



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Monday, January 22, 2018

10:00 A.M. Session

GEORGIA POWER COMPANY V. CAZIER ET AL. (S17G0706)

Georgia Power is appealing a ruling by the state Court of Appeals that allows a lawsuit brought by some of the utility's customers to go forward against it. The customers claim Georgia Power overcharged them.

FACTS: **Amy Cazier** and several other individuals are customers who purchase electrical services from Georgia Power. As an electrical utility, **Georgia Power** is authorized to collect and remit sales and use taxes to the Georgia Department of Revenue. The utility is regulated by the Public Service Commission. Cazier and other customers received monthly bills from Georgia Power that included a nuclear construction cost recovery fee to finance the cost of building a new nuclear generating facility, and a municipal franchise fee, to cover payments made to municipalities for access to roads and rights of way. The bills also show that Georgia Power assessed sales taxes on both of these fees. The customers sued in **Fulton County Superior Court**, seeking certification as a class action against Georgia Power. Although they did not challenge Georgia Power's authority to charge the nuclear construction and municipal franchise fees, they argued that such fees were not subject to sales taxes and Georgia Power therefore improperly collected sales taxes on both fees. They sought refunds of the sales taxes. They also claimed that Georgia Power has improperly calculated the municipal franchise fees. Municipal

franchise fees, which are set by contract between the utility and municipalities, are paid by Georgia Power to cities in exchange for use of their rights of way.

In the part of this complex case now on appeal, in 2015, the trial court granted Georgia Power's motion to dismiss the lawsuit, ruling that Cazier and the other customers had failed to exhaust their administrative remedies by taking their case to court before arguing their case before the PSC, the administrative agency. The trial court also denied the customers' motion for class certification. Cazier then appealed to the Court of Appeals, which reversed the trial court's ruling. The intermediate appellate court explained that Cazier had argued that PSC orders require Georgia Power to calculate municipal fees a certain way; that Georgia Power's accounting practice violates the applicable PSC orders, resulting in customer overcharges; and that under Georgia Code § 50-13-19 (a), the customers' claims were not subject to the Administrative Procedure Act, which governs the judicial review of agency decisions, including those of the PSC. The Court of Appeals held that Cazier and the others were not required to exhaust administrative remedies because they were not challenging an agency decision. Georgia Power now appeals to the state's highest court, which has agreed to review the case and has asked the parties to answer three questions: 1) Whether another statute, § 46-2-90 authorizes customers to bring suit against their utility provider for allegedly calculating and collecting fees in a manner that conflicts with an order of the Public Service Commission; 2) Whether § 46-2-90 displaces the usual rule that plaintiffs like Cazier must exhaust their administrative remedies before bringing a case to court; and 3) If § 46-2-90 does not displace this usual rule, whether the PSC provides adequate administrative remedies in a case such as this one, so that the customers were required to exhaust those remedies before bringing suit.

ARGUMENTS: Attorneys for Georgia Power argue that § 46-2-90, which is the state's Unlawful Acts Statute, provides no basis for claims based on alleged "excessive charges" above the "lawful amount authorized" by the PSC rate orders. This statute instead authorizes a cause of action for damages and legal fees for persons who suffer "loss, damage or injury" caused by a PSC regulated company that "fails to do any act which is required...by an order of the commission..." "A utility's rates are not orders of the PSC within the meaning of § 46-2-90," the attorneys argue in briefs. "Rather, rate case orders are utility or carrier initiated, not special orders directing specific action as contemplated by the statute. Here, all of the rates charged by Georgia Power were authorized by the PSC who found them to be compliant with its determinations in general rate cases and retained jurisdiction in order to assure compliance." In response to the Supreme Court's second question, "the Unlawful Acts Statute does not eliminate the requirement to exhaust administrative remedies but instead presumes exhaustion has occurred." As to the third question, "consumers with rate grievances have adequate remedies before the PSC and do not need a judicial exception to by-pass those remedies," the attorneys argue. "The Court of Appeals made no inquiry into the adequacy of remedies when it reversed the trial court's dismissal due to the failure to exhaust administrative remedies."

