



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Tuesday, January 23, 2018

10:00 A.M. Session

NEW CINGULAR WIRELESS PCS, LLC ET AL. V. GEORGIA DEPARTMENT OF REVENUE ET AL. (S17G1256)

Four cellular and wireless data providers are appealing a Georgia Court of Appeals ruling that upholds a **DeKalb County** court's dismissal of their lawsuit seeking a refund of millions of dollars in sales taxes for their customers.

FACTS: **New Cingular Wireless PCS, LLC** and three other data providers – all doing business as Georgia AT&T Mobility – allege that from 2005 to 2010, they sold wireless Internet access services to Georgia customers, which were exempt from state sales tax under Georgia Code § 48-8-2. The statute specifies that for purposes of state sales and use tax, “telecommunications service” shall not include, “Internet access service.” In November 2010, AT&T requested a refund from the **Georgia Department of Revenue** for sales tax AT&T claimed had been erroneously charged to its Georgia customers on the purchase of wireless Internet access service. Nearly five years later, in March 2015, the Department refused to pay the requested refund claims, apparently after conducting an audit and determining that the amount at issue was approximately \$4.8 million in sales taxes and \$3.8 million in interest. On April 17, 2015, AT&T Mobility sued the Department of Revenue and Commissioner Lynnette T. Riley in her official capacity. The Department filed a motion to dismiss AT&T's action. It argued the

complaint should be dismissed because: (1) AT&T did not reimburse the alleged illegally collected sales tax to customers before seeking a refund from the Department, in violation of Department Regulation 560-12-1-.25; (2) they lacked standing to file sales-tax-refund claims on behalf of customers for periods prior to May 5, 2009; and (3) the action was barred by Georgia class-action law. The trial court granted the Department's motion on all three grounds, and AT&T then appealed to the Court of Appeals. The Court of Appeals upheld the trial court's dismissal because AT&T had not proven that it had reimbursed the customers for the taxes before requesting the refund, in violation of Regulation 560-12-1-.25. The regulation states that if taxes are illegally or erroneously collected, "the dealer may secure a refund as provided in Georgia Code Section 48-2-35, provided however, the dealer must affirmatively show that the tax so illegally or erroneously collected was paid by him and not paid by the consumer, or that such tax was collected from the consumer as tax and has since been refunded to the consumer." The Court of Appeals agreed that § 48-2-35 does not require that a dealer advance its own funds to customers before knowing if the Department of Revenue will grant a refund, but the appellate court found that the Department interprets the regulation to impose that requirement, and it would defer to the Department's interpretation. AT&T now appeals to the state Supreme Court, which has agreed to review the case to determine whether the Court of Appeals correctly interpreted Regulation 560-12-1-.25 to require that a dealer seeking a sales tax refund must reimburse its customers before applying for a refund from the Department of Revenue.

ARGUMENTS: "The answer is no," attorneys for AT&T argue. Georgia Code § 48-2-35 does not require the dealer to reimburse the dealer's customers fully before the Department of Revenue must accept (or act on) the claim for refund. And to the extent that Regulation 560-12-1-.25 imposes such a requirement, the regulation is "ultra vires," or unauthorized, the attorneys argue. Georgia sales tax is imposed on the customer and collected by the dealer. The dealer remits the customers' tax payments to the state. Here, AT&T mistakenly imposed sales tax on its sales of Internet access services. Sales of Internet access services are exempt from sales tax under both federal law and Georgia law. Georgia Code § 48-8-2 (39) (f) defines otherwise taxable "telecommunications service" to *exclude* "Internet access service," the attorneys argue. "When AT&T learned of its error through litigation, it reached an agreement with its customers that it would file a claim for refund of the erroneously-collected taxes remitted to Georgia and return that money to those customers." The regulation as interpreted by the Department "serves the purpose of shielding Georgia from having to pay refunds or even face challenges to the validity of tax collections as unconstitutional, illegal and erroneous," the attorneys argue. "This case is a good example of the economic impossibility the regulation places on the dealer. It has been 12 years since this tax was first collected erroneously by AT&T and seven years since AT&T stopped paying the tax and filed a claim for refund on behalf of its customers." "Respectfully, to the extent that the regulation makes the full payment of the refund (without interest) to customers a condition precedent to filing the claim for refund authorized by § 48-2-35 (a) and (c), Regulation 560-12-1-.25 "cannot stand," AT&T's attorneys contend.

