decree alone does not sever a joint tenancy held by the divorcing spouses," the federal government's attorneys argue. As a general rule, "if a divorce decree does not describe certain of the parties' property, the title to that property is unaffected by the decree and remains titled in the name of the owners as before the decree was entered." Although several states have enacted statutes providing that a divorce automatically severs a joint tenancy unless the couple expressly agrees otherwise, "Georgia's legislature has not enacted a statute having that effect," the attorneys point out. "Georgia courts should look for a clear expression of an intent to sever the joint tenancy in the divorce decree or property settlement, without indulging in assumptions about ex-spouses' unexpressed desires." "The detailed provisions concerning the Old Course Drive property lack any expression of an intent to sever the joint tenancy. To the contrary, after providing that Cahill would have the right of possession, the agreement provides only that, 'Both parties shall remain on the title until its sale.'" "Thus, although some courts have discerned an intent to sever a joint tenancy on facts similar to the instant case, the better-reasoned opinions have declined to sever joint tenancies absent a clear expression of the parties' intent to do so," the U.S. government argues. "The settlement agreement here contains no clear expression of an intent to sever, and the Court should conclude that, in the absence of a clear expression, the joint tenancy survived the divorce."

Attorneys for Appellant (Cahill): Frank Podesta
Attorneys for Appellee (U.S.): David Hubbert, Acting Assistant Attorney General, Joan Oppenheimer, Robert Branman

SOUTHEASTERN PAIN SPECIALISTS, P.C. V. BROWN (S17G0732)
DOHERTY V. BROWN (S17G0733)
SOUTHEASTERN PAIN AMBULATORY SURGERY CENTER, LLC V. BROWN (S17G0737)

An anesthesiologist and his surgery center are appealing a Georgia Court of Appeals decision upholding a near $23 million verdict against them in a **Fulton County** medical malpractice lawsuit.

FACTS: Dr. Dennis Doherty, a board-certified anesthesiologist and pain management specialist, began treating Gwendolyn Lynette Brown in 2008 for chronic back pain. He performed two "epidural steroid injection procedures" on Brown in the fall of 2008 at the Southeastern Pain Ambulatory Surgery Center, which Doherty owned and had opened two years earlier. The procedure involves injecting steroid medication into the epidural space in the spine

to reduce inflammation and relieve pain, and Doherty performed both procedures without incident.

On Sept. 16, 2008, Brown arrived at the Surgery Center with her daughter-in-law for a third procedure, which was to be done under the same "conscious sedation" as before. Under conscious sedation, the patient receives a combination of medications to help the patient relax and to block pain. Mary Hardwick, a registered nurse who was the Surgery Center's administrator and nursing director, performed Brown's pre-op procedures, recording her vital signs and starting an intravenous line. At 4:40 p.m., after Brown was taken into the operating room, another nurse, Ann Yearian, started the anesthesia and oxygen. Doherty came in 50 minutes later and started the procedure at 5:30 p.m. Almost immediately, Brown's oxygen level began to drop "rapidly" and the pulse oximeter, used to monitor her blood oxygen saturation level, sounded an alarm. Doherty directed Yearian to increase the oxygen flow to 5 liters. Although the surgical tech remained concerned and believed Brown was not breathing, Doherty instructed her to go back to the imaging device and, when she asked him if she should call Hardwick, Doherty said "no." The tech later testified she remained concerned and surreptitiously texted Nurse Hardwick, saying simply, "Come."

When Hardwick arrived, the pulse oximeter was sounding an alarm and registering zero. Brown was lying face down with injection needles in her back, and Doherty was standing at the head of the table, holding Brown's jaw to maintain an airway. Although Hardwick wanted to resuscitate Brown, Doherty said that the pulse oximeter was malfunctioning and that Brown was breathing. However, when the surgical tech retrieved a second pulse oximeter and Hardwick placed it on Brown's toe, its alarm also sounded and had a reading of zero oxygen saturation. At the same time, the blood pressure monitor was "recycling," which indicated that it was not detecting a blood pressure. Doherty, however, maintained that everything was "fine." Doherty completed the procedure at 5:48 p.m. and Brown was given more oxygen, including manually with an airbag. After a few minutes, her oxygen levels rose to the 90s, but Hardwick remained concerned and asked if she could call 911. Doherty said no, that Brown was just heavily sedated.

