



Supreme Court of Georgia

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



SUMMARIES OF OPINIONS

Published Monday, March 5, 2018

Please note: *Opinion summaries are prepared by the Public Information Office for the general public and news media. Summaries are not prepared for every opinion released by the Court, but only for those cases considered of great public interest. Opinion summaries are not to be considered as official opinions of the Court. The full opinions are available on the Supreme Court website at www.gasupreme.us.*

WXIA-TV ET AL. V. STATE OF GEORGIA ET AL. (S17A1804)

The Supreme Court of Georgia has thrown out the gag order imposed by the **Irwin County** Superior Court in the high-profile murder case of Tara Grinstead.

“A gag order like this one may be constitutionally permissible in exceptional circumstances, but the record here does not reveal circumstances sufficiently exceptional to warrant such a restraint,” **Justice Keith R. Blackwell** writes for a unanimous Court. “For that reason, we vacate the gag order.”

More than 12 years ago, on Oct. 23, 2005, Grinstead, an Irwin County High School teacher and beauty queen, disappeared from her home in Ocilla, GA. In the ensuing years, the Georgia Bureau of Investigation conducted a massive investigation, interviewing more than 200 people and conducting searches of local waterways and other properties. For years, print and broadcast news reported about the case, but eventually the case went cold.

On Feb. 23, 2017, after allegedly receiving a tip, the GBI arrested Ryan Alexander Duke and charged him with Grinstead’s murder. Duke, who had graduated from Irwin County High School a few years before Grinstead vanished, pleaded not guilty. At a news conference that day in the Irwin County courthouse, authorities announced the arrest. Following the news conference, the magistrate conducted a first appearance hearing where Duke appeared in a green and white jail jumpsuit, shackles and handcuffs. The media was permitted to film Duke in the courtroom. Within a week, the trial judge entered a gag order after Duke’s attorney asked the court to bar trial participants from commenting on the case. Specifically the order restrained “the prosecution, all law enforcement, the defendant, counsel for the defendant, potential witnesses, expert or other, court personnel and family members for both the defendant and alleged victim”

from making any statements outside court “for dissemination by any means of public communication relating to any matters having to do with this case.” The judge explained that, “the defendant’s Sixth Amendment right to a fair trial may be prejudiced by extra-judicial statements” because “this case is high profile and has generated extensive media coverage.” On March 2, 2017, WXIA-TV and 13 WMAZ-TV filed an “Emergency Motion to Intervene and to Vacate the Gag Order.” Other news organizations promptly filed motions to intervene, as did Grinstead’s sister. At a hearing on the motions, attorneys for the media outlets argued that the gag order impaired news gathering, was a constitutionally impermissible prior restraint, swept too broadly, and was improperly issued with no evidentiary record to support it. Duke’s attorney introduced 78 exhibits containing various forms of media coverage about the Grinstead case and Duke’s arrest. The attorney argued the gag order was warranted and necessary, and the State’s prosecuting attorney said the State did not object to a gag order.

On March 27, 2017, the trial court rescinded its “First Order” and issued a “Modified Order of Court.” The “revised order,” as the State calls it, states that until final disposition of the case, the district attorney, his staff, Duke’s attorney and staff, Duke’s co-defendant (whom the State alleges helped conceal Grinstead’s body), the co-defendant’s attorney and staff, and all law enforcement who participated in the investigation, “shall not release, make or authorize the release of any extra-judicial statement by any means of public communication and news media.” The order states that, “Any violations of this Order may be punished by contempt of court.” The modified order is substantially narrower than the original order, but the news organizations asked the trial court to reconsider, arguing that it remains an improper prior restraint on their freedom of speech, and the evidence and findings of fact in the case do not establish a sufficiently high likelihood of prejudice to warrant any restraint. They also argued that the trial court failed to consider other less restrictive alternatives. The trial court took no action on the motion, and WXIA and WMAZ then appealed to the state Supreme Court.

