



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Tuesday, September 12, 2017

10:00 A.M. Session

BARNETT ET AL. V. CALDWELL (S17G0641)

The parents of an Atlanta teenager who died after he and another student were roughhousing in class, are appealing a Georgia Court of Appeals ruling that the teacher who left the students unsupervised is immune from being sued.

FACTS: On Oct. 14, 2008, 16-year-old Antoine Williams was a student in Phyllis Caldwell's seventh period American Literature class at Benjamin E. Mays High School in Atlanta. At about 2:45, Caldwell left the classroom. On the way out, she asked the neighboring teacher to "listen out" for her class. The two classes shared a common entrance into a room that was separated by a bifold – or sliding partition – wall. While the teacher was gone, Williams and another student began wrestling around and fell to the floor with the other student on top of Williams. Williams subsequently collapsed and was lying unconscious on the floor when Caldwell returned to the classroom at about 3:15 p.m. By then, the other teacher and the hall monitor were in the room after students had run into the hallway seeking help. Caldwell called 911, telling the operator she believed the student had suffered a seizure. Emergency medical technicians transported Williams to Grady Memorial Hospital where he was pronounced dead. The medical examiner determined that Williams had died from blood loss after his dislocated collarbone lacerated a major blood vessel.

Following Williams' death, Caldwell told the principal she had been in the classroom the entire time and had stopped some horseplay but observed no activity out of the ordinary. She said that Williams had complained about his nose bleeding and had fallen to the ground when he tried to stand. A few days later, however, the principal learned Caldwell had not been in the classroom when Williams collapsed. A subsequent investigation by an independent company hired by the Atlanta Public Schools also concluded that Caldwell had been away from her classroom when Williams was injured. After discovering that Caldwell had lied about being in the classroom, the principal confronted Caldwell, who gave several different explanations for leaving the room. The principal later said it had never become clear to him why she had left.

The Faculty and Staff Handbook for Benjamin E. Mays High School states in Section 6.5: "The classroom teacher is solely responsible for the supervision of any student in his or her classroom. Students are never to be left in the classroom unsupervised by an Atlanta Public Schools certified employee." The principal later testified that he had specifically explained to his teachers that this policy required a teacher's proximity to the classroom and that "students should not be out of your eyesight." Caldwell told the investigator that she was aware of the policy.

In October 2010, Williams' parents, Jena Barnett and Marc Antoine Williams, filed a wrongful death suit against Caldwell in **Fulton County** State Court. In their lawsuit, they alleged that Caldwell was liable for their son's death based on her negligent supervision of Williams because she had left her classroom unsupervised in violation of Section 6.5 of the school handbook. A key issue in this case stems from the difference between a "discretionary" action, which requires personal deliberation and judgment, and a "ministerial" action, which is a simple act that merely requires the execution of a specific duty. Under the doctrine of immunity, public officers are protected from personal liability for *discretionary* actions taken within the scope of their official authority if they are done without malice or corruption. But they may be personally liable for *ministerial* acts that are negligently performed, or performed with malice or an intent to injure. Here, Williams' parents argued that Caldwell was not entitled to official immunity because Section 6.5, a clear and unambiguous policy, created a ministerial duty, and she violated it. Caldwell's attorney filed a motion asking the trial court to dismiss the lawsuit on grounds including that Caldwell was protected by official immunity.

The trial judge granted "summary judgment" to Caldwell, finding that supervising and monitoring students is a discretionary act for which she was entitled immunity. (A judge grants summary judgment upon concluding that a jury trial is unnecessary because the facts of the case are undisputed and the law falls squarely on the side of one of the parties.) Barnett and Williams then appealed to the Court of Appeals, which upheld the trial court's decision, finding that by asking another teacher to watch out for her students while she was out of the classroom, "Caldwell did just enough for her actions to be discretionary." "Although discerning the line between ministerial and discretionary duties is sometimes difficult, it is well-established that the task of supervising and controlling students is a discretionary act entitled to official immunity," the appellate court wrote in its decision, citing several of its former decisions. "And this immunity applies 'even where specific school policies designed to help control and monitor students have been violated.'" Furthermore, "although Caldwell's conclusion was tragically wrong, second-guessing her determination is the very sort of thing that official immunity prohibits," the Court of Appeals ruled. Williams' parents now appeal to the state Supreme Court.

