



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Monday, February 12, 2018

10:00 A.M. Session

TENET HEALTH SYSTEM (doing business as) ATLANTA MEDICAL CENTER V. THOMAS (S17G1021)

The **Atlanta Medical Center** is appealing a Georgia Court of Appeals decision that allows a medical malpractice lawsuit against it to go forward. The hospital argued that an amendment to the lawsuit, which added a new cause of action against a nurse who was not named in the original lawsuit against two doctors, was barred by a two-year statute of limitations.

FACTS: In May 2012, **Lorraine Thomas** was in a car wreck. At the scene, paramedics placed her on a backboard and took her by ambulance to Atlanta Medical Center near downtown Atlanta in **Fulton County**. Thomas was placed in a cervical spine collar. At the hospital, Dr. Robin Lowman, an emergency room physician, ordered a CT scan and other tests on Thomas. When completed, Lowman had the CT scan sent to Dr. Clifford Grossman, a radiologist, who concluded Thomas had not suffered a cervical spine fracture. Based on Grossman's reading, Lowman ordered a nurse to remove the cervical spine collar and discharge Thomas from the hospital. The nurse removed the spine collar and hospital staff wheeled Thomas, who was heavily medicated, to the curb to wait for her brother to pick her up. When the brother arrived, Thomas was slumped over and unresponsive in the wheelchair. She was readmitted to the

hospital where following another CT scan, another physician concluded that Thomas did in fact have a fractured spine. Physicians determined that when the nurse removed the cervical spine collar, the fracture in Thomas's spine was displaced, which caused a compression of her spinal cord and neurological damage. Following surgery, Thomas was paralyzed from the neck down.

In May 2014, Thomas sued physicians Lowman and Grossman for professional negligence, as well as the hospital for the negligence of its physicians. During the discovery process – the pre-trial procedure in a lawsuit when lawyers for both parties can obtain documents and evidence from each other so they can prepare for trial – Thomas's lawyers learned that the hospital had a policy entitled "Termination of Cervical Spine Immobilization," which required that a physician remove a cervical spine collar. Based on this information, Thomas's lawyers filed an amended complaint in August 2015 – after the expiration of the two-year statute of limitations. In the complaint, they alleged among other things that the hospital was vicariously liable for the negligence of the nurse who had removed the cervical spine collar in violation of the policy requiring a physician to remove the collar.

The hospital sought dismissal of the amendment on the ground that it did not relate back to the original complaint and was barred by the statute of limitations. The trial court agreed and dismissed the amendment, concluding that under Georgia Code § 9-11-15 (c), the new claim did not relate back to the original complaint because it did not arise from the "same conduct, transaction, or occurrence" set forth in the original complaint, which was "devoid of allegations of liability on the part of the Atlanta Medical center nursing staff." Thomas appealed to the Court of Appeals, which reversed the trial court's decision, finding that both the original and amended complaints set out allegations about the improper removal of the cervical spine collar by a hospital employee, which caused Thomas's injuries. Therefore, the intermediate appellate court concluded, the claim in Thomas's amended complaint arose from the same "conduct, transaction, or occurrence" set forth in the original complaint and was not barred by the statute of limitations. The hospital now appeals to the state Supreme Court.

ARGUMENTS: Attorneys for Atlanta Medical Hospital argue the Court of Appeals was wrong and the state Supreme Court should reverse its decision. "The issue here is whether the new claim arises out of 'the conduct, transaction, or occurrence' that formed the basis for AMC's alleged liability in the original complaint," the attorneys argue in briefs. "It absolutely does not!" The incident behind the hospital's alleged liability in the original complaint was the conduct of Drs. Lowman and Grossman in performing the CT scan, interpreting the results, and diagnosing Thomas's spinal injury. The new complaint in the amended lawsuit sought to hold the hospital responsible "for the actions of a nurse who had nothing to do with the interpretation of Respondent's CT scan and diagnosis of her injury," the attorneys argue. Consequently, the claims in the amended lawsuit "do not relate back to the date of the filing of the original complaint pursuant to § 9-11-15 (c)." The Court of Appeals ruling "is contrary to Georgia precedent and to instructive cases from other courts that apply a similar relation-back rule." Furthermore, such a finding "would seriously undermine the application of the statutes of limitations," the attorneys argue. "It also would invite plaintiffs to draft needlessly verbose pleadings to expand the 'conduct, transaction, or occurrence' at issue to preserve an ability to assert new claims."