In today’s 25-page opinion, the high court points out that the standard of review which courts should apply in determining whether a gag order is proper “is a difficult question,” and “the United States Supreme Court has never decided a case exactly like this one.” To complicate matters, courts have applied different ranges of standards to determine whether a gag order is necessary to protect a defendant’s right to an impartial jury and fair trial. “In the end, we conclude that it is unnecessary today to decide definitively which standard applies in cases like this one,” the opinion says. That is because, in this case, “Even under the most deferential standard, the evidence of record and findings of the superior court cannot sustain the modified gag order.”

“Here, although the record shows significant media interest in the case, it does not demonstrate any likelihood that persons to whom the modified gag order is directed would make prejudicial statements,” the opinion says. “We have reviewed the exhibits offered by Duke at the hearing to illustrate the nature and extent of media coverage, and we find no reports attributing inflammatory statements or prejudicial information to sources covered by the modified gag order.” Indeed, many of the reports share information from arrest warrants and other public records. And images of Duke in shackles and an inmate uniform were not obtained from persons covered by the gag order but instead “were captured by media photographers in open court.”

“Duke and the State fail to identify a single statement attributed to any person to whom the modified gag order applies that would be likely to prejudice Duke’s right to a trial by an

impartial jury, and we cannot say that the record shows even a reasonable likelihood of prejudice sufficient to sustain a gag order,” the opinion concludes. “For that reason, the modified gag order is vacated.”

Attorneys for Appellants (WXIA-TV): S. Derek Bauer, Ian Byrnside, Cody Wiggington
Attorneys for Appellees (State, Duke): Paul Bowden, District Attorney, John Mobley, II

SOUTHEASTERN PAIN SPECIALISTS, P.C. V. BROWN (S17G0732)

DOHERTY V. BROWN (S17G0733)

SOUTHEASTERN PAIN AMBULATORY SURGERY CENTER, LLC V. BROWN (S17G0737)

The Supreme Court of Georgia has ordered a retrial in a medical malpractice case that resulted in a \$22 million verdict against an anesthesiologist and his surgery center after a woman suffered catastrophic brain damage during a procedure to relieve back pain.

In today’s unanimous opinion, written by **Justice Nels S.D. Peterson**, the high court has reversed a decision by the Georgia Court of Appeals and ruled that a retrial by the **Fulton County** State Court is necessary because the jury received an improper instruction on liability.

According to the facts of the case, **Dr. Dennis Doherty**, a board-certified anesthesiologist and pain management specialist, began treating **Gwendolyn Lynette Brown** in 2008 for chronic back pain. He performed two “epidural steroid injection procedures” on Brown in 2008 at the **Southeastern Pain Ambulatory Surgery Center**, which Doherty owned. The procedure involved injecting steroid medication into the epidural space in the spine to reduce inflammation and relieve pain, and Doherty performed both procedures without incident.

On Sept. 16, 2008, Brown arrived at the Surgery Center with her daughter-in-law for a third procedure, which was to be done under the same “conscious sedation” as before. Under conscious sedation, the patient receives medication to help her relax. Mary Hardwick, a registered nurse who was the Surgery Center’s administrator and nursing director, performed Brown’s pre-op procedures, recording her vital signs and starting an intravenous line. At 4:40 p.m., after Brown was taken into the operating room, another nurse, Ann Yearian, started the anesthesia and oxygen. Doherty came in 50 minutes later and started the procedure at 5:30 p.m. Almost immediately, the pulse oximeter used to monitor Brown’s blood oxygen saturation level, sounded an alarm. Doherty directed Yearian to increase the oxygen flow to 5 liters. Although a surgical tech was concerned and believed Brown was not breathing, Doherty instructed her to go back to the imaging device and, when she asked him if she should call Hardwick, Doherty said “no.” The tech later testified she remained concerned and surreptitiously texted Nurse Hardwick, saying simply, “Come.”

When Hardwick arrived, the pulse oximeter was sounding an alarm and registering zero. Brown was lying face down with injection needles in her back, and Doherty was standing at the head of the table, holding Brown’s jaw to maintain an airway. Although Hardwick wanted to resuscitate Brown, Doherty said that the pulse oximeter was malfunctioning and that Brown was breathing. However, when the surgical tech retrieved a second pulse oximeter and Hardwick placed it on Brown’s toe, its alarm also sounded and had a reading of zero oxygen saturation. At the same time, the blood pressure monitor was “recycling,” inflating repeatedly without registering a reading. Doherty, however, maintained that everything was “fine.” Doherty completed the procedure at 5:48 p.m. and Brown was given more oxygen, including manually

with an airbag. After a few minutes, her oxygen levels rose to the 90s, but Hardwick remained concerned and asked if she could call 911. Doherty said no, that Brown was just heavily sedated.