The Attorney General's Office, representing the Department of Revenue, argues that the Court of Appeals correctly upheld the dismissal of AT&T's sales tax lawsuit based on Regulation 560-12-1-.25 (2), which mandates that a sales tax "dealer" must "affirmatively show" that it first reimbursed its customers prior to obtaining a refund from the Department of Revenue. AT&T "makes several disjointed arguments for why Regulation 560-12-1-.25 (2) does not apply

to them and why the Court of Appeals should be reversed,” the State argues in briefs. As best the Department can discern, the arguments include 1) the regulation is invalid; 2) the Department misinterpreted its own regulation; and 3) the regulation is unconstitutional. None of the arguments has merit, the State argues. “First, it is clear that Regulation 560-12-1-.25 (2) is valid and applied to Appellants [i.e. AT&T Mobility]. The reimbursement requirement is authorized by statute and reasonable because the Department is authorized to promulgate regulations to enforce the Revenue Code, Georgia Code § 48-2-12, and a basic principle of Georgia sales tax law is that the customer is the actual ‘taxpayer’ and should be reimbursed prior to any refund payment to a ‘dealer.’” This requirement “has been law for many years, is a common requirement throughout the United States, and in fact was noted in Appellants’ own Settlement Agreement with their customers,” the State argues. Second, the interpretation that the regulation requires reimbursement before AT&T may obtain a refund from the Department is correct. “The plain meaning of ‘secure’ mandates that Appellants reimburse customers prior to obtaining a refund, and in any event, Appellants have never reimbursed their customers for any amount during the administrative process or even to the present time.” Third, AT&T’s constitutional arguments are plainly without merit, the State argues. In sum, because AT&T’s arguments are without merit, and the regulation at issue “is longstanding, reasonable, and is a common requirement in sales tax law nationwide, the Court of Appeals should be affirmed.”

Attorneys for Appellants (AT&T): Bryan Vroon, Margaret Wilson

Attorneys for Appellees (Department of Revenue): Christopher Carr, Attorney General, W. Wright Banks, Jr., Dep. A.G., Alex Sponseller, Sr. Asst. A.G.

IN THE INTEREST OF I.L.M. ET AL. (S17G1391)

A father whose parental rights were terminated regarding his three older children, is appealing a decision by the Georgia Court of Appeals upholding placement of his fourth child in state custody. The father argues that the trial court violated state law by postponing the case on its own accord without a request from either party, and without presentation of evidence supporting the continuance.

FACTS: In July 2015, the **Cherokee County** Juvenile Court terminated the parental rights of a mother and father to their three minor children – **I.L.M.**, then 6 years old, **I.T.M.**, then 5, and **B.M.**, then 2, due to inadequate housing, lack of supervision, and medical neglect. **B.M.** had been born addicted to methadone. The parents had a three-year history with the local Department of Family and Children Services (DFCS). Both parents used illegal drugs, including methadone and methamphetamines, and had failed to complete drug treatment. Three months after the court terminated their parental rights, the mother gave birth to the couple’s fourth child, **E.G.M.** The newborn was four weeks premature and also addicted to methadone. The child welfare agency, DFCS, filed a complaint four days after the baby’s birth, and that same day, on Oct. 8, 2015, the juvenile court placed **E.G.M.** in protective custody and scheduled a hearing for Oct. 22, 2015. The mother consented to placing the children in the Department’s care. The day of the scheduled hearing, however, the juvenile court “on its own motion” postponed the hearing due to a “lengthy court docket,” noting that “there is no time to complete the trial in this matter on today’s date.” The court also noted that **E.G.M.** remained hospitalized with no discharge date, that the parents were “able to visit multiple times per week at the hospital,” and that **E.G.M.**’s

“needs were presently being met.” The juvenile court set E.G.M.’s hearing for Nov. 18, 2015, “the next available court date.”