Attorneys for Thomas begin their arguments by pointing out that when plaintiffs file lawsuits, they often have limited information. "As documents and testimony are provided during

discovery, cases develop more nuance, and theories of recovery get expanded and refined. It is for this reason that Georgia recognizes notice pleading and provides for liberal amendments to the initial complaint. And that is only fair, since plaintiffs are perforce dependent on the discovery process to obtain information not revealed or obtainable from defendants without the power of formal discovery.” After discovery fleshed out details of Thomas’s treatment at Atlanta Medical Center that were not contained in her medical records, she filed an amended complaint regarding the conduct of one of the hospital’s nurses. That complaint “arises out of the conduct, transaction, or occurrence Thomas set forth or attempted to set forth in her original pleading. Accordingly, it relates back to the date of the original complaint pursuant to § 9-11-15 (c),” the attorneys argue in briefs. “To find otherwise flies in the face of Georgia’s pleading standards and defeats the entire purpose of the Code’s relation back provision.” Thomas’s original complaint “was filed and served within the statute of limitations, named AMC as a defendant, asserted a claim against AMC for vicarious liability arising from Thomas’s treatment at AMC on May 10 and 11, 2012, and demanded judgment. That complaint was sufficient under the Code to put AMC on fair notice of the claim and the type of litigation involved. Thomas was not required, in that initial pleading, to plead every cause of action or advise AMC of all facts that might be involved: That is the province of discovery and pretrial matters.” Ruling that the new claim relates back to the original complaint does not undermine the statute of limitations, Thomas’s attorneys argue. “This is precisely the kind of claim that relates back under § 9-11-15 (c), which is to be liberally applied.” The Court of Appeals correctly ruled that the new claim related back to the original complaint and its decision should be upheld.

Attorneys for Appellant (Atlanta Medical Center): Leah Ward Sears, Edward Wasmuth, Jr., Brian Mathis

Attorneys for Appellee (Thomas): Robin Loeb, Anne Coolidge-Kaplan

MONDY ET AL. V. MAGNOLIA ADVANCED MATERIALS, INC. (S17G1478)

An attorney is appealing a Georgia Court of Appeals decision affirming a **DeKalb County** Superior Court ruling that held him in contempt of court.

FACTS: Magnolia Advanced Materials, Inc. is a chemical manufacturing company. While employed at Magnolia as a chemist, Moses Langford allegedly sent emails containing confidential and trade secret information from his Magnolia email account to his personal email account, including the “Screening Formula for Cold Cure ReflectorLock” and “Mix Ratio Spreadsheet.” Magnolia terminated Langford, then sued him for breach of his employment agreement and violation of the Georgia Trade Secrets Act. **Michael O. Mondy** was Langford’s attorney. To prevent further disclosure of its proprietary information while the lawsuit against Langford was pending, Magnolia filed a pre-trial motion in DeKalb County court requesting an injunction. According to Magnolia, while the motion was pending before DeKalb Judge Gregory Adams, Mondy allegedly contacted a Magnolia competitor, Epoplex, concerning the Magnolia-Langford litigation. Unrelated to Langford, Epoplex and Magnolia were involved in litigation in the U.S. District Court for the District of South Carolina. Soon after hearing from Mondy, Epoplex issued a subpoena to Langford in the South Carolina case, demanding the same formulas that Magnolia contends Langford took from it. About one week before the return date on the federal subpoena, Judge Adams granted Magnolia’s motion for a pre-trial injunction, prohibiting Langford and Mondy from disclosing Magnolia’s non-public information.