Over the next couple of hours, however, Brown failed to fully wake up or respond to "voice or painful stimuli," and at about 7:30 p.m., staff called 911. The daughter-in-law later testified that Doherty told the responding emergency medical technicians that Brown "was there that day for an epidural procedure, the procedure went fine, and she was having complications coming out of the anesthesia slowly." She said he did not mention any other complications and did not tell the technicians she had possibly experienced a "hypoxic event," which is a sudden loss of oxygen. Later, the treating neurologist at the hospital where Brown was eventually taken, testified he was suspicious of a hypoxic injury so he had the hospital call Doherty. But Doherty said "there was no history of hypoxia because she had a pulse ox and everything was fine." It was later determined that Brown had suffered a catastrophic brain injury caused by oxygen deprivation. As a result, she could not walk, talk, stand or move her limbs. She was mentally incapacitated and required 24-hour-a-day care. She died six years later in September 2014.

Brown's husband, Sterling Tyrone Brown, Sr. sued Doherty, his Surgery Center, Southeastern Pain Specialists and Hardwick, alleging medical malpractice and "ordinary negligence." Following her death, he added a wrongful death claim. The trial was split into three phases – a liability phase, a punitive liability phase, and a punitive damages phase. In phase 1 of the trial, the jury found the defendants liable for Brown's injury and apportioned fault at 50

percent to Doherty, 30 percent to the Surgery Center, 20 percent to the Southeastern Pain Specialists, and 0 percent to Hardwick. In phases 2 and 3 of the trial, the jury found Doherty liable for punitive damages but awarded nothing for those damages. A final judgment totaling $21,981,093.29 in damages was awarded to Brown's husband as the surviving spouse and as executor of her estate. Doherty and the others appealed, but the Court of Appeals, in a 6-to-3 decision, upheld the lower court's ruling. Doherty and the others now appeal to the state Supreme Court.

ARGUMENTS: The "appellants" – i.e. Doherty, the Surgery Center, and Southeastern Pain Specialists – argue that the evidence at trial did not support a claim for "ordinary negligence." Rather, allegations of negligence against a professional that "involve the exercise of professional skill and judgment within the professional's area of expertise" form a claim for "professional negligence." At issue in this case is whether the task before the doctor required the exercise of professional judgment. The trial court therefore erred in instructing jurors they could find Doherty liable on the basis of ordinary negligence. The verdict cannot stand because it is not possible to determine whether the verdict was entered upon a proper basis. Georgia courts recognize that certain types of negligence occurring in a medical context, such as administrative, clerical, or routine acts, are not professional negligence, including: 1) where a nurse or other support personnel fails to follow a doctor's orders, or 2) negligence based upon purely clerical acts that any individual could perform. Neither type was at issue here. The allegations were that Doherty violated the physician standard of care in making certain professional judgments. The plaintiff's expert physician testified that the alleged failure to provide Brown's history to the emergency medical technicians was a violation of the physician standard of care, not ordinary negligence. The question of whether Doherty was honest and forthright depends on what constitutes accurate and sufficient medical information. Furthermore, to allow a jury instruction on ordinary negligence every time there's an allegation that a medical provider did not "tell the truth" would open the floodgates to make every professional negligence claim an ordinary negligence claim. Even if Doherty's alleged failure to relay accurate information about Brown's history was ordinary negligence, there is no evidence that this failure caused her brain damage. None of the plaintiffs' witnesses testified that any doctor would have done anything differently had Doherty disclosed more information at the outset. And the pathologist who performed the autopsy did not link the cause of Brown's death to the alleged negligence of anyone, including Doherty. The erroneous allegation of ordinary negligence harmed the defendants' case because it lowered the evidence standard by allowing the jury to consider a theory of the case that did not require a presentation of expert testimony. It allowed jurors to inject their own lay opinion regarding the physician standard of care. The jury was led by the judge's instruction to believe that ordinary negligence could apply to the medical malpractice claims. Doherty and the others deserve a new trial.