On Nov. 13, 2015, the parents filed a motion to dismiss the dependency petition to remove E.G.M. from their care. They claimed the delay violated the time limits for deciding the case under state law (Georgia Code § 15-11-110 and § 15-11-181); limited their “opportunity to bond with” their baby; and failed to afford “substantial weight” to E.G.M.’s “need for prompt resolution of his custody status.” On Nov. 17, 2015, the juvenile court alerted the parties that “due to a contested Superior Court matter,” the hearing again would be rescheduled. The parents filed a second motion to dismiss. Ultimately, the court held a hearing on Jan. 12, 2016, and in an order filed Feb. 11, 2016, denied the parents’ motions to dismiss and placed him in the State’s custody, concluding that E.G.M. was “dependent.” (Under the state’s new Juvenile Code, the term “dependent” replaces the former term of “deprived.”) The parents then appealed to the Court of Appeals. In one case, it appealed termination of their parental rights to I.L.M, I.T.M, and B.M., arguing they had substantially completed their case plan and the children’s dependency or deprivation “was not likely to continue or cause future harm.” In the second case, the parents argued that the juvenile court impermissibly continued E.G.M.’s adjudication hearing for more than three months without “good cause” and erroneously concluded that DFCS proved clear and convincing evidence of dependency. The Court of Appeals consolidated the two cases and in a 56-page opinion, upheld the juvenile court’s orders in both cases. The appeal now before the Supreme Court only concerns the status of E.G.M. In that case, the Court of Appeals concluded that, “because we find that the record contains clear and convincing evidence of the parents’ chronic and unresolved substance issues, we affirm the juvenile court’s order adjudicating E.G.M. as a ‘dependent child.’” The father then appealed to the Supreme Court, which agreed to review the case to answer questions regarding E.G.M.’s case and the trial court’s application of § 15-11-110 – a statute that addresses requirements juvenile courts must use to continue – or postpone – hearings in child dependency proceedings.

ARGUMENTS: “The plain language of Georgia Code § 15-11-110 does not permit a trial court to continue a dependency hearing on its own motion,” the father’s attorney argues in briefs. The first sentence of the statute clearly states that the court may continue a hearing “upon request of an attorney for a party.” “Such a result may seem unsettling in the sense that the trial court’s authority to control its own dockets is limited, but a view to the text and its context within the larger legal framework to discern the intent of the legislature should assuage those worries. The purpose of the Juvenile Code is to protect children from abuse and neglect while protecting the parent-child relationship and the parent’s due process rights.” Another purpose is to ensure “that proceedings are conducted expeditiously to avoid delays in permanency plans for children,” the attorney argues. The statute also requires a trial court to hold a hearing prior to granting a continuance. “Continuances may be granted only upon a showing of: 1) good cause, and 2) only for that period of time shown to be necessary by the **evidence presented at the hearing** on the motion.” The facts proving the continuance must then be entered into the court record. Here, the trial court failed to hold a hearing or make its determination prior to granting a continuance. “Instead, the trial court made its findings by pronouncement three months after it continued the case without a request having been made or the presentation of evidence, in clear contravention of § 15-11-110 (b),” the father’s attorney argues. While “docket congestion” could satisfy the “good cause” requirement found in § 15-11-110 (b) or Uniform Juvenile Court Rule

11.3, “the record in this case is insufficient to support such a finding.” Among other arguments, the father’s attorney argues that the proper legal remedy for violation of the statute or the Rule 11.3 is dismissal of the dependency petition.

The State, represented by Georgia’s Attorney General’s Office, argues that the juvenile court properly continued E.G.M.’s dependency hearing in accordance with § 15-11-110, and this Court should uphold its order finding E.G.M. dependent, or deprived. Contrary to arguments by the father’s attorney, § 15-11-110 (a) “does not state that a juvenile court may only continue a dependency proceeding upon a motion by an attorney for a party,” the State argues. “Nor does section 15-11-110 anywhere expressly state that a juvenile court is prohibited from continuing a dependency proceeding on its own motion.” The statute also does not specifically command trial courts to conduct hearings on motions for continuances by a party. While “good cause” is referenced in § 15-11-110, it is not specifically defined in the Juvenile code. “Therefore, in construing ‘good cause, this Court must look to the legislative intent.” While the General Assembly left much of the old juvenile code intact, “the current Juvenile Code’s provisions reflect an almost single-minded focus on the best interests of children that was lacking in the previous versions,” the State argues. “The current Juvenile Code provides that its provisions ‘shall be liberally construed to reflect that the paramount child welfare policy of this state is to determine and ensure the best interests of its children. While the General Assembly still guarantees parents’ due process of law under the current Juvenile Code, it does not elevate those rights above that of the child...” In the case of E.G.M., “An abundance of evidence was presented at the dependency hearing supporting the juvenile court’s finding that removal of E.G.M. from Appellant’s [i.e. father’s] custody was in his best interests,” the attorneys argue. DFCS placed E.G.M. in the foster family with his three siblings, a prospective adoptive placement. His siblings are now free to be adopted, as this Court’s grant of the appeal does not touch the order terminating their mother’s and father’s parental rights to them. “By the time this court renders a decision in this matter, E.G.M., by contrast, will have been in foster care for over two years, and if this Court grants Appellant the relief he seeks, E.G.M. will have to wait another extended period before he is able to be adopted into his foster family with his siblings,” the State argues. “Such a result is directly at odds both with the General Assembly’s intent in enacting the new Juvenile Code to provide permanency for dependent children as expeditiously as possible as well as its ‘paramount’ goal of ensuring E.G.M.’s best interests are furthered.” The only appropriate legal remedy for a juvenile court’s improper continuance of a dependency proceeding beyond the timeframe allowed by the statute, “without conceding that the juvenile court acted improperly in the instant matter,” is obtaining a “writ of mandamus.” A writ of mandamus is issued by a superior court to force a lower court or government official to perform mandatory duties correctly. And although doing so might conflict with the Georgia Supreme Court’s 1976 opinion in *Sanchez v. Walker County Department of Family and Children Services*, that case was decided under the old juvenile code which was enacted in 1971 and “which, unlike the current Juvenile Code, prioritized parents’ rights to custody over children’s interests,” the State contends. This Court should uphold the Court of Appeals’ and juvenile court’s decision.