ARGUMENTS: Attorneys for Williams’ parents argue that Caldwell should not benefit from official immunity. The Court of Appeals decision should be reversed because it conflicts with the precedent-setting decisions of the state Supreme Court and the Court of Appeals regarding liability for ministerial acts. “Long-standing Georgia law establishes that a public employee’s negligent performance of a ministerial duty is not protected by official immunity, and that such duties may arise from a clear written policy or from the specific instructions of a supervisor,” the attorneys argue in briefs. In this case, the Court of Appeals has relied on its 1999 decision in *Chamblee v. Henry County Board of Education* that created an exception to that doctrine for school personnel by ruling that, “Supervision of students is considered discretionary even where specific school policies designed to help control and monitor students have been violated.” Benjamin E. Mays High School had a written policy stating that “students are **never** to be left in the classroom unsupervised.” The principal specifically explained to his teachers, including Caldwell, that this policy required a certificated employee to be present in the classroom with eyes on the students at all times. Yet Caldwell left a classroom full of students unwatched for more than half an hour at the end of the school day, “and the horseplay that foreseeably occurred in her absence resulted in a fatal injury to plaintiffs’ son, Antoine Williams,” the attorneys argue. “If Caldwell had been any other type of public employee, this clear written policy and the specific instructions of her supervisor would have been held to create a ministerial duty that could support civil liability.” But the Court of Appeals ruled that Caldwell was protected by immunity, stating that, “Regardless of whether Caldwell violated the policy as explained to her, binding precedents of our court are clear that discretionary decisions related to supervision are entitled to official immunity ‘even where specific school policies designed to help control and monitor students have been violated.’” This “student-supervision exception” of the law of ministerial acts “should be overturned,” the attorneys argue because “the Court of Appeals’ decisions establishing that exception stand in conflict with settled precedents and create inconsistency in the law of official immunity.” The state Supreme Court should reverse the Court of Appeals’ decision in this case, and the case should go before a jury.

Caldwell’s attorneys argue the Court of Appeals correctly ruled that official immunity protects Caldwell from a negligence claim for wrongful death. “The issue here comes down to whether Ms. Caldwell’s actions in supervising her class were discretionary or ministerial,” the attorneys argue in briefs. “Georgia courts have long recognized that supervising students nearly always requires discretion.” That discretion, quoting the Georgia Supreme Court’s 2010 decision in *Grammens v. Dollar*, is “the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed.” No school policy, written or oral, changes the “inherently discretionary acts of supervision” into something ministerial, the attorneys argue. “The relevant two-sentence written policy required that students never be ‘unsupervised,’ but it provided no elaboration as to what ‘supervision’ required,” the attorneys argue. While the principal asserted that the policy meant a teacher must have students “in your eyesight” at all times, he also conceded that teachers may need to go to the restroom and that asking other teachers or a hall monitor to cover a class was proper. Caldwell exercised her discretion when she asked another teacher to listen out for her class while she used the restroom. “Her decisions reflect, ‘the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed,’” the attorneys argue, again

quoting the *Grammens* decision. The school’s faculty handbook and the principal’s admonition did not create a ministerial task. “The policies plaintiffs raise here did not order Ms. Caldwell to take ‘a specified action in a specified situation,’” Caldwell’s attorneys argue, “but left discretion to her in supervising her class.”

Attorneys for Appellants (Barnett): Shean Williams, Leighton Moore

Attorneys for Appellee (Caldwell): Cheryl Haas, Kurt Lentz, Matthew Fitzgerald

GRADY V. BENNETT (S16G1758)

