



## Supreme Court of Georgia

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## CASES DUE FOR ORAL ARGUMENT

### Summaries of Facts and Issues

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**Monday, May 21, 2018**  
**Special Session**  
**Cobb County Superior Court**  
**Ceremonial Courtroom**  
**Marietta, GA**

### **10:30 A.M. Session**

#### **THE STATE V. ANTONIO TAPIA ALMANZA (S18G0585)**

The State is appealing a Georgia Court of Appeals ruling that when a child sex abuse case goes to trial in **Cobb County**, hearsay evidence identifying the alleged abuser must be excluded.

The questions in this pre-trial appeal involve the Court of Appeals ruling that under Georgia's 2013 Evidence Code, two doctors may testify at trial about a mother's statements that her child reported being sexually abused, but they will not be permitted to testify about the mother's statements regarding the child naming the abuser.

**FACTS:** In May 2014, **Antonio Tapia Almanza's** stepdaughter reported to her mother that about a year earlier, Almanza had twice molested her. The mother reported the accusations to law enforcement, who arrested Almanza on May 28, 2014. Police instructed the mother to take the child for a physical exam at Scottish Rite children's hospital in Atlanta. Subsequently, Almanza was indicted for aggravated child molestation, aggravated sexual battery, statutory

rape, child molestation, and incest. Following the indictment, the child's mother took the child out of Cobb County (and possibly the country), and the District Attorney's efforts to locate them have since failed. The State therefore filed a motion seeking a court order that would allow prosecutors to introduce into evidence the testimony of both the emergency room physician who examined the child at Scottish Rite and the child's regular pediatrician. The State relied on Georgia Code § 24-8-803 (4), which is part of Georgia's "new" Evidence Code (enacted in 2013). Under this part of the law, one of the exceptions to the hearsay rule (the rule that prohibits the admission of hearsay testimony), is: "Statements for purposes of medical diagnosis or treatment." At an October 2016 hearing on the State's motion, both doctors testified that the mother had provided information about the molestation and that the child had not said anything. Following the hearing, and relying on cases interpreting a provision of the "old" Evidence Code (former Georgia Code § 24-3-4), the trial court ruled that the doctors could testify at trial about the mother's statements that her child had reported being sexually abused. But they could not testify about her statements that the child had identified Almanza as the abuser.

The State appealed to the Court of Appeals, arguing that the trial court erred by relying on cases decided under the old Evidence Code to determine the scope of § 24-8-803 (4) that is part of the new Evidence Code. The State argued that because § 24-8-803 (4) mirrors Federal Rule of Evidence 803 (4), the trial court was required to base its ruling on federal cases interpreting that federal rule. The State argued the trial court erred in excluding the mother's statements about Almanza being the abuser. In a lengthy opinion, however, the Court of Appeals upheld the trial court's exclusion of the statements identifying Almanza as the abuser. The intermediate appellate court concluded that hearsay statements "identifying the party responsible for a victim's injuries do not carry with them the same guarantee of trustworthiness as other statements made for purposes of medical diagnosis and treatment," and therefore, "such statements do not fall within the hearsay exception at issue." The State now appeals to the Georgia Supreme Court.

**ARGUMENTS:** The State argues the Court of Appeals made at least eight errors. Among them, the legislature's adoption of the new Evidence Code had the effect of "liberalizing" Georgia evidence law to broadly encourage the admission of relevant admission, sweeping away the exclusion policies and case law of the old Evidence Code. In particular, Georgia Code § 24-4-402 under the new Evidence Code states that, "All relevant evidence shall be admissible, except as limited by constitutional requirements or as otherwise provided by law or by other rules..." The State argues that most courts that have examined the issue have ruled that abuser identification statements are admissible in child sexual abuse cases due to the special character of diagnosis and treatment in that context. The State insists that reliance on cases decided under the old Evidence Code is not authorized here. It also argues that the new Evidence Code's almost complete replacement of the hearsay provisions of the old Evidence Code means that the prior law of hearsay in Georgia has been "displaced." The State argues that the Court of Appeals ruling that "out-of-court statements identifying the party responsible for a victim's injuries do not carry with them the same guarantee of trustworthiness as other statements made for purposes of medical diagnosis and treatment," violates Georgia Code § 24-1-104 (a), which does not allow judges to make credibility determinations about evidence in deciding questions of admissibility. Among other arguments, the State also contends that the Court of Appeals disregarded numerous decisions by this Court interpreting the new Evidence Code, including

some that reversed the Court of Appeals, and that its ruling ignored the General Assembly's intent to reenact the evidence law of Georgia and to adopt the Federal Rules of Evidence.