Attorneys for Cazier and the other customers argue that the Court of Appeals made the right decision, and the courthouse doors should not be "barred against ratepayers enforcing rates set for their benefit by order of the Public Service Commission." "Placing Georgia Power beyond the reach of civil actions for damages would do violence to the express language of § 46-2-90," the attorneys argue in briefs. "These ratepayers seek only their legal rights to the rate *approved for them* in PSC orders. Whether it be equitable, efficient or wise to allow ratepayers to

seek damages in courts and enforce their rights under PSC orders is not for this Court to say. By enacting § 46-2-90, the legislative branch has already spoken.” Under the statute, “the General Assembly made courts of law – not the PSC – the exclusive domain for claims of legal damages by parties injured by Georgia Power’s violation of the PSC’s orders,” the attorneys argue. “Gutting the statute, like Georgia Power wants, is inconsistent with the respect due a law enacted by a co-equal branch of government.”

Attorneys for Appellant (Georgia Power): William Droze, Robert Edwards, Jr., Lindsey Mann
Attorneys for Appellees (Cazier): Roy Barnes, John Salter, J. Glenn Richardson

WORKMAN ET AL. V. RL BB ACQ I-GA CVL, LLC ET AL. (S17G1485)

A woman and 16 limited liability companies that she manages are appealing a Georgia Court of Appeals decision reversing a **Fulton County** trial court’s award of more than \$41,000 to cover their legal expenses.

FACTS: This case involves a “post-judgment discovery” dispute. “Discovery” is generally the pre-trial phase in a lawsuit when both parties may obtain information from each other to prepare their case. However, this case involves discovery after a judgment has been rendered, when a party that has won the judgment attempts to identify the assets and income of the other party that is responsible for paying the judgment. Here, a limited liability company with the legal name of “RL BB ACQ I-GA CVL, LLC,” but referred to as “Rialto,” won a \$1.9 million judgment against Cooper Village, LLC, and **Howard Workman**, its manager. Rialto had sued after Cooper Village defaulted on a \$5.5 million loan, and Howard, who had managed the loan documents and also gave a personal guaranty to secure the note, refused to honor the guaranty. Rialto alleged among other things that in 2009, Howard transferred title to a piece of real property to his wife, Honey C. Workman, for the purpose of defrauding his creditors. In 2014, after winning the judgment, Rialto served post-judgment discovery requests on Honey and 16 separate limited liability companies she managed and in which Howard had an ownership interest. The discovery requests demanded all of her financial records and the financial records of any entity in which she owned at least a 5 percent interest dating back to Jan. 1, 2009. The parties objected to producing all the information requested, but produced some. About a year later, Rialto served additional discovery requests on Fidelity Bank, seeking numerous documents related to any account held at Fidelity by Cooper Village, Howard, Honey, or any of the companies. Honey and her companies objected to these requests, and when the parties could not agree on the appropriate scope of the discovery from Fidelity, Honey filed a motion for a protective order. Following a hearing, the trial court granted the protective order and limited the discovery Rialto could obtain from Fidelity.

After Rialto’s attorney failed to appear to depose Honey on a date that had been informally agreed upon, Honey and her companies filed the motion requesting attorney fees and costs they had incurred in seeking a protective order and in preparing for Honey’s deposition. This is the subject of the current appeal. Following a hearing, the trial court granted their motion and granted all the relief Honey and her companies had requested. The trial court found that Rialto’s conduct in serving broad post-judgment discovery on Fidelity, and in opposing the motion for a protective order, violated Georgia Code section 9-5-14. The statute says that a court may award such expenses and fees “in any civil action in any court of record if,” the court finds, “that an attorney or party brought or defended an action...that lacked substantial justification or

that the action...was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct, including...abuses of discovery procedures.” The trial court also ruled that Rialto’s failure to appear for Honey’s deposition violated § 9-5-14 and another statute; that because Honey and the companies prevailed on the motion for a protective order, they were entitled to attorney fees; and it prohibited Rialto “from taking any further oral post-judgment examination” of Honey for five years. Rialto appealed to the Court of Appeals, which reversed the judgment in part, and vacated and remanded it in part, sending it back to the trial court. The Court of Appeals ruled that § 9-5-14 “does not apply to post-judgment discovery.” The intermediate appellate court ruled that the statute provides that attorney fees and expenses “may be requested by motion at any time *during the course of the action* but not later than 45 days after *the final disposition of the action*.” Honey and the companies now appeal to the state Supreme Court, which has agreed to review the case to determine two things: 1) Did the Court of Appeals err in deciding whether attorney fees and costs are authorized by § 9-5-14 for conduct that occurs during post-judgment discovery; and 2) Did the Court of Appeals err in remanding the issue of whether Honey and the companies waived their right to request the fees by failing to request them at the time they sought and obtained a protective order.