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

FACTS: Steven Grady and Brittney Bennett had a son together in 2013; they were not married and the baby remained with his mother. Two years later, Grady filed a “Petition for Legitimation and Child Custody” in **Forsyth County** Superior Court. Bennett objected based on “abandonment of the opportunity interest” by the father. Before granting a petition to legitimate, a court must determine whether the father has abandoned his opportunity to develop a relationship with the child. A biological father’s interest begins at conception and may endure through the child’s minor years, but the unwed father may abandon his interest if he doesn’t pursue it in a timely fashion. Factors that may support a finding of abandonment include the father’s inaction during pregnancy and birth, a delay in filing a legitimation petition, and a lack of contact with the child. In September 2015, the Forsyth court issued a Final Order, finding that Grady had abandoned his interest in the minor child and dismissing his petition for legitimation. Grady then filed a “direct” appeal to the Georgia Court of Appeals, as opposed to a “discretionary” appeal. In a direct appeal, the party has an automatic right to appeal based on the type of case it is. For instance, all those convicted of murder have a right to a direct appeal. In a discretionary appeal, however, the party must file an application and the appellate court decides whether it will accept the application and review the case. In May 2016, the Court of Appeals also dismissed Grady’s case, stating that “appeals in domestic relations cases must comply with the discretionary appeal procedure, and a legitimation action is a domestic relations case.” Grady now appeals to the state Supreme Court, which has agreed to review the case to determine whether an application for discretionary review is required to appeal from an order on a petition for legitimation.

ARGUMENTS: Grady’s attorney argues that the trial court’s final order denying the legitimation and denying any custody of his child “essentially terminated the Father’s parental rights.” Georgia Code § 5-6-35 (a) (2) requires an application to appeal “from judgments or orders in divorce, alimony, and other domestic relations cases....” But the Court of Appeals has ruled that an appeal from a termination of parental rights does not fall under this statute and is therefore directly appealable. Furthermore, Georgia Code § 5-6-34 (a) (11) is the statute that applies in this case, and it permits a direct appeal of all “judgments or orders in child custody cases awarding, refusing to change, or modifying child custody....” This case does not involve divorce or alimony, to which Georgia Code § 5-6-35 (a) (2) applies, “and therefore the direct appeal should not have been dismissed” by the Court of Appeals. Here, Grady filed for a change in custody from the mother having sole legal and physical custody to having joint legal and physical custody, Grady’s attorney argues. Although the Court of Appeals’ 2013 ruling in *Cloud v. Norwood* “appears at first blush to support the position that a discretionary application is

necessary in a legitimation action, this case appears to be an outlier in its position,” the attorney argues. “Moreover, it is in direct contrast to later holdings and an abundant number of other cases.” If anything, this case demonstrates the conflict in the law under court rulings and demonstrates the need for clarity. “The underlying issue in the present case is a child custody determination and a termination of parental rights,” Grady’s attorney argues. The dismissal order in this case “should have been directly appealable and not subject to the discretionary application procedure.”

Although Grady argues that this matter is a child custody case, the order on appeal “involves the sole issue of legitimation,” Bennett’s attorney argues. More than 30 years ago, in *Brown v. Williams*, the Court of Appeals made it explicit that, “A legitimation proceeding is a type of domestic relations case” that is subject to discretionary appeal. The only time custody was even mentioned at the legitimation hearing was when Bennett’s trial attorney talked about the “bright line rule” articulated in the Georgia Supreme Court’s 1987 ruling in *In re: Baby Girl Eason*. In that decision, the court stated that, “there is a distinction between the degrees of protection that are afforded to unwed, biological fathers who have lived with children and assumed their roles as parents, and unwed biological fathers who have never had custody of their children or participated as a parent.” Bennett’s attorney then went on to point out that Grady is the latter type of father, “having never provided any support for his child and never having even met his child.” Although his petition stated in the title that it was for “Legitimation and Child Custody,” the petition’s contents “do not support such a grand title,” the attorney argues. The question of whether this matter is subject to application or direct appeal is whether it is a domestic relations case – mandating an application – or a child custody case – allowing for direct appeal. “Georgia courts have been consistent in their interpretation of legitimation actions being a type of domestic relations case subject to the application requirements,” Grady’s attorney argues. Legitimation is a precondition to establishing custody rights. “The Georgia Legislature is clear that custody of a minor illegitimate child is in the mother alone prior to legitimation.” Prior to a judgment of legitimation, the father has no custodial rights and no standing to raise the issue of custody. “The Final Order does not make a custody determination because Appellant [i.e. Grady] had no legal rights to the minor child upon which to base a custody determination,” her attorney argues. Similarly, “The denial of a legitimation petition does not constitute a termination of parental rights.”

Attorney for Appellant (Grady): Lindsay Haigh

Attorney for Appellee (Bennett): Joann William

2:00 P.M. Session

TAYLOR V. THE STATE (S17G0501)

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

FACTS: According to state prosecutors, **Harry Brett Taylor** sexually molested 16 children. Each child’s ordeal is detailed in briefs filed by the Gwinnett County District Attorney.