Over the next couple of hours, however, Brown failed to fully wake up or respond to “voice or painful stimuli,” and at about 7:30 p.m., staff called 911. The daughter-in-law later testified that Doherty told the responding emergency medical technicians that Brown “was there that day for an epidural procedure, the procedure went fine, and she was having complications coming out of the anesthesia slowly.” She said he did not mention any other complications and did not tell the technicians she had possibly experienced a “hypoxic event,” which is a sudden loss of oxygen. Later, the treating neurologist at the hospital where Brown was eventually taken, testified he was suspicious of a hypoxic injury so he had the hospital call Doherty. But Doherty said “there was no history of hypoxia because she had a pulse ox and everything was fine.” It was later determined that Brown had suffered a catastrophic brain injury. As a result, she could not walk, talk, stand or move her limbs. She was mentally incapacitated and required 24-hour-a-day care. She died six years later in September 2014.

Brown’s husband, Sterling Tyrone Brown, Sr., sued Doherty, his Surgery Center, **Southeastern Pain Specialists**, and Hardwick, alleging medical malpractice and “ordinary negligence.” Following Brown’s death, her husband added a wrongful death claim. At the January 2015 trial, the court instructed jurors on both medical malpractice and ordinary negligence. At issue in this case is whether Doherty’s actions involved “ordinary negligence,” which is a lack of ordinary care or diligence, or “professional negligence,” which is a professional’s failure to exercise his professional skill and judgment within his area of expertise.

The trial was split into three phases – a liability phase, a punitive liability phase, and a punitive damages phase. In phase 1 of the trial, the jury awarded \$21,981,093.29 in damages to Brown’s husband. It found all the defendants except Hardwick liable for Brown’s injury and apportioned fault at 50 percent to Doherty, 30 percent to the Surgery Center, and 20 percent to the Southeastern Pain Specialists. In phases 2 and 3 of the trial, the jury determined that the circumstances warranted additional punitive damages against Doherty but awarded none. Doherty and the others appealed, but the Court of Appeals, in a 6-to-3 decision, upheld the lower court’s ruling, finding the trial court did not err in instructing the jury on ordinary negligence. The intermediate appellate court concluded that a jury could have found ordinary negligence based on Doherty’s insufficient response to the readings of the two pulse oximeters and blood pressure monitor, as well as his failure to inform emergency responders about Brown’s possible oxygen deprivation. Doherty and the others then appealed to the state Supreme Court.

In today’s opinion, the high court finds the Court of Appeals was wrong. “The plaintiffs’ case of medical malpractice was very strong,” the opinion says. “But a very strong case of medical malpractice does not become a case of ordinary negligence simply due to the egregiousness of the medical malpractice. The Court of Appeals erred in concluding that an ordinary negligence instruction was authorized by evidence that a doctor defendant responded inadequately to medical data provided by certain medical equipment during a medical procedure. Because the verdict was a general one such that we cannot determine that the jury did not rely on this erroneous theory of liability, we reverse with instructions that the Court of Appeals on remand order a full retrial as to the appellants.”

This case involves a sedated patient showing some signs of respiratory distress in the midst of a complex medical procedure. “It was error to charge the jury on ordinary negligence

based on the premise that whether and how to respond to medical data from medical devices during a medical procedure does not require medical judgment,” the opinion says.

The improper jury instruction on ordinary negligence was harmful to the defendants. “The ordinary negligence instruction invited jurors to decide the liability of the defendants without consideration of the strictures on claims for professional malpractice, such as the need for expert testimony to overcome the presumption of due care, and the bar on finding liability based solely on hindsight,” the opinion says.

The defendants deserve a retrial, the Georgia Supreme Court concludes, although it rejects the defendants’ argument that the verdict on punitive damages should stand. The Court has declined to mandate a retrial of the plaintiffs’ claims against Hardwick, however, as she is no longer a party before this Court.