Brown's attorneys argue that the Court of Appeals and Fulton County court made the correct decision. "The evidence at trial proved ordinary negligence," they argue in briefs. "Brown's brain injury and death resulted from a failure to exercise even the basic care and diligence of a reasonable ordinary person. No professional knowledge or judgment was required. Everyone knows a person must be able to breathe to live. This fundamental fact of human life does not vary because a person happens to be in an out-patient medical facility under the care of a medical doctor." "It does not take a doctor to realize a person lying face-down on her stomach

who is having trouble breathing should be put on her back." Also "Doherty was known by all (especially nurse Mary Hardwick) to be severely impaired and dangerous to patients." Judgment in favor of Brown's surviving husband always will be demanded no matter how many times this case is retried, his attorneys contend. Furthermore, "Everyone, doctor or not, has a duty of ordinary care to be truthful," the attorneys argue, "and a professional license is not a license to lie." Doherty "misrepresented and concealed basic material facts from Gwen Brown's subsequent doctors." Here, "whether or not the jury verdict below was informed and supported by expert testimony is not an issue at all. All nine judges on the Court of Appeals below agreed [Mr. Brown] proved professional negligence." "Georgia law recognizes many situations where juries can recognize the negligence of a professional even without expert testimony," the attorneys argue. And while Doherty and the others argue that the improper jury charge on ordinary negligence damaged their case, the judge quickly followed that instruction with charges on the skill required of physicians and nurses, as well as the presumption of due care. "Jury instructions must be considered as a whole to determine if harm occurred," the attorneys argue. "Appellants [i.e. Doherty et al.] were given all the presumptions and protections of a professional negligence claim, and the jury was told to apply them even to Doherty's ordinary negligence." "Under the frightening facts present in this case, all Appellants were properly judged by the proper standard," Brown's attorneys conclude. "Even if the ordinary negligence [jury] charge should not have been given, the error was harmless. No new trial is warranted. The judgment should be affirmed."
Attorneys for Appellants (Doherty et al.): John Hall, Jr., Nichole Hair, Nathan Gaffney, W. Curtis Anderson, David Root, Frank Lowrey IV, Robert Ashe III, Michael Baumrind
Attorneys for Appellee (Brown): James Sadd, Edward Wynn

2:00 P.M. Session

LUCAS V. BECKMAN COULTER, INC. ET AL. (S17G0541)

A man who sued his company after a fellow employee accidentally shot him in the stomach at work is appealing a Georgia Court of Appeals ruling that under a Georgia statute, the company is immune from liability.

FACTS: Beckman Coulter, Inc. is a company based in Southern California that manufactures and services biomedical testing equipment. The company employs field-service engineers who use vehicles owned by Beckman Coulter (BCI) to travel to various client medical facilities where they perform onsite maintenance and repair of BCI equipment. Jeremy Wilson had been a field-service engineer for BCI since 1999 who serviced accounts in South Georgia. On July 10, 2013, Wilson drove a company van to the Albany Area Primary Healthcare facility to perform maintenance work on BCI equipment. In the parking lot, he ran into Claude Scott Lucas, a lab technician for the facility whom Wilson had known for several years. As the two walked into the facility, Lucas mentioned that several vehicles in the parking lot had been broken into recently. Wilson was concerned because he regularly took his personal handgun with him while traveling for his company, although doing so violated company policy. Worried his handgun might be stolen, Wilson went back to his car to retrieve it, then followed Lucas back toward the entrance of the medical facility. Shortly after entering, Wilson attempted to clear the

weapon, but as he did, the gun discharged, striking him in the hand and Lucas in the abdomen. Emergency medical personnel quickly arrived and took both men to the local hospital. Two days later, BCI fired Wilson for violating company policy by transporting his handgun in a company vehicle.