Attorney for Appellant (Father): Cory DeBord

Attorneys for Appellee (State): Christopher Carr, Attorney General, Annette Cowart, Dep. A.G., Shalen Nelson, Sr. Asst. A.G., Calandra Harps, Sr. Asst. A.G., Hope Pereira, Spec. Asst. A.G.

IN THE INTEREST OF K.S., A CHILD (S17G1344)

A juvenile is challenging the Georgia Court of Appeals' dismissal of his appeal on the ground that he lacked the right to a direct – or automatic – appeal and rather was required first to file a petition asking permission to appeal the transfer of his case from juvenile to superior court.

FACTS: After a series of car break-ins, the State filed delinquency petitions in the Juvenile Court of **Douglas County**. The State alleged that five juvenile defendants, including **K.S.**, had committed acts in July 2015, which, if committed by adults, would have constituted 32 counts of entering an automobile with intent to commit a theft, one count of criminal gang activity, and one count of theft by taking. The Douglas County District Attorney filed motions to transfer the delinquency cases to the superior court for prosecution. After holding hearings on the motions, the juvenile court ordered the transfer of the delinquency cases to superior court. **K.S.** and the other four juveniles filed a notice of appeal, stating they intended to appeal the transfer order directly to the Court of Appeals, Georgia's intermediate appellate court. The Court of Appeals, however, dismissed their appeals on the ground that they did not follow the proper procedure. The appellate court ruled that under Georgia Code § 15-11-564 in Georgia's new Juvenile Code, the transfer of a juvenile case to superior court "shall only be an interlocutory judgment," or a judgment that deals with some intermediate matter in the case. It is not a final judgment that is automatically appealable. The Court found that interlocutory judgments must follow the appeal procedures laid out in § 5-6-34 (b), requiring the party to petition the Court of Appeals or Supreme Court and ask for permission to appeal. In its discretion, the appellate court may then grant or deny the appeal. **K.S.** now appeals to the state Supreme Court, which has agreed to review the case to determine whether the Court of Appeals erred in interpreting § 15-11-564 to require that a party follow the interlocutory appeal procedures in § 5-6-34 (b) to obtain appellate review of an order transferring a case from juvenile to superior court.

ARGUMENTS: **K.S.**'s attorney argues the Court of Appeals erred in holding that § 15-11-564 requires a party to follow interlocutory appeal procedures to obtain appellate review of an order transferring a case from juvenile to superior court. The appellate court "has ignored significant Georgia precedent," the attorney argues in briefs. "If the General Assembly had meant to overturn all of the previous case law on this issue, it would have done so expressly, not by implication." Georgia Code § 15-11-564 (a) "expressly grants a right to review by the Court of Appeals. Interlocutory reviews do not afford a right to review by an appellate court." The inference that the statute implicitly overturned case law "is further weakened by the fact that nowhere else in the Code does the General Assembly rely on the word interlocutory to invoke the § 5-6-34 (b) procedure," the attorney argues. **K.S.** argues that although the Court of Appeals denied his appeal based on a decision that the legislature intended to make this type of appeal interlocutory, there was never such an expression of legislative intent. In fact, the Court of Appeals has since ruled on this type of case and found a direct appeal was appropriate, **K.S.**'s attorney contends.