Meanwhile, Magnolia filed a motion in federal court to quash the subpoena. A few days later, a U.S. magistrate judge entered a stay order commanding Langford “to refrain from disclosure of the information sought by the subpoena until further order of this court.” Despite the DeKalb judge’s injunction and the federal judge’s order, according to Magnolia’s attorneys, Mondy subsequently filed in federal court, on the open docket, a brief with 28 exhibits opposing Magnolia’s motion to quash the subpoena. In so doing, Magnolia claimed, Langford and Mondy disclosed Magnolia’s non-public information not just to competitor Epoplex but to anyone with access to the district court’s publicly available online docketing system. Magnolia then filed a third motion in DeKalb court asking the court to hold Mondy and Langford in contempt. Following a hearing on Nov. 23, 2015, Judge Adams took a 10-minute recess, then returned and stated, “Mr. Mondy, what I’m going to do, I’m going to hold you in contempt.”

One week after the hearing, Mondy filed on Langford’s behalf a motion to recuse Judge Adams on the basis that the judge’s comments, facial expressions, and actions during the hearing indicated the judge was biased and clearly “wanted to put me in jail.” Two weeks later, on Dec. 15, 2015, Judge Adams entered a written order holding Mondy in contempt, memorializing his Nov. 23 oral ruling. Less than an hour later, the judge voluntarily recused himself from the case without ruling on the pending motion to recuse.

Mondy appealed to the Court of Appeals, arguing the trial court erred in finding him in contempt and in issuing the contempt order after Mondy filed the motion for recusal. Mondy argued that once he filed the motion, Judge Adams was required to cease acting on the merits of the case and determine whether another judge should hear the recusal motion before ruling on the contempt motion. Because the trial court did not do that, Mondy argued the contempt order should be reversed. The intermediate appellate court rejected his arguments and upheld Judge Adams’ order holding Mondy in contempt. Mondy now appeals to the state Supreme Court, which has agreed to review the case to answer whether a trial court must address a motion to recuse before entering a written order on contempt, when the motion to recuse was filed between the trial court’s oral ruling of contempt and the entry of the written order.

ARGUMENTS: “The answer to the Court’s question is yes,” Mondy, representing himself, argues in briefs. “The answer is yes because statutes and judicial codes of conduct that govern recusals ‘serve to maintain the integrity of the judiciary and the rule of law.’ The rules governing the recusal of judges should be strictly enforced at all times.” Under Georgia’s Uniform Superior Court Rule 25.1, a judge may not preside over his own recusal hearing. Rule 25.3 states that when presented with a motion to recuse, “the judge shall temporarily cease to act upon the merits of the matter” and determine whether recusal would be warranted. If the judge determines it could be warranted, “another judge shall be assigned to hear the motion to recuse.” Here the judge acted on the merits of the matter after he was asked to recuse himself. “When a trial court signs, modifies or vacates an order, the trial court is acting upon the merits of the case, Mondy argues. “The trial court is acting upon the merits of the case because the trial court is exercising power granted by statutory law.” A written order is an exercise of power “because oral statements from the bench are not considered judgments. A judgment must be in writing, signed by the trial court and filed with the clerk of court.” Uniform Superior Court Rule 25.3 “requires a judge to temporarily cease to exercise such power.”

