



## 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.*

**Tuesday, February 6, 2018**

### **10:00 A.M. Session**

#### **COEN V. CDC SOFTWARE CORPORATION ET AL. (S17G1375)**

The former chief legal officer of a software company, who was fired and subsequently won a lawsuit against the company for breach of contract, is appealing a Georgia Court of Appeals decision upholding a lower court's dismissal of a second lawsuit over the same matter.

**FACTS:** At issue in this case is the doctrine of "res judicata," a Latin term for an issue that already has been definitively settled by judicial decision. The doctrine bars the same parties from litigating a second lawsuit on the same claim or any other claim that could have been raised in the first suit, but was not.

According to the facts of the case, in December 2011, **Timothy Coen** was hired by CDC Software Corporation as senior vice president. Soon after, he was promoted to chief legal officer. After a change in corporate management, Coen was placed on administrative leave on March 4, 2012. Four days later, on March 8, CDC published an SEC Form 6-K disclosing the resignation of the CEO, changes in the board of directors, and Coen's placement on administrative leave "pending the completion and results of an internal investigation related to allegations of unethical conduct, violations of Company policy and protocol and attempts to influence the content and consideration of an internal audit..." Coen was terminated on April 12, 2012. He subsequently sued CDC and Apteon, Inc., the corporation's successor, for breach of contract,

asserting claims for terminating his employment and refusing him severance pay. Coen prevailed and won a judgment for contract damages. He then filed a second action against CDC, Apteau, and four CDC executives, alleging claims for “defamation, false light and disclosure of private facts, tortious interference with contract, intentional infliction of emotional distress, and attorney fees.” The **Fulton County** Superior Court dismissed this action based on “res judicata” and failure to state a claim. The trial court ruled that the first judgment barred the second suit. The Court of Appeals affirmed the ruling based on “res judicata” without addressing the failure to state a claim. Coen now appeals to the state Supreme Court.

**ARGUMENTS:** Coen’s attorneys argue that this case concerns the “oft-misunderstood” doctrine of res judicata. Here, Coen successfully sued his former employer, CDC and Apteau, for breach of contract after CDC refused to pay him severance under the terms of Coen’s employment agreement. Later, he sued CDC again, “but this time for personal injury and harm to reputation caused by CDC’s publication of a defamatory SEC report,” the attorneys argue in briefs. “Although these separate causes of action involved different sets of facts and contained different allegations of wrongdoing, the trial court dismissed Coen’s subsequent tort suit based on the doctrine of res judicata. That ruling was incorrect.” For more than 100 years, the Georgia Supreme Court “has adhered to the principle that res judicata bar requires identical causes of action – not just overlapping subject matter – and identical parties.” This Court should reverse the Court of Appeals decision in this case because res judicata does not apply, as Coen’s contract suit and his subsequent suit “do not contain identical causes of action or identical parties.”

Attorneys for CDC and Apteau argue that this is the sixth lawsuit Coen has filed against Apteau since his employment with the company ended in 2012. “Coen’s main assertion is that the Court of Appeals erred in applying the four-part ‘identical subject matter’ analysis for res judicata set forth in such cases” as the Georgia Appeals Court’s 1998 decision in *Doman v. Banderas*. “Coen asserts the proper analysis is a three-part ‘identical cause of action’ test, as set forth in certain other cases. Coen’s assertion is no doubt an effort to avoid the consequences of the four-part analysis, which requires that for res judicata to apply, the plaintiff must have had a full and fair opportunity to litigate his claims in the first action,” which Coen does not dispute he had. “Coen’s arguments ignore this Court’s consistent recognition that the ‘full and fair opportunity to litigate’ requirement is essential to the res judicata analysis, even under the three-part test Coen advocates.” There is no conflict in the law, CDC’s attorneys argue. While different cases have stated the test for res judicata in slightly different ways, “the cases all examine the prior and current actions and ask whether they involved the same core facts and whether the plaintiff had an opportunity to litigate his claims in the prior action.” The Court of Appeals correctly concluded that res judicata bars Coen’s claims. “His claims in both actions arose from Coen’s acrimonious departure from Apteau, **and** there is an immediate causal link between the claims in the two actions, **and** Coen alleges the claims in the two cases stem from the same single, wrongful ‘scheme,’” the attorneys argue. Both actions stem from the whistleblower allegations against Coen that led to his termination. And his contract action contemplated the claims in his second lawsuit because Coen attached a letter he wrote to CDC as an exhibit in which he threatened to sue CDC for making spurious allegations about his unethical conduct. As to the identity of the parties, the Court of Appeals correctly ruled that even though the four individuals sued in the second action were not parties in the first, Coen’s complaint in the second action asserted they were “co-conspirators” with CDC. Because co-conspirators are considered

parties with mutual interests for purposes of res judicata, the identity of parties requirement was met, CDC's attorneys contend.

**Attorneys for Appellant (Coen):** Laurie Daniel, Matthew Friedlander

**Attorneys for Appellees (CDC):** Michael Bowers, Matthew Ames, E. Righton Johnson

### **CAFFEE V. THE STATE (S17G1691)**

A man arrested for possession of less than one ounce of marijuana is appealing the denial of his motion to suppress certain evidence when his case goes to trial. The man argues the police officer was required to have a warrant before searching his pockets and discovering the drug.