The District Attorney, representing the State, argues the Court of Appeals ruled correctly because § 15-11-564's "requirement to use the interlocutory appeal procedure enshrined in § 5-6-34 (b) is the sole appeal procedure available for transfers." A comparison between the former and new Juvenile Codes demonstrates that the General Assembly intended to create this sole appeal procedure for transfer orders. First, "the new Juvenile Code made explicit that transfer

orders from the juvenile court to the superior court are only interlocutory judgments,” the State argues in briefs. “Second, the statute involved in the instant appeal, titled ‘Appeal of transfer order,’ explicitly characterizes the procedure of appeal as an interlocutory appeal. Third, it was clearly the General Assembly’s intent to overrule and supersede by statute the longstanding and singular exception to the general rule that juvenile transfer orders are directly appealable. Lastly, to reverse the Court of Appeals would make § 15-11-564 meaningless and trample upon the Georgia General Assembly’s intent,” the State contends.

Attorney for Appellant (K.S.): James Anagnostakis

Attorneys for Appellee (State): Brian Fortner, District Attorney, Sean Garrett, Asst. D.A.

STARDUST, LLC ET AL. V. CITY OF BROOKHAVEN (S18A0213)

A store that sells sexual devices is appealing a **DeKalb County** court ruling that prohibits it from continuing to operate at its present location in the **City of Brookhaven**, arguing that Brookhaven’s local ordinance regulating sexually oriented businesses is unconstitutional.

FACTS: Brookhaven became a new city on Dec. 17, 2012. The next month, it enacted the City’s “sexually oriented business” code – or SOB Code – through ordinance No. 2013-01-51, which licenses and regulates such businesses. In May 2013, the City amended the SOB Code, prohibiting a sexual device shop or any other sexually oriented business from operating within 100 feet of another SOB or within 300 feet of a residential district, place of worship, park, or public library. In support of the ordinance, the City has cited numerous reports documenting the negative secondary effects of sexually oriented businesses, including crime, lower property values, and blight. A “sexual device shop” is defined as a “commercial establishment that regularly features sexual devices.” The definition excludes pharmacies, drug stores, medical clinics, and other establishments that are “primarily dedicated to providing medical or healthcare products or services.” A “sexual device” is defined in the ordinance as:

“any three-dimensional object designed for stimulation of the male or female human genitals, anus, buttocks, female breast, or for sadomasochistic use or abuse of oneself or others and shall include devices commonly known as dildos, vibrators, penis pumps, cock rings, anal beads, butt plugs, nipple clamps, and physical representations of the human genital organs. Nothing in this definition shall be construed to include devices primarily intended for protection against sexually transmitted diseases or for preventing pregnancy.”

In February, 2013, **Stardust**, owned by Michael Morrison, applied for an occupation tax certificate, stating that its business would be “Retail – Smoke Shop; Tobacco; related accessories; gifts.” In June 2013, the City began issuing tickets to Stardust for violations of City laws: operating an SOB without an SOB license; operating an SOB within 100 feet of another SOB (it is adjacent to the Pink Pony); operating an SOB within 300 feet of a residential zone (it is across the street from residences); and failure to identify its line of business at the time of business registration in violation of state law.

In July 2014, Stardust and Morrison sued the City of Brookhaven in DeKalb County superior court over its SOB and general business licensing laws, arguing they violated constitutional rights of free speech, equal protection and due process. At the time, it was facing a trial in Brookhaven Municipal Court on a 255-count accusation. A month after Stardust sued, the City responded with a counterclaim, seeking a permanent injunction to stop the shop from

