



## Supreme Court of Georgia

Jane Hansen, Public Information Officer  
244 Washington Street, Suite 572  
Atlanta, Georgia 30334  
404-651-9385  
hansenj@gasupreme.us



## 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, October 16, 2017

#### 10:00 A.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 decision that 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 statute, 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

### **CAHILL V. UNITED STATES (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 66<sup>th</sup> 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**

### **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 them 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

### **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.

**Attorneys for Appellant (Kemp):** Konrad Ziegler, C. Ryan Lee

**Attorneys for Appellee (State):** D. Victor Reynolds, District Attorney, Michael Carlson, Dep. Chief Asst. D.A., John Melvin, Chief Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Youn, Asst. A.G.

### **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.