Attorneys for Appellants (Doherty et al.): John Hall, Jr., Nichole Hair, Nathan Gaffney, W. Curtis Anderson, David Root, Frank Lowrey IV, Robert Ashe III, Michael Baumrind

Attorneys for Appellee (Brown): James Sadd, Edward Wynn

LUCAS V. BECKMAN COULTER, INC. ET AL. (S17G0541)

Under an opinion today by the Georgia Supreme Court, a lawsuit may now be able to go forward against a company whose employee accidentally shot a man in the stomach while on the job.

With today’s unanimous ruling, written by **Justice Robert Benham**, the high court has reversed a Georgia Court of Appeals decision, which had upheld a **Fulton County** court ruling that the company was immune from liability under a Georgia statute that allows people to bring their guns to work. With that legal issue resolved adversely to the employer, the high court is sending the case back to the Court of Appeals with instructions to examine other legal issues raised in the lawsuit that the appellate court did not previously address.

Beckman Coulter, Inc. (BCI) is a company based in Southern California that manufactures and services biomedical testing equipment. The company employs field-service engineers who travel to various client medical facilities where they perform onsite maintenance and repair of BCI equipment. Jeremy Wilson had been a field-service engineer for BCI since 1999 who serviced accounts in South Georgia. On July 10, 2013, Wilson drove a company car to the Albany Area Primary Healthcare facility to perform maintenance work on BCI equipment, according to briefs filed in the case. In the parking lot, he ran into **Claude Scott Lucas**, a lab technician for the facility whom Wilson had known for several years. As the two walked into the facility, Lucas mentioned that several vehicles in the parking lot had been broken into recently. Wilson was concerned because he had taken his personal handgun with him on this particular service call, although company policy prohibited employees from transporting firearms while on company business. Worried his handgun might be stolen, Wilson went back to his car to retrieve it, then followed Lucas back toward the entrance of the medical facility. Shortly after entering, Wilson attempted to clear the weapon, and as he did, the gun discharged, striking him in the hand and Lucas in the abdomen. Emergency medical personnel quickly arrived and took both men to the local hospital. Two days later, BCI fired Wilson for violating company policy by transporting his handgun in a company vehicle.

Lucas subsequently sued Wilson and BCI in Fulton County State Court, alleging that Wilson’s negligence resulted in his injuries and that BCI was liable for Wilson’s conduct under

the theory of “respondeat superior” – a Latin term for the doctrine that holds an employer liable for its employee’s wrongful acts committed during the scope of employment. In response, BCI filed a motion asking the court to grant “summary judgment” in its favor, arguing that under Georgia Code § 16-11-135 (e), it was immune from firearm-related liability. The statute says that, “No employer... shall be held liable in any criminal or civil action for damages resulting from or arising out of an occurrence involving the transportation, storage, possession, or use of a firearm... pursuant to this Code section unless such employer commits a criminal act involving the use of a firearm or unless the employer knew that the person using such firearm would commit such criminal act on the employer’s premises.”

Following a hearing, the trial court granted summary judgment in BCI’s favor. (A court grants summary judgment when it determines a jury trial is unnecessary because the facts are undisputed and the law squarely falls on the side of one of the parties.) Lucas then appealed to the Court of Appeals, but the intermediate appellate court upheld the lower court’s decision, ruling that the language of § 16-11-135 (e) was “plain and unambiguous” and entitled BCI to immunity from being sued. “Here, there is no dispute that Lucas’s injuries and subsequent civil action arose out of Wilson’s possession and/or use of a firearm,” the appellate court’s opinion says. “Similarly, it is undisputed that the shooting was not the result of a criminal act by Wilson or BCI. Thus, under the plain language of the statute, BCI cannot be held liable for the firearm-related injury Lucas suffered as a result of Wilson’s alleged negligence.” Lucas then appealed to the Georgia Supreme Court, which agreed to review the case to determine whether the Court of Appeals correctly interpreted § 16-11-135 (e).