Most of the children were 8 or 9 years old when the abuse began, although some were as young as 6. “Appellant [i.e. Taylor] began molesting C.T. when C.T. was between 8 and 9 years old and continued to do so until C.T. was between 12 and 13 years old,” according to briefs filed by the State. “Appellant had C.T. insert his penis into Appellant’s anus on three to four occasions, Appellant attempted to insert his own penis into C.T.’s anus, Appellant performed oral sex on C.T., Appellant had C.T. perform oral sex on him, and Appellant had C.T. touch Appellant’s penis. When Appellant attempted to insert his own penis into C.T.’s anus, C.T. stated his anal cavity was too small for Appellant’s penis. These acts comprised Counts One through Six of the Indictment.”

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

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

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

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

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

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

ARGUMENTS: “Georgia should follow the majority of jurisdictions that have decided this precise issue and held that a search warrant is fatally defective when the supporting affidavit

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

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

Attorney for Appellant (Taylor): Bernard Brody

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

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

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

FACTS: In 2012, EJC6, LLC paid a bank \$850,000 for a 6.7-acre property in Johns Creek that was in foreclosure. The land was part of a 42-acre tract that a decade earlier, before the City of Johns Creek was incorporated, had been zoned as a “MIX District” by the Fulton County Board of Commissioners after the property owner successfully petitioned for rezoning. The rezoning application included a letter of intent and site plan indicating the intended use for each parcel of the tract. Upon incorporation, the City of Johns Creek adopted the County’s MIX zoning classification, which is now found in Section 8.2 of Ordinance 2010-05-08. The ordinance says that the MIX District “mandates a residential component of single-family dwellings, duplexes, triplexes, quadruplexes, townhouses, multifamily dwellings or any combination thereof along with at least two of the following: commercial, office or institutional uses.” The ordinance makes clear that construction in the MIX District is subject to certain conditions not in the zoning ordinance. These conditions are found in the site plan and letter of intent, and under the conditions, EJC6’s property is apparently zoned for an office development or residential use limited to 75 units. The property is adjacent to a hospital and office buildings, including medical offices.

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

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

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

In conclusion, the judge said, EJC6 “has failed to provide clear and convincing evidence of significant detriment.”

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

ARGUMENTS: EJC6 was not required to file an application to appeal the superior court’s decision, the developer’s attorneys argue. Since the Georgia Supreme Court’s 1989 decision in *Trend Development Corp. v. Douglas County*, this Court has clarified that a direct appeal is proper where “a zoning case does not involve superior court review of an administrative decision.” However, an appeal of a constitutional issue, such as this appeal, is the first time a court sits in an appellate position, and therefore the underlying dispute is being reviewed for the first time. Therefore, EJC6 is entitled to a direct appeal because it filed this lawsuit in the trial court alleging that the zoning ordinance is unconstitutional as applied. Also, the trial court erred in finding that EJC6 did not suffer a significant detriment from the zoning ordinance, the attorneys argue. A zoning classification is unconstitutional as applied and must be declared void when “the damage to the owner is significant and is not justified by the benefit to the public.” Finally, the trial court erred in failing to find that the zoning ordinance is not related to the public health, safety, morality or welfare of the City, the developer’s attorneys argue.

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

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

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

KEMP V. THE STATE (S17A1646)

A man is appealing his conviction and life-without-parole prison sentence he received in **Cobb County** for his role in the murder of a man who was trying to buy marijuana.