Magnolia’s attorneys argue the question here is whether Rule 25.3, which states that a “judge shall temporarily cease to act upon the merits of the matter” when a party has requested

he recuse himself, prohibits the judge from reducing to writing his earlier verbal order of contempt against a party's lawyer while the recusal motion remains pending. "The answer is 'No,'" the attorneys argue in briefs. "The motion to recuse did not prevent the trial judge from lawfully entering the contempt order against attorney Mondy because: 1) the contempt order was unrelated to the substance of the underlying proceeding against Langford; and 2) a party cannot prevent an oral order from being memorialized in writing by moving to recuse the trial judge." Georgia law prevents a litigant from taking action to prevent or delay an entry of an oral order once the litigant knows the result. The contempt order does not implicate "the merits of the matter" because Mondy's contempt is collateral to any claim or defense at issue in the underlying litigation. Furthermore, oral rulings are binding upon the parties when announced, and reducing them to writing is a mere administrative process, the attorneys argue. "Attorney Mondy's contemptuous behavior has no bearing on his client defendant Langford's liability in the underlying litigation. Thus, the trial judge did not act on the merits by entering the written contempt order. Moreover, allowing attorneys to move to recuse a judge to avoid answering for their own misconduct would subvert the judicial process by encouraging attorneys to attack the integrity of judges who seek to ensure obedience to their orders. Thus, the Court should affirm the Court of Appeals and the contempt order," Magnolia's attorneys contend.

Attorney for Appellant (Mondy): Michael Mondy

Attorneys for Appellee (Magnolia): Erika Birg, Peter Munk

GEORGIA DEPARTMENT OF HUMAN SERVICES V. STEINER (S18A0281)

The **Georgia Department of Human Services** is appealing a **Lamar County** judge's order striking down as unconstitutional the state's Child Abuse Registry that is used to track abusers.

FACTS: As background to the case, the Georgia General Assembly established the Registry to allow childcare employers to screen for potential child abusers when hiring. Under Georgia Code § 49-5-180, the legislature charged the Division of Family and Children Services of the Department of Human Services with setting up the Registry to enable abuse investigators to "identify and locate substantiated cases" of child abuse. The Registry statute defines a "substantiated case" as a report of abuse that has been "confirmed based upon a preponderance of the evidence that child abuse has occurred." If an investigator "substantiates" an allegation of abuse, the investigator is required by statute to notify the Division of Family and Children Services (DFACS). The Division then adds the alleged abuser's name to the Registry, along with a copy of the investigator's report, and the kind of abuse alleged – physical, sexual or neglect. Under the law, the Registry is confidential, and only a limited set of persons and entities have access but only "for purposes of licensing or employment of a specific individual." These include government or private entities that care for children or license such entities. Once a person is placed on the registry, DFACS sends the person a notice of the listing and information about the right to appeal and the procedure for doing so. If a person challenges his/her inclusion on the Registry, the Office of State Administrative Hearings must hold a hearing within 30 days and an Administrative Law Judge determines whether there was a preponderance of evidence that the alleged abuser committed the abuse. The Administrative Law Judge's decision is then appealable to the superior court, which must rule within 30 days.

The case now being appealed began in 2016, when a child's legal guardian filed a missing person's report that the child was missing. The guardian suspected that the child, 13-year-old K.S., was at the home of Christopher Steiner, 52. The Lamar County Sheriff's Office found K.S. at Steiner's home and arranged for a forensic interview at the Crescent House in Macon, GA, a children's advocacy center that serves children who have been physically or sexually abused. A sheriff's deputy took a written statement from K.S., who said about Steiner, "He started to hump me a way a dog would. I said stop the first time. Then he done it again. When he done it the second time, my nana turned around and saw it."

In January 2017, DFACS sent a letter to Steiner informing him his name was being entered into the Georgia Child Abuse Registry based on its determination that he had committed child abuse. Steiner filed a written constitutional challenge and argued it before the Administrative Law Judge. The judge denied the constitutional challenge. Following a second hearing, the judge found that DFACS had substantiated a case of alleged sexual abuse against Steiner, concluding that "the facts of this case show that Petitioner dry humped K.S., a...minor child, two times."