Almanza's attorneys argue that the Court of Appeals correctly affirmed the decision of the trial court in refusing to admit the hearsay statements at issue. Both the preamble to the 2013 Evidence Code, and the State Supreme Court's rulings since 2013 "reflect that Georgia case law is still applicable and precedential unless: 1) a new rule in the Evidence Code borrowed its language from one of the Federal Rules of Evidence, *and* 2) the language in the new rule *deviates* substantively from the language in the old rule." The hearsay rule at issue here – Georgia Code § 24-8-803 (4) – borrowed its text from Federal Rule of Evidence 803 (4), but the language of Rule 803 (4) does not deviate from the language of its predecessor, Georgia Code § 24-3-4. "As a result, federal case law has not displaced Rule 803 (4) or its corresponding case law holding that statements of fault/identity are inadmissible in child abuse cases under Rule 803 (4)," Almanza's attorneys argue in briefs. "Simply because Rule 803 (4) was renumbered in the Evidence Code to conform to the corresponding federal rule of evidence does not mean that the prior version of Rule 803 (4), Georgia Code § 24-3-4, and the case law interpreting it, were 'displaced.' This Court and several Georgia legal scholars have noted that reliance on prior Georgia case law is perfectly appropriate where, as here, there was no new rule of evidence or where there was no substantive change to the prior rule." The mother's statements in this case identifying Almanza as the alleged abuser are not admissible under Rule 803 (4), Almanza's attorneys contend.

In an amicus curiae brief, Children's Advocacy Centers of Georgia, which serve abused children, argue that the Court of Appeals decision should be reversed because it "perpetuates the culture of secrecy in child sexual abuse cases, which is contrary to a court's inherent duty to protect the well-being and safety of children." Furthermore, the decision "would withhold essential medical facts from the jury. The identification of the alleged perpetrator, particularly in the family setting (the father in this case), is critical information for a physician to diagnose or treat a child who is an alleged sexual abuse victim."

In another amicus curiae brief, the Crime Victim Advocacy Council, Inc., also argues on behalf of the State, stating that, "Unless the Court of Appeals is reversed, pertinent medical evidence will be improperly excluded from Georgia juries' consideration under Georgia Evidence Rule 803 (4)." Furthermore, the intermediate appellate court's ruling is "destructive to the dispensation of justice and devastating to the most vulnerable of victims' rights."

In a third amicus curiae brief, the DeKalb County Solicitor-General's office argues that with its decision, "The Court of Appeals violated multiple rules and principles in establishing a blanket prohibition against the admission of relevant and probative abuser identity evidence. The decision of the Court of Appeals should be reversed."

**Appellant (State):** D. Victor Reynolds, District Attorney, Michael Carlson, Dep. Chief Asst. D.A., John Edwards, Sr. Asst. D.A., Amelia Pray, Sr. Asst. D.A., John Melvin, Chief Asst. D.A., Charles Boring, Dep. Chief Asst. D.A., Lindsay Gardner, Sr. Asst. D.A.

**Appellee (Almanza):** John Merchant, III, Ashleigh Merchant

## **DELAY ET AL. V. SUTTON, COMMISSIONER (S18A0765)**

The **DeKalb County** Board of Ethics is appealing a superior court decision finding unconstitutional a DeKalb County local law that set up a new way of appointing ethics board members, stripping the County Commission of its authority to appoint them.

**FACTS:** In March 2015, ethics allegations were lodged with the DeKalb ethics board against then County Commissioner **Sharon Barnes-Sutton** for alleged spending irregularities. At the time, the seven members of the board were appointed and overseen by the DeKalb County CEO and the seven County Commissioners. An outside 2014 report, prepared by the Andrew Young School of Policy Studies at Georgia State University, recommended a change in the appointment process, stating that, “Under the current system, these members are chosen by the individuals they are selected to monitor. A preferred model may be that used by the City of Atlanta and Cobb County where outside individuals are chosen to serve.” While the complaints were pending against Barnes-Sutton, the DeKalb County legislative delegation ushered House Bill 597 through the state legislature, recreating a new board member makeup. Under the legislation, the power to appoint members of the ethics board would be given to a variety of public and private organizations, including DeKalb’s legislative delegation, the county’s chief superior court judge, the probate court judge, the DeKalb Bar Association, the DeKalb County Chamber of Commerce, Leadership DeKalb, and a group of colleges and universities located within the county. The Georgia legislature passed House Bill 597, the governor signed it, and on Nov. 3, 2015, 92 percent of DeKalb County voters approved it.