ARGUMENTS: Attorneys for Honey and her 16 companies argue that they are entitled to attorney fees and costs under § 9-5-14 for Rialto’s conduct during post-judgment discovery. The statute applies to post-judgment discovery, which is part of a “civil action,” they argue in briefs. For one thing, Rialto failed to raise this issue when the case was before the trial court, and therefore it has waived its right to raise it for the first time before the appellate court. The plain text of the statute demonstrates the Court of Appeals erred on the merits because the statute allows attorney fees and the expenses of litigation where an “attorney brings or defends action lacking justification,” the attorneys argue. And under another statute, Honey was not required to seek sanctions against Rialto in the form of attorney costs at the time she filed a motion for a protective order. The Court of Appeals erred by deciding two issues that it raised on its own and that were not raised by Rialto. The Court of Appeals decision should be reversed or thrown out by the Supreme Court, which should affirm the trial court’s order, the attorneys argue.

Rialto’s attorneys argue that the Court of Appeals correctly ruled that Honey and her companies are not entitled to attorney fees and litigation costs under § 9-5-14 for Rialto’s conduct during post-judgment discovery. The appellate court correctly determined that § 9-5-14 does not apply to post-judgment discovery. Furthermore, Honey and the companies are non-parties to the underlying lawsuit involving her husband, and the Court of Appeals has previously ruled that an award of litigation costs under § 9-5-14 is unavailable to non-parties such as themselves. As the Court of Appeals decision correctly noted, “the fact that post-judgment discovery necessarily cannot occur until a judgment has been entered, combined with the fact that a motion for fees under § 9-5-14 must be filed within 45 days of a final judgment, provides clear evidence that the statute was not intended to apply in the post-judgment discovery context,” the attorneys argue in briefs. “As such, the plain language of § 9-5-14 leads to a simple conclusion: The statute does not provide for attorney fees and expenses for a non-party in post-judgment discovery.” Finally, under § 9-11-26, Honey and the companies waived their right to seek sanctions by failing to request them at the time they sought a protective order, the attorneys

contend. Also, the Court of Appeals possessed the authority to consider the two questions on its own, “sua sponte” which is Latin for “on its own motion.”

Attorneys for Appellants (Honey Workman): Gus Small, Brent Herrin, Benjamin Klehr
Attorneys for Appellees (Rialto): Michael Shaw, Stephen Drobny

2:00 P.M. Session

IN RE: ESTATE OF GLADSTONE (S17G1472)

An insurance company is appealing a ruling by the Georgia Court of Appeals upholding a Probate Court’s award of punitive damages against the company.

FACTS: Jacqueline Gladstone was 87 years old, suffered from dementia, and was married to Emanuel Gladstone. In October 2014, **Emanuel Gladstone** filed a Petition for Appointment of a Guardian and/or Conservator in **Forsyth County** Probate Court asking that he be appointed conservator for his wife after she received an inheritance from her brother. The probate court appointed Maggie Spaulding as counsel for Gladstone’s wife and later appointed Gladstone as his wife’s conservator, setting a bond at \$430,000. Ohio Casualty Insurance Company served as surety on the bond. The surety’s role is to secure the obligations of conservators. In April 2015, Gladstone filed as required an Adult Conservatorship Inventory and Asset Management Plan. In response, Spaulding expressed concerns with the plan and inventory and requested additional documentation. In an August 2015 order, the court noted that Spaulding had not yet received all the additional information she had requested and that the court had not yet approved the inventory and plan Gladstone had submitted. In October 2015 the probate court suspended Gladstone as conservator and appointed attorney Kevin Tallant as substitute conservator. The court directed Tallant to submit an interim asset management plan for the support and maintenance of Mrs. Gladstone. Concerns escalated with the filing of a report by Tallant to the court in December 2015 in which Tallant reported that about the time Gladstone was suspended as conservator, he had removed \$80,000 from his wife’s funds via checks to himself. In December 2015, the probate court ordered Gladstone and the insurance company – the surety – to “show cause at this time and place... why this court should not find the suspended conservator has committed a breach of fiduciary duty, and why damages or other redress should not be ordered.”