Lucas subsequently sued Wilson and BCI in **Fulton County** State Court, alleging that Wilson's negligence resulted in his injuries and that BCI was liable for Wilson's conduct under the theory of "respondeat superior" – a Latin term for the doctrine that holds an employer liable for its employee's wrongful acts committed during the scope of employment. In response, BCI filed a motion asking the court to grant "summary judgment" in its favor, arguing that under Georgia Code § 16-11-135 (e), it was immune from firearm-related liability. The statute says that, "No employer…shall be held liable in any criminal or civil action for damages resulting from or arising out of an occurrence involving the transportation, storage, possession, or use of a firearm…pursuant to this Code section unless such employer commits a criminal act involving the use of a firearm or unless the employer knew that the person using such firearm would commit such criminal act on the employer's premises."

Following a hearing, the trial court granted summary judgment in BCI's favor. (A court grants summary judgment when it determines a jury trial is unnecessary because the facts are undisputed and the law squarely falls on the side of one of the parties.) Lucas then appealed to the Court of Appeals, but it upheld the lower court's decision, ruling that the language of § 16-11-135 (e) was "plain and unambiguous" and entitled BCI to immunity from being sued. "Here, there is no dispute that Lucas's injuries and subsequent civil action arose out of Wilson's possession and/or use of a firearm," the appellate court's opinion says. "Similarly, it is undisputed that the shooting was not the result of a criminal act by Wilson or BCI. Thus, under the plain language of the statue, BCI cannot be held liable for the firearm-related injury Lucas suffered as a result of Wilson's alleged negligence." Although Lucas argued that subsection (e) of the statute was not applicable because of language in other subsections of § 16-11-135 that limits the statute's reach to privately-owned vehicles, the Court of Appeals rejected his contention. Lucas now appeals to the Georgia Supreme Court, which has agreed to review the case to determine whether the appellate court correctly interpreted § 16-11-135 (e).

ARGUMENTS: Attorneys for Lucas argue that the trial court and Court of Appeals were wrong because the provisions of § 16-11-135 and the immunity of subsection (e) do not apply to this lawsuit, as that section only applies to instances involving firearms in "*privately-owned vehicles of employees or guests*" on employers' parking lots. "The Court of Appeals' interpretation of § 16-11-135 (e) expands the immunity provision beyond the scope of the Code section and results in broad, far-reaching immunity for employers for firearm-related liability involving employees," the attorneys argue in briefs. Here, the appellate court erred in interpreting subsection (e) to expand immunity beyond the Code section's parameters and to "thereby eviscerate long-standing common law bases of employer liability." "This Code section relates to privacy in 'privately owned vehicles of employees and invited guests' to prohibit employers from searching such vehicles or restricting firearms from being in such vehicles on employers' parking lots," Lucas's attorneys argue. Subsection (a) of § 16-11-135 prohibits employers from searching their employees' privately owned vehicles that are in employers' parking lots, and subsection (b) prohibits employers from restricting firearms from being in such vehicles. "The relevant Code section, enacted in 2008 as part of the Business Security and

Employee Privacy Act, relates to privacy in the 'privately owned vehicles of employees or invited guests' on employers' parking lots and access thereto, and it prohibits employers from searching or restricting possession of firearms in such vehicles." Subsections (a) and (b) "specify the universe of situations in which the employee privacy right created by this Code section exists, specifically limiting that universe to situations involving firearms in privately owned vehicles of employees or guests on the employer's parking lot," the attorneys contend. "The immunity provision is then restricted in reach to only limit liability for 'damages resulting from or arising out of an occurrence involving the transportation, storage, possession, or use of a firearm…pursuant to this Code section.'" "The statute's plain language should not be construed so broadly as to undo hundreds of years of common law governing the duties and liability of employers."

