



## Supreme Court of Georgia

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## CASES DUE FOR ORAL ARGUMENT

### Summaries of Facts and Issues

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**Monday, May 7, 2018**

### 10:00 A.M. Session

#### **WITHERS ET AL. V. SCHROEDER, III (S17G1875)**

A **DeKalb County** judge and court administrator are appealing a Georgia Court of Appeals ruling that partially reversed a lower court's dismissal of a lawsuit against them, allowing the case to go forward.

**FACTS:** In December 2015, **Bobby Schroeder, III** sued then **Chief Judge Nelly F. Withers** of the DeKalb County Recorder's Court and Court Administrator Troy Thompson. According to his complaint, after receiving a traffic ticket in 2013, Schroeder appeared in Recorder's Court where he was ordered to pay a fine. He claimed that he promptly paid the fine, but the staff of the Recorder's Court failed to close his case. Furthermore, he alleged, the court staff falsely informed the Georgia Department of Driver Services that Schroeder had failed to appear for his court hearing, failed to pay his fine, and his driving privileges should be suspended. Subsequently, according to Schroeder, he was arrested in Rockdale County for driving with a suspended license and taken into custody before bonding out. The following month he was again arrested in Newton County for the same thing. At some point, the Recorder's Court realized it had given the Department of Driver Services incorrect information, and it sent a notice to the department withdrawing the suspension of Schroeder's driving

privileges. That in turn led to the dismissal of the charges against him in Rockdale and Newton counties. Meanwhile, however, Schroeder had lost his job because of what had happened.

In his lawsuit, Schroeder asserted state law negligence claims and federal claims under Title 42 of the United States Code (USC) against Withers and Thompson. He filed for damages, alleging that the defendants failed to perform their “ministerial” duties with due care and that their actions had led to Schroeder’s arrest. In addition to the state law claims, Schroeder asserted claims under 42 USC § 1983, alleging that Withers and Thompson had violated his constitutional rights by maintaining customs and policies that caused his deprivation of liberty. These customs included chronically understaffing and underfunding the Recorder’s Court, failing to adequately train employees, failing to implement an audit system that would have caught mistakes, hiring based on a quota system that increased the rate of errors in the court’s communications with the Department of Driver Services, and failing to adequately discipline and terminate employees. Schroeder claimed that Withers and Thompson knew these customs and practices repeatedly had led to the arrest of innocent persons, yet they had failed to correct the problems.

In response, Withers and Thompson filed a motion asking the court for “judgment on the pleadings,” which is a judgment based solely on the allegations and information contained in the legal documents filed with the court. They claimed that the state law negligence claims were barred based on the doctrine of “official immunity” because Schroeder failed to allege any specific acts they had done that had caused his injury; that the state law and federal § 1983 claims were barred based on the doctrine of “judicial immunity” because all of Schroeder’s allegations “related to Judge Withers’ performance of her duties as a judge....;” and that the § 1983 claims were also barred based on the doctrine of “qualified immunity” because as the court’s supervisor, Judge Withers was performing “discretionary” duties of her job as opposed to ministerial duties and was therefore immune. (Discretionary acts are those requiring personal deliberation and judgment. Ministerial duties, on the other hand, involve merely the execution of a specific duty. In essence, officials are afforded greater protection when they are faced with a situation that requires them to make a judgment call.) Also, they were entitled to official immunity because Schroeder failed to allege specific prior incidents prior to his alleged injuries that would have put Withers and Thompson on notice that widespread unconstitutional conduct was occurring.

In August 2016, the trial court granted Withers’ and Thompson’s motion for judgment on the pleadings, finding that Schroeder’s lawsuit against them was barred by official, judicial and qualified immunity. On appeal, the Court of Appeals reversed most of the lower court’s decision, finding that a 2014 decision by the state Supreme Court, *Austin v. Clark*, precluded dismissal of Schroeder’s lawsuit based on “official immunity” grounds. As to “judicial immunity,” the intermediate appellate court ruled that Withers and Thompson were performing administrative rather than judicial acts and therefore were not protected by judicial immunity. And as to “qualified immunity,” the Court of Appeals ruled that Schroeder was not required to allege specific prior incidents. Withers and Thompson now appeal to the state Supreme Court, which has agreed to review the case to determine whether the Court of Appeals erred in holding that Withers and Thompson were not entitled to official, judicial, or qualified immunity.