Following another hearing, in February 2016, the probate court wrote a detailed order finding that Gladstone was indebted to his wife in the sum of \$167,000 and entered judgment in this amount against Gladstone and his surety based on breach of fiduciary duty. The probate court also found aggravating conduct by Gladstone including diversion of the conservatorship assets, and the looting of the account by writing checks to himself totaling \$80,000. The probate court imposed an additional award of punitive damages in the amount of \$150,000 against Gladstone and the surety. The Ohio Casualty Insurance Company as surety appealed the imposition of punitive damages to the Court of Appeals, which upheld the lower court’s ruling. The surety now appeals to the Georgia Supreme Court, which has agreed to review the case. The high court has asked the parties to respond to two questions: Did the Court of Appeals err in holding that a conservator’s bond covers punitive damages even though such damages are not expressly provided for under Georgia Code § 29-5-40 or under the provisions of the bond itself?

And if a conservator's bond does cover damages, did the intermediate appellate court err in ruling that because the probate court complied with § 29-5-92 (b) (4) in imposing sanctions against the surety, compliance with the procedures for imposing punitive damages under another statute was not required?

ARGUMENTS: Attorneys for the surety argue that it provided the statutorily-required conservator's bond for the value of the property owned by Gladstone's spouse. But neither the Georgia statute requiring the bond, nor the bond itself, state that the bond covers punitive damages. No one asked for punitive damages, and the probate court did not provide for argument or evidence related to punitive damages. In affirming the probate court's award of punitive damages, the Court of Appeals' decision is "contrary to longstanding Georgia law that surety bonds cover only actual damages and that punitive damages are not recoverable against statutory bonds unless the statute calling for the bond specifically states that the bond covers penalties," the attorneys argue in briefs. "The conservator bond only covers actual damages." In this case, the actual damages resulting from Gladstone's breach (\$167,000) were not uncertain or difficult to ascertain. The appellate court also erred in holding that probate courts could award punitive damages as sanctions without complying with § 51-12-5.1, contrary to the rules of statutory construction and § 15-9-122, which makes the statute applicable to probate courts. "The purpose of the conservator's bond is to secure the ward's estate from loss through the default or fraud of the conservator and to furnish indemnity to the estate," the attorneys argue, quoting one of the chief architects of Georgia's Probate Code. "The purpose is not to insure the conservator from having to pay punitive damages, which are to 'be awarded not as compensation to a plaintiff but solely to punish, penalize, or deter a defendant.'" Imposing punitive damages against the surety "undermines the purpose of punitive damages, which is to punish wrongdoers, not sureties who agreed to provide security against actual losses," the attorneys argue. This Court should reverse the Court of Appeals.

Attorneys for Mark Spector, the son of Mrs. Gladstone who was eventually appointed her conservator following Gladstone's suspension, argue the Court of Appeals did not err in holding that the conservator's bond covers punitive damages. "The Georgia statutes governing a conservator's bond do not expressly provide for recovery of punitive damages by specific reference to that term," the attorneys acknowledge in briefs. "But the same statutes do not exclude recovery of punitive damages under a conservator's bond." Georgia Code § 29-5-49 (d) contains a clear expression that "any surety on the bond **shall be liable for all acts of the conservator** in relation to the trust..." "The surety agreed to indemnify Gladstone and 'be liable for all acts of the conservator...' up to \$430,000," the attorneys argue. If the bond did cover punitive damages, the Court of Appeals also did not err in ruling that because the probate court complied with the law in imposing sanctions against the surety, compliance with the procedures for imposing punitive damages under the Georgia Code of law was not required, the attorneys contend.

Attorneys for Appellant (Ohio Casualty Ins. Co.): John Burch, Timothy Burson, W. Randal Bryant

Attorneys for Appellee (Conservatorship): Richard Neville

RHODEN V. THE STATE (S18A0116)

A man is appealing his conviction and life prison sentence for the murder of a man who had just purchased a television in a shopping center parking lot.