"The sole issue on appeal is whether the Court of Appeals erred in interpreting § 16-11-135 (e) as providing immunity to employers for firearm related incidents, subject to certain exceptions not applicable here," the attorney for BCI argues. "The answer to this question is a resounding no. As the Court of Appeals correctly held, the statutory language clearly and unambiguously provides that an employer cannot be held liable in any criminal or civil action for damages arising from the transportation, storage, possession or use of a firearm unless the employer commits a criminal act or knew the person using the firearm would do so. Lucas's tortured interpretation of the statute contravenes the plain language of the statute, disregards the General Assembly's specific choices in the language and structure of the statute as a whole, and ignores long-established canons of statutory construction. The Court of Appeals correctly interpreted the statute according to the plain meaning of its unambiguous terms which provide immunity to BCI from liability in this case." Here, "the statute and the overall statute structure demonstrate that the General Assembly did not intend to limit the immunity subsection as Lucas suggests," BCI's attorney argues. "Had the General Assembly intended to limit the scope of subsection (e) to 'privately owned vehicles,' it would have expressly done so just as it did in subsections (a) and (b)." "Accordingly, summary judgment in BCI's favor was proper and should be affirmed."

Attorneys for Appellant (Lucas): Peter Daughtery, Dustin Brown
Attorney for Appellee (BCI): Kurt Powell

FRANKLIN V. THE STATE (S17A1599)

A young man convicted of murder for his role in the stomping and beating death of a 19-year-old at a high school party is appealing his conviction and life-without-parole prison sentence.

FACTS: On Nov. 6, 2010, the parents of Alexis and Ariana Thompson hosted a party for their daughters at their home on Independence Drive in **Douglas County**. Each daughter was permitted to invite six friends to the party that was to be a celebration of the girls' good grades at school. Among those invited to the party was Bobby Tillman, 19, a recent graduate of Chapel Hill High school and a freshman at Perimeter College. The party started out relatively tame, with dancing and no drugs or drinking. But news about the party spread on social media and eventually, more than 50 uninvited people showed up. Among them were **Tracen Lamar Franklin**, 18, and his friends, Emmanuel Boykins, Horace Coleman, and Quantez Mallory. Franklin, a college freshman at Alabama State University, had come home for the weekend. As

the party grew out of control, the parents shut it down, called police, and many of the partygoers spilled into the front yard and onto the street. A fight broke out among some of the girls who had crashed the party. As people congregated around the girls to watch the fight, Tillman, who had not been involved in any of the verbal or physical altercations, sat passively on the trunk of a Mercedes that was parked across the street. At one point, Boykins tried to break up one of the fights between girls and was himself hit. Witnesses heard him say he wasn't about to hit a female, "but the next n----- I see, I'm going to swing on him."

According to State prosecutors, Boykins then headed toward Tillman and began hitting him. Franklin, Coleman, and Mallory joined in, punching and kicking the downed Tillman. "They just kept kicking him and kept kicking him," one witness said. As Tillman lay on the ground, the four stomped on him more than 10 times. After they finally stopped, Tillman lay on the ground bleeding from his mouth. When deputies from the Douglas County Sheriff's Office arrived, they blocked the roadway with their vehicles to prevent people from leaving the scene. They found Tillman lying unconscious in the grass but still alive with a weak pulse and gasping for air. Law enforcement and then paramedics performed CPR, but Tillman never regained consciousness. He was transported to the hospital and pronounced dead shortly after arrival. Tillman's death was caused by a rupture in the wall of his heart's right ventricle, according to the medical examiner. Meanwhile, law enforcement officers transported 57 partygoers to the sheriff's office for interviews. At the sheriff's office, officers set up photo lineups, and several witnesses identified Franklin, Coleman, Boykins, and Mallory as Tillman's attackers.