Steiner appealed to the Lamar County Superior Court, which reversed the Administrative Law Judge's findings and ordered that Steiner's name be stricken from the Registry. The trial court judge ruled that DFACS had failed to prove an act of child abuse by a preponderance of the evidence, the Registry had violated Steiner's due process rights by providing insufficient notice, and the Registry was unconstitutional under the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution and parallel provisions of the Georgia Constitution. DFACS now appeals to the Georgia Supreme Court.

ARGUMENTS: The state Department of Human Services, represented by the Attorney General's and Solicitor General's offices, argues that this Court should reverse the Lamar County decision for several reasons. First, the trial court erred in ruling that the Registry violates due process as applied to Steiner. Steiner did not demonstrate a protected liberty interest. "In cases involving challenges to child abuse registries like this one, individuals often contend that their inclusion on the registry implicates a protected liberty interest because of associated stigma or reputational harm," the State's attorneys argue in briefs. Although Steiner asserted that inclusion on the Registry "substantially impairs" his right to work as a child care provider or teacher, he has not claimed he currently works for – or ever intends to work for – such an entity that would have access to the Registry. "These sorts of speculative future employment effects do not implicate a constitutionally protected liberty interest, even if a person's future employment opportunities could be 'seriously impaired,'" the State argues. The trial court also failed to assess the adequacy of the notice and procedures afforded to individuals on the Registry under the appropriate legal analytical framework, the attorneys argue. And the trial court erred in holding that DFACS failed to prove child abuse by a preponderance of the evidence. The Administrative Law Judge found the child's testimony about Steiner reliable, and under the Administrative Procedure Act, a court reviewing an administrative ruling "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact," he State contends.

Steiner's attorneys urge this Court to uphold the Lamar County court's decision, which correctly ruled that Georgia's Child Abuse Registry is an unconstitutional violation of Steiner's due process rights because listing his name on the Registry deprives him of liberty. "Because he is on the registry, he is precluded from a range of jobs," the attorneys argue in briefs. Also, the

Registry's procedural safeguards are inadequate and unconstitutional. "Mr. Steiner came into his hearing uncertain of what he was accused of, and he left the hearing with little explanation of what the Administrative Law Judge believed he did," the attorneys contend. And, the problem of inadequate notice was exacerbated by the "trial by ambush" nature of the proceedings. "Mr. Steiner was 'ambushed' by the information DFACS came to the hearing with, including evidence that a forensic interview was conducted of the child, and a written statement was elicited by law enforcement after that interview." Among other arguments, the attorneys argue the trial court did not err in ruling that DFACS failed to prove child abuse by a preponderance of the evidence. "Even if this Court were to find the Registry statute constitutional, DFACS failed to carry its burden of proof and did not present sufficient evidence that Mr. Steiner committed an act of abuse," the attorneys argue. "The alleged act was never defined, never explained, and did not establish an act of sexual abuse under Georgia Code § 19-7-5." And the trial court did not reweigh the evidence but had the authority to reverse the decision "because substantial rights of Mr. Steiner were prejudiced by the Administrative Law Judge's findings being in violation of constitutional provisions." "The Administrative Law Judge made such basic factual and legal mistakes that the Superior Court did its duty to set aside the Administrative Law Judge's decision," Steiner's attorneys contend.

Attorneys for Appellant (State): Christopher Carr, Attorney General, Annette Cowart, Dep. A.G., Shalen Nelson, Sr. Asst. A.G., Penny Hannah, Sr. Asst. A.G., Sarah Warren, Solicitor General, Ross Bergethon, Dep. Sol. Gen.

Attorneys for Appellee (Steiner): J. Scott Key, Kayci Dennis

MCGOUIRK V. THE STATE (S18A0130)

A man deemed incompetent to stand trial for the aggravated child molestation of a 5-year-old, as well as for arson, is appealing a **Lamar County** court order committing him to confinement in a state mental hospital while he receives treatment designed to restore him to competency so he can stand trial.