**FACTS:** On Nov. 1, 2015 **Cherokee County** Deputy Sheriff Mark Patterson saw **Richard Ivan Caffee** driving his red Chevrolet Silverado truck with an expired tag. Patterson had previously stopped Caffee for driving with an expired tag, and when he ran the tag through dispatch, Patterson confirmed it was still expired. While speaking with Caffee, Patterson smelled the odor of "green," or unburned, marijuana coming from inside the vehicle. Patterson later testified that based on his training and experience, he was familiar with the smell of burned and unburned marijuana, as well as with some of the physical signs of marijuana use. He observed that Caffee's eyes were "bloodshot and glassy," and, when he asked Caffee to show him his tongue, he observed that Caffee's taste buds were "white and risen," both indicators of recent marijuana consumption. Patterson asked Caffee if there was any marijuana in the truck and Caffee said no. While waiting for back-up, Patterson did a pat-down on Caffee for weapons. After back-up arrived, he searched the truck and found two small bottles that smelled of green marijuana, but did not contain any of the drug. Patterson found no marijuana in the truck. According to Patterson, the odor of green marijuana had dissipated from the truck during the search, while the doors were open and Caffee stood outside. But when Patterson approached Caffee to discuss the two bottles, he began "smelling marijuana again pretty strongly." Patterson searched Caffee's outer clothing, "feeling the pockets and looking in them" as he did so, and he discovered a small plastic bag containing less than an ounce of marijuana.

Patterson arrested Caffee and charged him with possession of marijuana less than one ounce and driving with an expired tag. Caffee subsequently filed a motion to suppress the marijuana evidence when the case goes to trial. The Cherokee County State Court held a hearing, where Patterson testified as the sole witness and the State played the videotape of the traffic stop. Following the hearing, the trial court denied Caffee's pre-trial motion to suppress the evidence. The court concluded that Patterson had reasonable suspicion to justify the traffic stop; that the warrantless search of Caffee's truck was justified based on the odor of marijuana; and that there was no unreasonable delay regarding the traffic stop. The trial court also concluded that based on "the totality of the circumstances," Patterson had sufficient probable cause to search Caffee's shirt pocket. Caffee then appealed to the Court of Appeals, arguing that the trial court erred by denying his motion to suppress because Patterson was not authorized to search Caffee's shirt pocket without a warrant. The intermediate appellate court, however, upheld the trial court's ruling. Caffee now appeals to the Georgia Supreme Court, which has agreed to review the pre-trial appeal to determine whether the warrantless search of Caffee was authorized under exceptions to the U.S. Constitution's Fourth Amendment against unreasonable searches and seizures.

**ARGUMENTS:** Caffee’s attorney argues it was not. “An officer is not justified in unbuttoning a person’s clothing and reaching inside without his consent,” the attorney argues in briefs. “The opinion of the Court of Appeals has eroded Fourth Amendment protection for citizens of the state of Georgia in their bodily integrity.” The U.S. Supreme Court has ruled that a person may be searched “incident to a lawful arrest.” “Here, the evidence was undisputed, however, that Mr. Caffee was not arrested until after the marijuana was located. Therefore, the search of the marijuana could not be justified as a search incident to arrest.” Furthermore, no urgency existed. “In order to justify this search without a warrant there must be both probable cause to search the person and exigent [i.e. urgent] circumstances.” In this case, both the trial court and the Court of Appeals focused only on whether probable cause existed. But as in the Court of Appeals ruled in *State v. Kazmierczak*, “the intrusion into a person, as well as one’s home, are protected from warrantless searches.” Also, since a backup officer was present, “Deputy Patterson could have had an electronic search warrant within minutes,” Caffee’s attorney argues. “Thus, the officer’s actions of intruding into Mr. Caffee’s clothing by unbuttoning Mr. Caffee’s shirt pocket, reaching in and removing a bag containing marijuana were not authorized under the clearly established exceptions to the Fourth Amendment recognized by Georgia’s appellate courts and the United States Supreme Court.”

The State, represented by the Cherokee County Solicitor General’s Office, “begrudgingly admits” that the search of Caffee did not fall under most of the “well-delineated” exceptions to the Fourth Amendment’s warrant requirement. Such exceptions include a hot pursuit, seeing the evidence in “plain view,” a pat-down to check for weapons, or valid consent. “Obviously, there was no hot pursuit of Appellant [i.e. Caffee] nor was there any consent for the search,” the State concedes. And no marijuana was in “plain view” or found during the pat-down for weapons. Despite this, the State “respectfully and in good faith argues that the exigent circumstances exception to the warrant requirement applies. An officer may conduct a warrantless search if there is a likelihood that drug evidence or contraband is in danger of immediate destruction.” Though Patterson did not verbalize this “exigency,” “the facts of the case reveal a situation rife for destruction of evidence,” the State argues. “The time, attention and detail that would have been required for the application and execution of a search warrant would have created a situation where Appellant, standing on the side of the road, could have easily tossed away the contraband.” Therefore, the trial court’s order denying Caffee’s motion to suppress the evidence should be affirmed, the State argues.

**Attorney for Appellant (Caffee):** Gregory Hicks

**Attorneys for Appellee (State):** David McElyea, Deputy Assistant Solicitor General