**ARGUMENTS:** Attorneys for Withers and Thompson argue the Court of Appeals erred, and because their alleged actions were actions that are “normally performed” by judges around the state, this Court should reverse the Court of Appeals opinion. This Court has stated that in

determining whether judicial immunity applies, a court must analyze the “nature of the act performed.” Here, the Court of Appeals decision is completely devoid of any functional analysis of the alleged acts of the petitioners that barred them from judicial immunity. In addition, the attorneys argue, the Court of Appeals applied the wrong legal analysis because for qualified immunity purposes, an official performing her discretionary duties, as was the case here, only needs to show that she took the actions pursuant to the performance of her duties and within the scope of her authority. Finally, Withers and Thompson argue that the Court of Appeals erred in finding that their claims were not barred by official immunity because none of the functions Schroeder described were ministerial in nature but were rather discretionary in nature, including 1) the staffing, training, and discipline of employees; 2) funding and budgetary decisions; and 3) any failure to implement an audit system.

Schroeder’s attorneys argue that in dismissing his lawsuit, the trial court applied an incorrect legal standard, “which fatally tainted its consideration of the merits of the ‘official,’ ‘judicial,’ and ‘qualified’ immunity defenses.” In contrast, “the Court of Appeals applied the correct legal standard, carefully considered and discussed the pertinent legal precedents, and arrived at the correct result,” the attorneys argue in briefs. “At the pleadings stage, Defendants plainly are not entitled to ‘official immunity’ or ‘judicial immunity’ or ‘qualified immunity.’ The mere fact that Withers was a judge at the time of the events in question is not enough to change the outcome. This Court should reject Defendant Withers’ implicit invitation to confer immunity upon her based solely on her job title. The decision of the Court of Appeals should be affirmed in its entirety, and the case remanded for a trial on the merits.”

In amicus briefs, the Councils of Georgia’s State Court Judges, Superior Court Judges and Municipal Court Judges argue that the Court of Appeals opinion “appears to remove protections from civil suits brought against those who serve in the judiciary.” “If allowed to stand, the opinion would require judges and court personnel to defend against all lawsuits alleging negligent management, supervision, and training of personnel in the performance of judicial functions. This apparent erosion of official immunity, judicial immunity and qualified immunity is likely to have significant, negative repercussions on the courts of this state.”

**Attorneys for Appellants (Withers):** Thomas Mitchell, Angela Couch, Laura Johnson, Terry Phillips

**Attorneys for Appellee (Schroeder):** Harlan Miller, Gerard Lupa

**COLONIAL OIL INDUSTRIES, INC. V. LYNCHAR, INC. D/B/A T&W OIL COMPANY ET AL. (S17G1788)**

An oil company is appealing a Georgia Court of Appeals ruling that two men who signed personal guaranties are not liable for covering a debt of more than \$1 million because the guaranties did not identify in writing the official debtor and therefore are unenforceable.

**FACTS: Colonial Oil Industries** entered into an account agreement with Lynchar, Inc., agreeing to sell and deliver to Lynchar fuel products and other goods. A “New Account Data Sheet” signed in December 1986 lists the billing name on the account as “**Lynchar, Inc. d/b/a T&W Oil Co.**” (“d/b/a” stands for “doing business as.”) An updated “Account Data Sheet and Agreement” signed 11 years later lists “T&W Oil Co.” as the billing name on the account. In 2007 and 2008, Lawrence M. Derby, Sr. and Charles G. Thompson, Jr. signed personal

guaranties that identified Colonial as the “Holder” and T&W Oil, Inc. as the “Debtor.” The guaranty stated that, “Guarantor hereby unconditionally and absolutely guarantees to the Holder the full and prompt payment, when due, of all of the ‘Obligations.’ ‘Obligations’ shall mean and include all indebtedness and liability of whatsoever nature of the Borrower to the Holder.” Thompson and Derby are shareholders in Lynchar, Inc. and both claim they have never been associated with an entity known as “T&W Oil, Inc.”