FACTS: According to the State's case at trial, on Oct. 12, 2012, Tariq Smith sold Emmanuel Afari-opoku a large flat-screen television in a shopping center parking lot on Campbellton Road in Atlanta, **Fulton County**. During the transaction, Smith noticed that Afari-opoku was carrying a large amount of cash. Smith also believed the man might be in possession of marijuana, based on his earlier dealings with Afari-opoku. Later that day, at the Oakland City West End Apartments, Smith discussed his plan to rob Afari-opoku with **Tefflon Derron Rhoden** and Anthony Norris, according to prosecutors. The three left together in Norris's red Dodge pick-up truck and drove back to the shopping center to find the target. When Afari-opoku left the shopping center in his car, they followed him back to the Camelot Condos in south Fulton County where he lived. After Afari-opoku parked, the three ran up to his car with guns. "Don't shoot me," Afari-opoku yelled. According to Norris, who later testified against Rhoden and Smith in exchange for a reduced charge, Rhoden was afraid Afari-opoku was about "to do something" and shot him in the head before the robbery took place. The men then fled the scene. Police ultimately apprehended Smith who had prior convictions for aggravated assault and drug felonies.

A grand jury jointly indicted Rhoden, Smith, and Norris with malice murder, felony murder, attempted armed robbery, aggravated assault and weapons charges. Rhoden, who is the subject of this appeal, was tried jointly with Smith, and the jury found him guilty of all charges. He was sentenced to life plus 10 years in prison. Rhoden now appeals to the state Supreme Court.

ARGUMENTS: Rhoden's attorney argues his client received "ineffective assistance of counsel" from his trial attorney in violation of his constitutional rights. The attorney was ineffective for failing to move for a mistrial after the prosecutor admitted that during jury selection, he had discriminated based on race and gender. Under its 1986 decision in *Batson v. Kentucky*, the U.S. Supreme Court outlined a three-part process to determine whether purposeful racial or gender discrimination occurred during jury selection. "However, here it is not necessary to utilize that process because the prosecutor admitted during the trial that he had engaged in purposeful racial and gender discrimination." The assistant district attorney specifically stated during a trial conference concerning possible juror misconduct, "So I certainly appreciate the fact that he is a black male on the case. One of the reasons why I selected him initially... I want black males on the jury." "By making that statement, the prosecutor admitted to purposeful racial and gender discrimination during jury selection," Rhoden's attorney argues in briefs. The trial attorney also was ineffective for failing to file a motion to sever Rhoden's trial from Smith's. Had the men been tried separately, co-defendant Smith could have been called as a witness to testify that Rhoden had not been a passenger in the truck when he and Norris drove to the complex where the murder took place. At Rhoden's subsequent hearing on his motion requesting a new trial, Smith testified he "was in fact willing to testify on Rhoden's behalf, and would have done so at Rhoden's trial if Rhoden had been tried separately," the attorney argues. Under its 1993 decision in *Zafiro v. United States*, a court "should grant a severance... if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." "Rhoden was prejudiced by

defense counsel's error in failing to move to sever defendants prior to trial because Smith's testimony that Rhoden was not in the pickup truck would have contradicted the State's witness who placed Rhoden in the truck," the attorney argues.

The State, represented by the Fulton County District Attorney and the Georgia Attorney General, argues that Rhoden's trial attorney was not ineffective for failing to make a motion for a mistrial after the prosecutor's comment about Juror 36. Juror 36 was the only black man on the jury, and after he was replaced by an alternate, the State prosecutor expressed his concern about the fact that there was now no African-American on the jury. "The defendants are entitled, as the court is aware, to a cross-section of the community," the prosecutor told the judge. "I mean, if there's not a black juror on the jury panel that sits and considers the evidence, under the law, that would not give rise to an issue with respect to going forward." Rhoden's trial attorney died before the hearing on Rhoden's motion for new trial, but the State argues that "it must be presumed" that the attorney did not move for a mistrial for strategic reasons. "As evidence of the strategic nature of his inaction, he not only did not seek a mistrial, he requested that Juror 36 be allowed to continue to serve," the State points out. "Second, the prosecutor's statement was not admission to racial discrimination during jury selection. It follows that neither the actions of the prosecutor nor the statement, in and of itself, violated *Batson*." The trial attorney also was not deficient in failing to move for a severance of the trial. Rhoden "has presented no evidence to defeat the presumption that Appellant's [i.e. Rhoden's] trial counsel's decision to not file a motion to sever was anything other than strategic and outside the range of reasonable professional conduct," the State argues. Rhoden also "has failed to demonstrate a reasonable probability that the court would have granted a motion to sever if counsel had filed one."

Attorney for Appellant (Rhoden): Ivars Lacis

Attorneys for Appellee (State): Paul Howard, Jr., District Attorney, Lyndsey Rudder, Dep. D.A., Arthur Walton, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew O'Brien, Asst. A.G.