In August 2011, then Douglas County District Attorney announced he would seek the death penalty against Boykins and Franklin. In 2012, Boykins pleaded guilty and was sentenced to life in prison with the possibility of parole after 30 years. Coleman and Mallory were jointly tried, convicted and sentenced to life without parole. On Aug. 14, 2017, the Georgia Supreme Court upheld their convictions and sentences. In September 2012, a jury convicted Franklin of malice murder and felony murder based on aggravated assault. During sentencing, the jury deadlocked on the issue of punishment, and the judge discharged the jury. The decision of whether to sentence Franklin to life imprisonment with the possibility of parole or without the possibility of parole then went to the judge, who opted for life without parole. Franklin now appeals to the Georgia Supreme Court.

ARGUMENTS: Franklin's attorneys, who are from the Office of the Georgia Capital Defender, argue that the trial court erred because "the death penalty was invoked in this case as a blatant intimidation tactic designed to force the accused teenagers to enter guilty pleas within 90 days and to tilt the scales in favor of the prosecution. The trial court refused to intervene, erroneously concluding that it was without authority, and the case was ultimately permitted to proceed as a death penalty trial over defense objection." Franklin's trial exposes the failure of Georgia law to "meaningfully narrow the class of murders for which death is an available punishment," Franklin's attorneys argue. Under Georgia law, the jury must find at least one of 11 "aggravating circumstances" for a judge to impose the death penalty. Among aggravating circumstances are a murder that was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." The facts in this case were "patently insufficient to make out any statutory aggravating circumstance," and it was error "for the trial court to allow the prosecution to force Mr. Franklin into a death penalty trial over his specific pre-trial objection, thereby giving the prosecution the upper hand at trial and

depriving Mr. Franklin of his constitutional rights to a fair opportunity to prove his innocence," the attorneys argue in briefs. This is a case in which a "scrum of rowdy teenagers brawling outside a house party in suburban Douglas County led to the sudden and tragic death of an innocent man named Bobby Tillman…." Franklin admitted with remorse that he had swung at Tillman who did nothing to provoke the assault that killed him. Franklin had not so much as a misdemeanor in his background. "The death penalty was sought in this case not as a measured response to either the facts of the offense or to the character and record of the defendants, but rather solely for the improper purpose of gaining unfair strategic leverage in a marginal case where acquittal was otherwise a very real possibility." "In a seemingly unprecedented move, the then-elected district attorney, David McDade, who was later forced to resign under threat of criminal prosecution, made a very public threat to seek the death penalty against all four defendants unless they entered guilty pleas within 90 days," the attorneys contend. "By making these menacing proclamations, Mr. McDade laid bare his unmistakable purpose for invoking the state's power to kill: to coerce a quick guilty plea, or, barring that, to tilt the scales in his favor at a trial he might otherwise stand to lose." Franklin is also entitled to a new trial because the pool from which his grand jury was drawn "systematically underrepresented blacks and overrepresented whites" in violation of the Sixth and Fourteenth Amendments of the Constitution, Franklin's attorneys argue.

The State, represented by the District Attorney's and Attorney General's offices, argues that Franklin's challenge of the trial court's permitting the State to proceed with a death penalty trial, despite Franklin's pre-trial objection, is moot, or in the alternative, lacks merit. Franklin was ultimately sentenced to life without parole. "Because Appellant [i.e. Franklin] was not sentenced to death, any issue related to the State seeking the death penalty or Appellant's objection thereto is moot," the attorneys for the State argue. Here, Franklin's counsel "seeks to use this appeal to overturn well-established principles of law, essentially seeking to have this Court issue an advisory opinion on these issues, which Appellee [i.e. the State] urges this Court to refrain from doing." Regardless, Franklin's arguments are without merit. Franklin has not shown that the State sought the death penalty for an improper purpose. Despite his attorneys' "baseless allegations," Franklin "has not produced any proof that the district attorney [was] motivated by anything other than the strength of the evidence," the State argues. The trial court also did not err in ruling after the close of evidence that there was evidence of aggravating circumstances. After the close of evidence and prior to closing arguments, the trial judge revisited the issue of Franklin's motion to dismiss the aggravating circumstances and gave both sides the opportunity to argue the issue. The evidence establishes that Franklin's actions clearly show depravity of mind and torture, as the victim was subjected to serious physical abuse and his death was not instantaneous. Franklin was not deprived of the opportunity to demonstrate his "actual innocence." Finally, the grand jury pool was selected in compliance with the law, and Franklin's claim that it was not also "is without merit," the State contends.