Newly appointed board members were seated in January 2016. By then, Barnes-Sutton had filed a lawsuit against the ethics board and its chair, **Clara Delay**. After passage of the new legislation, she amended her complaint in March 2016 with a Petition for a “Writ of Quo Warranto,” which is Latin for “by what authority” and which is used to challenge the authority by which someone holds public office. Barnes-Sutton argued the newly appointed ethics board was unconstitutional because the majority of its seven members were appointed by private organizations – the bar association, the chamber of commerce, Leadership DeKalb, and the group of universities and colleges. Barnes-Sutton argued that those members had no right to their office because no elected official had final authority over their appointments. The trial court judge ruled in Barnes-Sutton’s favor, finding that under the state Supreme Court’s 1979 decision in *Rogers v. Medical Association of Georgia*, Georgia House Bill 597 violated the Constitution because it delegated appointment power for four of the seven ethics board members to private organizations that were not subject to any confirmation by any elected governmental official or body. The DeKalb County Board of Ethics now appeals that ruling to the state Supreme Court. (Barnes-Sutton was voted out of office in 2016.)

**ARGUMENTS:** “The appointment process adopted by the General Assembly and overwhelmingly approved by 92 percent of DeKalb County voters does not violate the Georgia Constitution,” attorneys for the ethics board argue. The trial court erred in granting to Barnes-Sutton a Writ of Quo Warranto, and this Court should reverse the lower court’s decision. First, the statute invalidated in the *Rogers* opinion is distinguishable from House Bill 597, the attorneys argue in briefs. “*Rogers* does not apply to the facts here.” While *Rogers* does contain “overbroad language suggesting that every appointment to public office by a private individual is unconstitutional, that case arose in a fundamentally different context than does the dispute now before the Court,” the attorneys contend. Second, even if the trial court was required to follow

the *Rogers* decision, “this Court is not.” “*Rogers* is a thinly-reasoned decision inconsistent with the plain language of the Georgia Constitution, and – if this Court were to conclude it applied to the facts here – would be in conflict with numerous prior decisions of this Court (and with most other state supreme courts that have addressed the same issues),” the attorneys argue. “This Court should either overrule *Rogers* or restate its analysis in a manner consistent with the Constitution of Georgia.” In the *Rogers* decision, the state Supreme Court relied on Article I, Section II, Paragraph 2 of the Georgia Constitution, which states that, “The people of this state have the inherent right of regulating their internal government...and at all times they have the right to alter or reform the same whenever the public good may require it.” “Here, the overwhelming majority of the voters of DeKalb have determined that the public good requires regulating their internal government by altering it to allow some appointments to the Board of Ethics to be made by impartial community groups.” In its 1902 decision in *Mayor & Council of Americus v. Perry*, the Georgia Supreme Court upheld a statute allowing a board of police commissioners to name its own successors, removing any accountability to the public. The high court stated in *Perry* that, “There is nothing in the provisions of the constitution...which in express terms prohibits the General Assembly from either naming the officers who are to have the control of the affairs of a municipal corporation, or from prescribing the manner in which such officers are appointed...How far a community shall be allowed to control its own affairs is left to the judgment and discretion of the General Assembly.” “Because House Bill 597 dictated the appointment of the Board members, this Court’s decision in *Perry* makes clear that the General Assembly had complete authority over the manner of appointment of the Board members, and no scheme it selected could violate Article I, Section II, Paragraph 1.” “If Georgia courts begin to enforce *Rogers* beyond the minimal times it has been cited so far, doing so would invalidate countless other public bodies,” the ethics board’s attorneys argue.

Barnes-Sutton’s attorney argues that the crux of the ethics board’s argument is that the Supreme Court’s ruling in *Rogers* “does not mean what it says, and if it means what it says then overrule *Rogers*.” The decision in *Rogers* is “good law,” and there is no need to overrule it. “Should the power to appoint members to the MARTA Board be delegated to Uber and Lyft, without governmental confirmation?” the attorney asks. “Can and should the power to appoint members to the housing board and zoning and planning board, be delegated to the Klan, without governmental confirmation?” In *Rogers*, this Court ruled the manner of appointing members of the State Board of Medical Examiners was unconstitutional because it delegated “the power of appointment to a private interest group,” which was the Medical Association of Georgia. The opinion quoted the Constitution as saying that, “The people of this State have the inherent, sole, and exclusive right of regulating their internal government and the police thereof....” The opinion then stated: “This is accomplished through elected representatives to whom is delegated...the power to regulate and administer public affairs, including the power to provide for the selection of public officers...These constitutional provisions mandate that public affairs shall be managed by public officials who are accountable to the public.” The fact that other jurisdictions may be operating in violation of the Georgia Constitution is no reason to overrule *Rogers*, the attorney argues. If there is a concern that it is a conflict of interest to allow county commissioners to appoint the ethics board that monitors them, “The fix is simple and non-disruptive,” the attorney argues. The Georgia legislature can revise the law to allow nonpartisan

elected state, superior court, and probate judges, or the sheriff, to appoint the members of the ethics board – none of whom falls within the jurisdiction of the DeKalb County Board of Ethics.

**Attorneys for Appellant (Delay):** Darren Summerville, Angela Fox, Kurt Kastorf

**Attorney for Appellee (Barnes-Sutton):** Dwight Thomas