FACTS: In July 2011, Derek “Dirt” George Gray, Jr. had just returned from his honeymoon and lived at Million Galleria Apartments in Smyrna, GA. On July 1, Gray told his brother, Renard Gray, that he was going to buy some marijuana from Alphonso “JRock” Watkins, his long-time supplier. Renard loaned Derek \$1,000 since Derek had spent a lot of money on his honeymoon. Derek showed his brother a black Taurus Judge .45 revolver that he had recently bought. Later the night of July 1, 2011, Watkins called Derek Gray and said that although he did not have any marijuana, he would arrange for Gray to buy some from someone else. During the next hour and a half, there were numerous calls between Watkins and **Derek Lee Kemp** and several calls between Kemp and Derek Gray and Watkins and Derek Gray. A few days earlier, Kemp was overheard planning a robbery, saying, “I’m going to rob this man for anything he got, I don’t care.” At about 9 that night, Derek Gray left his apartment with the \$1,000. The last call answered on his phone was from Kemp at 9:58 p.m., at which time cell tower information showed that the phones belonging to Kemp, Watkins, and Gray were in an area located off Circle 75 in Cobb County. Around 10:30 that night, Michael Sanders saw a light colored Ford Taurus pull up to his house in the Bluffs neighborhood near downtown Atlanta. The car drove away after Harvey Hogans got out and fell to the ground, saying he’d been shot. Later that evening, a woman left her home in the Mission Galleria Apartments and was walking along Circle 75 Parkway on her way to work when she saw Gray’s dead body. He had been shot multiple times and sustained a fatal bullet to his chest that struck his heart and aorta. Law enforcement officers did not find the \$1,000 on his body.

Derek Kemp, Hogans and Watkins were tried together, and at their trial, the judge allowed State prosecutors to call Steve Lewis to testify. Lewis, a member of the Loyal to Gang (“LTG”) faction of the Gangster Disciples gang, had prior felony convictions and once worked as a confidential informant. Lewis testified that Watkins and Kemp were members of LTG. After Gray’s death, Watkins told Lewis that he and Kemp had “f---d up,” but he did not elaborate. More than five months after Gray’s murder, Lewis was arrested for something unrelated and placed in the same prison facility as Watkins. Watkins told him that he, Kemp and Hogans had planned to rob Gray during a contrived drug deal. When Gray wanted to buy marijuana from Watkins, Watkins arranged for Kemp and Hogans to drive Gray to Mission Galleria Apartments, according to Lewis. Once there, Hogans pointed a gun at Gray, but Gray shot at Hogans first, wounding him in the arm and shoulder. Hogans then returned fire, killing Gray. Watkins also told Lewis that he, Kemp and Hogans formulated a plan to conceal the crime by dumping Gray’s body, burning the car, and having Hogans claim he got shot by someone trying to rob him.

Following trial in January 2014, Derek Lee Kemp was convicted of malice murder, armed robbery, and possession of a firearm during the commission of a crime. Hogans and Watkins were also convicted, and although all three are appealing their convictions, only Kemp’s case is set for oral argument before the Georgia Supreme Court.

ARGUMENTS: Kemp’s attorneys argue the trial court erred in admitting as evidence Lewis’s testimony about Watkins’s confession as a “co-conspirator statement.” To admit a co-conspirator’s statement as an exception to the hearsay rule, Georgia Code § 24-8-801 requires that the statement be made in the course of the conspiracy or in furtherance of it. Watkins’s

statements were made in December 2011, more than five months after Gray's death, and therefore not in the course of the conspiracy. His statements also were not in furtherance of the conspiracy because they did not advance or facilitate the ultimate objects of the conspiracy, Kemp's attorneys argue. Among other arguments, the evidence was insufficient to sustain Kemp's convictions because the jury did not exclude the reasonable hypothesis that he did not know his co-defendant had a gun and there was not a plan to point a gun at, much less shoot, the victim. Although there is some evidence that Kemp knew of a plan to rob Gray, the evidence did not support a conviction for malice murder because the evidence of intent is entirely circumstantial and did not rule out the possibility of lack of intent to kill.

The State, represented by the District Attorney's and Attorney General's offices, argues that the trial court's finding that Lewis's statements were made in furtherance of the conspiracy can be overturned only if clearly erroneous. Here, Watkins was speaking to another Gangster Disciples member about the gang's business, thus acting in the course of, and in furtherance of, the gang's interests. In the related area of racketeering cases, where the "enterprise" is functionally equivalent to a gang, co-conspirator statements are admissible, regardless of whether the defendant participates in the same conspiracy or criminal act. Therefore, a gang member's testimony about the conduct and behavior of other gang members is admissible. As to the sufficiency of the evidence, there was both direct and circumstantial evidence showing Kemp's involvement in the crimes, the State argues. Regardless of whether Kemp shot Gray, he was a party to the murder and his criminal intent could be inferred from his conduct throughout, the State contends. He planned to rob Gray, helped Watkins and Hogans carry out the robbery, and attempted to conceal evidence of the crimes by moving Gray's body and burning the vehicle in which the murder occurred.

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