operating in its current location. The City ultimately denied Stardust's sign permit application, and in November, Stardust sued the City in federal court, also challenging the constitutionality of Brookhaven's SOB Code. Stardust pursued both federal and state claims in this suit. Again, the City filed a countersuit, seeking an injunction. In September 2016, the federal U.S. District Court issued an 80-page ruling, ruling in favor of the City. It granted judgment to the City on each of Stardust's federal constitutional claims and dismissed Stardust's state constitutional claims. In response, Stardust has appealed the federal order to the Eleventh Circuit Court of Appeals. In February 2017, the City returned to the DeKalb County superior court seeking "summary judgment" and a permanent injunction. (A court grants summary judgment when the judge determines there is no need for a jury trial because the facts are not disputed, and the law falls squarely on the side of one of the parties.) Prior to a hearing, Stardust filed a motion to stay the superior court case, pending the outcome of its appeal in the federal case. In May 2017, the superior court rejected Stardust's motion to stay and granted summary judgment and a permanent injunction to the City. The court found that "claim preclusion" barred Stardust from raising its federal claims because there had already been a judgment on them in federal court. Claim preclusion, or *res judicata*, is the legal doctrine that precludes continued litigation of a case on claims that have been litigated and settled by judicial decision. And the court found that because the state constitutional claims were essentially the same as the federal claims, issue preclusion barred Stardust's state claims. The court ruled that Stardust failed to show how its sexual device shop is "identical" to pharmacies and observed that, unlike pharmacies, Stardust sells "more than a thousand sexual devices." The court also observed that Stardust's affidavit improperly counted condoms and gels as sexual devices, and that the affidavit constituted inadmissible opinion testimony. Morrison, the court ruled, is not qualified to opine about the alleged "health benefits" of products such as "GoodHead Dry Mouth Spray" and "Crazy Girl Kissmass Sparkle Shave Cream," or to opine that penis pumps and anal stimulators are "considered healthcare products." Having rejected Stardust's challenges to the City's SOB Code, the trial court subsequently prohibited Stardust by injunction from continuing to operate a sexual device shop at its present location. The court said an injunction was necessary not only because Stardust was operating illegally, but also because hundreds of citations and an adverse ruling in federal court were insufficient to secure Stardust's compliance. Stardust now appeals to the Georgia Supreme Court.

ARGUMENTS: Stardust's attorney argues the trial court erred in granting the City of Brookhaven summary judgment and a permanent injunction "The City of Brookhaven has adopted a thoroughly confusing law to govern who may sell 'sexual devices,'" the attorney argues in briefs. "Under the ordinance, for example, stores which are 'primarily dedicated' to selling 'healthcare products or services' can display and sell sexual devices in any fashion they choose, without regard for the City's sexually oriented business ordinance. Not for the masses." "Stardust is being punished for displaying and selling what the City says are the wrong types of sexual devices in the wrong type of store." The state claims are not barred by issue preclusion, the attorney argues. "Although the court is correct that, as it stands and in light of federal preclusion doctrine, Stardust is precluded from pursuing its federal claims in this Court, it is incorrect to say that Stardust is precluded from pursuing its state claims." Under the doctrine of issue preclusion, a number of conditions must be met, including "the issue at stake must be identical to the one involved in the prior litigation." Here, "the issues were not identical," the

attorney argues. “In the federal proceedings, the district court did not analyze whether the City’s ordinance, on its face or as enforced, violates the Georgia Constitution.” The Georgia Supreme Court is bound by its precedent in its 1999 decision in *Love v. State*. But the federal court did not mention *Love* in its opinion because it had no obligation to consult Georgia’s state court decisions to determine whether Stardust’s federal equal protection rights were violated. Stardust has “viable due process claims that are not barred by issue preclusion,” the attorney argues. And the city is not entitled to a permanent injunction.

The City’s attorneys argue that Morrison, “a veteran sex-shop owner,” and Stardust already pursued all their claims in federal court. The U.S. District Court rejected “the reasoning of *all* of Stardust’s claims, including its state constitutional claims, which are evaluated under the same standards as the federal constitutional claims.” “Issue preclusion bars Stardust’s claims because the issues resolved in federal court are substantively identical to the ones presented here,” the attorneys argue in briefs. “Stardust completely misses the mark on issue preclusion.” Additionally, Stardust’s equal protection claim fails “because Stardust is not similarly situated to a pharmacy and because the City rationally distinguishes sex shops from pharmacies,” the attorneys argue. “Stardust’s argument – that regulating sexual device shops differently than pharmacies violates equal protection – fails as a matter of law.” Stardust’s vagueness challenges to the definition of “sexual device shop” are also meritless. For one thing, it cannot pursue the vagueness claims because it already litigated them in federal court. But even if issue preclusion did not apply, the trial court correctly rejected Stardust’s vagueness claims. “Stardust lacks standing for vagueness challenges because it is plainly a sexual device shop,” the attorneys argue. And Stardust’s vagueness claims are meritless “because an average person would understand what activity makes one a ‘sexual device shop.’” Finally, the trial court was well within its discretion to grant the City’s permanent injunction. This Court should uphold the lower court’s ruling.

Attorney for Appellants (Stardust): Cary Wiggins

Attorneys for Appellee (Brookhaven): Scott Bergthold, Bryan Dykeks