Attorneys for Appellant (Franklin): Josh Moore, Jerilyn Bell

Attorneys for Appellee (State): Brian Fortner, District Attorney, Emily Richardson, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Crowder, Asst. A.G.

<u>SMITH V. THE STATE</u> (S17A1490)

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

FACTS: Orlando and Demetra Smith were married in Las Vegas in February 2010 and lived in an apartment on DeLowe Drive in Atlanta. According to prosecutors with the State, Orlando was very controlling and abused his wife, prohibiting her from talking on the phone or going anywhere without him. One of Demetra's friends said he would choke her if she used the telephone. The friend said she once accompanied Demetra to the hospital after the couple got into an altercation. At one point, Demetra asked another friend, Ali Hassan, for money so she could go to a hotel for the night to get away from her husband. After that, she rented a storage room and gradually began moving her belongings out of the apartment, hoping he would not notice. On May 24, 2010, Demetra told Hassan she could not remain any longer with Orlando. Hassan later testified that he told her she was welcome to stay with his family. She said she needed to go back to the apartment to get more of her things, but she would be back. Hassannever saw her again. Hassan also testified that although Demetra regularly carried a gun, she told him she was missing her gun that day. Around 6:30 p.m., a neighbor who lived next door to the Smiths, saw both Orlando and Demetra at the apartment.

According to prosecutors, sometime between midnight and 1:00 a.m. on May 25, Orlando took his wife's semi-automatic pistol and shot her in the back of the head, killing her. The bullet that killed Demetra was fired from a Beretta or a Taurus pistol, both of which have the same rifling structure. Demetra owned a .40 caliber Taurus pistol, but her pistol was never recovered. According to the State, before leaving the crime scene, Orlando set off the apartment alarm, then went to his daughter's house. Police arrived at the apartment, but found no sign of forced entry and did not enter the apartment. The next morning, the couple's daughter told her father she had to go to school. He told her to stay with him, and if anyone asked, to say he had been with her since 5 p.m. the previous evening. Orlando then drove his daughter back to the apartment and while he went inside, she waited outside. He called his daughter into the apartment, and she then called 911. Police found Demetra dead from a close-range bullet that had entered through the back of her head and exited through the forehead. After obtaining a search warrant, Atlanta Police Sergeant Liane Lacoss found the victim's wedding ring and a bloody wash rang in the sink. At the time, police had no suspects and no sign of a burglary. Police asked the father and daughter to come to the police station to talk.

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

A Fulton County grand jury indicted Orlando Smith for malice murder, felony murder, aggravated assault and gun charges. Following an October 2011 trial, the jury convicted Smith of

all charges except malice murder and aggravated assault. He was sentenced to life in prison plus five years for the gun charges. Smith now appeals to the Georgia Supreme Court.

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

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

under suspicion of being a drug dealer. Finally, "There was more than sufficient evidence for a rational trier of fact to find Appellant guilty," the State contends.
Attorney for Appellant (Smith): Jessica Seares, Office of the Public Defender
Attorneys for Appellee (State): Paul Howard, Jr., District Attorney, Lyndsey Rudder, Dep. D.A., Joshua Morrison, Sr. Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., S. Taylor Johnston, Asst. A.G.