FACTS: On Jan. 27, 2016, **Ryan L. McGouirk** was arrested on charges of aggravated child molestation, child molestation and arson. He remained in the county jail until April 21, 2016, when he was released on bond. In June 2016, a Lamar County grand jury indicted McGouirk for a number of charges, alleging that on Dec. 31, 2015, McGouirk pulled down his pants, touched a 5-year-old boy's penis, and had the child touch and put his mouth on McGouirk's penis. His attorney filed a motion asking the court to find McGouirk incompetent to stand trial. Subsequently, a mental evaluation was conducted at West Central Georgia Hospital by Dr. Elizabeth Donegan from the state Department of Behavioral Health and Developmental Disabilities. In her report, she found that McGouirk was intellectually disabled and was currently not competent to stand trial. At a June 2017 hearing, Dr. Donegan testified that services to restore McGouirk's competency could be delivered by either an outpatient or inpatient facility. At the hearing, the State, represented by the District Attorney, argued that under Georgia Code § 17-7-130, due to the serious nature of the charges against McGouirk that involved a 5-year-old victim, the attempt to restore him to competency was required by law to be performed as an inpatient. His attorney argued that requiring competency restoration to be performed in confinement violated his protection and due process rights. The trial court, agreeing with the State that inpatient restoration services would provide continuous monitoring and supervision of

McGouirk, issued a written order committing McGouirk for inpatient competency restoration. In this pre-trial appeal, his attorney now appeals to the state Supreme Court.

ARGUMENTS: McGouirk’s attorney argues that Georgia Code § 17-7-130 (c) violates due process because it requires confinement for persons charged with certain offenses without a showing of necessity. “This summary commitment may last for a period of up to one year without any requirement that the State hold a hearing to determine whether the defendant meets the criteria for civil commitment,” the attorney argues in briefs. “Therefore, the statute authorizes the deprivation of a defendant’s liberty for a substantial amount of time without a finding that confinement in a mental health institution is necessary to restore the defendant’s competency to stand trial.” Furthermore, the “statute’s delineation between mandatory confinement for persons accused of violent offenses as opposed to discretionary confinement for those accused of nonviolent offenses does nothing to save it,” the attorney argues. A defendant who is otherwise competent to stand trial is presumed innocent of the charges until proven guilty. “No defendant loses this presumption of innocence simply because he has been found incompetent to stand trial.” The trial court also erred by not finding the statute’s commitment violated McGouirk’s equal protection rights by requiring confinement that is at least three times longer than for any other class of persons without requiring a hearing and a showing of necessity. As applied to McGouirk, § 17-7-130 (c) “violates his equal protection rights because he was committed for inpatient treatment solely on the basis that it was required by the statute due to the nature of his charges even though inpatient treatment was shown to be unnecessary.” Finally, the trial court erred by not finding that the disparate treatment of persons charged with violent offenses and persons charged with nonviolent offenses under § 17-7-130 (c) violated McGouirk’s equal protection rights. While the statute mandates confinement for persons charged with violent offenses, it gives the trial court discretion to allow outpatient treatment for persons charged with nonviolent offenses. “This distinction entirely ignores the presumption of innocence,” the attorney argues.

The State argues the trial court did not violate McGouirk’s equal protection rights by ordering the Department of Behavioral Health and Developmental Disabilities to evaluate McGouirk and report back to the court. The statute “permits the court to exercise the authority validly delegated to it by the General Assembly in the clear, unambiguous language presented therein,” the State argues in briefs. The order is not for an indefinite time as the court ordered the department to report its findings within 90 days. The trial court also did not violate McGouirk’s equal protection rights by not finding § 17-7-130 (c) unconstitutional. McGouirk is charged with aggravated child molestation, which is designated as a serious violent felony under another statute that already has been found constitutional. His due process or equal protection rights have not been violated simply because he is a part of a class of individuals charged with a crime that has been designated as a violent offense, the State contends.

Attorney for Appellant (McGouirk): Allen Knox

Attorneys for Appellee (State): Jonathan Adams, District Attorney, Anita Howard, Asst. D.A.