In today’s opinion, the high court has determined that the Court of Appeals was wrong. “No support exists for the proposition that this Code section’s purpose was to immunize employers from all firearm-related” liability, the opinion says. “Subsection (e) cannot be construed as providing immunity to this case.” This Code section simply “does not, as the Court of Appeals ruled, immunize an employer for all damages arising out of an employee’s transportation, storage, possession, or use of a firearm.”

“It is apparent that subsection (e) is to exempt employers from liability that might arise by complying with the Code section’s prohibition against maintaining a policy of searching an employee’s own vehicle... on the employer’s parking lot, or its prohibition against conditioning employment on an employee’s agreement not to bring firearms into the parking lot in the employee’s own vehicle, even when they are locked out of sight by an employee who possesses a weapons carry license,” the opinion says. “In this case, the automobile in which Wilson transported the firearm that injured Lucas was not an employee-owned vehicle... This incident did not even occur on the employer’s premises, but on the premises of the employer’s customer. For these reasons, the immunity referenced in subsection (e) does not apply to this case.”

The Court of Appeals decision is therefore reversed, the opinion concludes. On remand, the Court of Appeals is instructed to address Lucas’s other claims, which the appellate court did not address in its first decision, including Lucas’s assertion that the trial court erred in granting summary judgment to BCI on his claim of liability under “respondeat superior” and for his claim that the company was negligent in its supervision.

Attorneys for Appellant (Lucas): Peter Daughtery, Dustin Brown

Attorney for Appellee (BCI): Kurt Powell

IN OTHER CASES, the Supreme Court of Georgia has upheld **murder** convictions and life prison sentences for:

- * Johnathan Donald Anthony (Cobb Co.) **ANTHONY V. THE STATE (S17A1722)** *
- * Antonio Shandwan Pass (Cobb Co.) **PASS V. THE STATE (S17A1723)** *
- * Jekari Oshay (Cobb Co.) **STROZIER V. THE STATE (S17A1724)** *
(Anthony, Pass and Strozier were co-defendants. Although the Supreme Court has upheld their murder convictions for the beating and subsequent death of Joshua Chellew, the Court has reversed one of their convictions for criminal gang activity. The trial court also erred in failing to vacate and merge the remaining convictions for criminal gang activity into felony murder for sentencing purposes.)

- Lee Douglas (Clayton Co.) **DOUGLAS V. THE STATE (S17A1348)**
(Although the Supreme Court has upheld Douglas’s murder conviction and life prison sentence, due to a merger error, the high court is sending the case back to the trial court for resentencing.)

- * Steven Mark Eller (Bartow Co.) **ELLER V. THE STATE (S17A1549)**
- * Eddieard Konta Greene (Chatham Co.) **GREENE V. THE STATE (S17A1349)**
- * Tommy Hood (DeKalb Co.) **HOOD V. THE STATE (S17A1753)**
- * John Allen Jacobs (Warren Co.) **JACOBS V. THE STATE (S17A1892)**
- * Jonathan Nations (Fulton Co.) **NATIONS V. THE STATE (S17A1597)**
- * Emmanuel Perez (Chatham Co.) **PEREZ V. THE STATE (S17A1370)**
- * Orlando Ramirez (Whitfield Co.) **RAMIREZ V. THE STATE (S17A1662)**
- * Marquis Dequan Tanner (Whitfield Co.) **TANNER V. THE STATE (S17A1417)**
- * Yvette Taylor (Columbia Co.) **TAYLOR V. THE STATE (S17A627)**

IN DISCIPLINARY MATTERS, the Georgia Supreme Court has **disbarred** the following attorneys:

- * Sam Louis Levine **IN THE MATTER OF: SAM LOUIS LEVINE (S18Y0348)**

- * Walter Linton Moore **IN THE MATTER OF: WALTER LINTON MOORE (S18Y0559)**

The Court has ordered the **5-year suspension with conditions for reinstatement** of attorney:

- * Andre Keith Sanders **IN THE MATTER OF: ANDRE KEITH SANDERS (S18Y0383)**

The Court has ordered the **2-year suspension or until the end of his criminal probation (whichever is longer) with conditions for reinstatement** of attorney:

* Christopher Aaron Corley **IN THE MATTER OF: CHRISTOPHER AARON CORLEY**
(S18Y0350)