When Lynchar failed to meet its obligations under the agreements, Colonial sued Lynchar, T&W Oil, Derby and Thompson in **Chatham County** Superior Court, claiming breach of the account agreement, breach of both guaranties, and seeking reimbursement for their legal fees. Colonial’s complaint alleges that based on “an agreement with Defendant T&W Oil and personal guaranty agreements with Defendant Lawrence M. Derby, Sr. and Defendant Charles G. Thompson, Jr., Plaintiff [i.e. Colonial] sold and delivered fuel products and other goods to Defendant T&W Oil on account. The outstanding balance on this account for product sold is \$1,406,194.61 plus interest.” The complaint states that under the guaranty agreements Derby and Thompson signed, both are “personally liable for any amounts owed Plaintiff by Defendant T&W Oil...” In their first response, Derby and Thompson disputed the amount owed. In an amended response, they raised a new defense based on the Statute of Frauds, arguing that the guaranties were not enforceable because they failed to identify the correct principal debtor, Lynchar, Inc. In the meantime, Colonial amended its complaint to include a claim for fraud. Colonial asked the court for “summary judgment” in its favor, pointing to Derby’s and Thompson’s admissions in their original response, as well as various emails between Derby as “President of T&W Oil Company” and Colonial’s credit manager that revealed Lynchar’s inability to satisfy its payment obligations. During his deposition, Derby confirmed that the 2011 federal tax return listed the corporate name as “Lynchar, Inc. d/b/a T&W Oil Company, Inc.” When asked whose debt he was covering, he testified that, “It would be Lynchar,” that was doing business as, “T&W Oil.” When asked if T&W Oil, Inc., to which the document referred, was the correct name of whose debt he was going to guarantee, Derby said, “No ma’am. We don’t go by that name.” Derby and Thompson objected to Colonial’s reliance on “parol evidence” to construe the unambiguous guaranties. (“Parol evidence” is oral evidence, as opposed to evidence that is documented in writing.) The trial court overruled their objection and ruled in favor of Colonial, finding that Derby and Thompson admitted the debt and that Colonial was entitled to summary judgment on its breach of contract claim. The judge also ruled that the guaranties were enforceable even though they identified the debtor as “T&W Oil, Inc.” instead of “Lynchar” because Derby and Thompson admitted the interchangeable nature of the names. Also, under the Georgia Court of Appeals 2005 ruling in *L. Henry Enterprises v. Verifone, Inc.*, parol evidence was admissible to explain ambiguities in descriptions. On appeal, however, the Court of Appeals reversed the ruling, agreeing with Derby and Thompson that because the guaranties identified the principal debtor as “T&W Oil, Inc.,” which was not a legally existing entity, the guarantees were unenforceable because they failed to reference the corporate debtor. The intermediate appellate court determined that a “personal contract of guarantee must be in writing and must satisfy all of the requisites of the Statute of Frauds,” Georgia Code § 13-5-30 (2), and that “parol evidence is not admissible to supply any missing essential elements of a contract required to be in writing.” The Court of Appeals concluded that there was no ambiguity in the defect at issue, judicial construction of the contract of guaranty was improper, and parol evidence was inadmissible to

cure the defect. Therefore, it could not conclude that the guarantors were obligated to guarantee the debt of Lynchar. Colonial now appeals to the Georgia Supreme Court.

**ARGUMENTS:** Colonial's attorney argues that the Court of Appeals decision was wrong and should be reversed. Georgia law applying the Statute of Frauds clearly establishes that a simple misnomer or defect in the identification of the principal debtor does not render a guaranty unenforceable. "The guaranties here identified the proper principal debtor by its trade name," the attorney argues in briefs. "There is no dispute in this case that the guaranties were intended to cover the debts owed to Colonial, and there is no assertion in this case that there is any doubt regarding the entity that was the principal debtor. Defendants admitted numerous times that the guaranties covered the debts of Lynchar, Inc. The guaranties were thus enforceable." At most, the designation on the guaranties identifying the principal debtor rendered the document ambiguous, but that "may be resolved through the use of parol evidence," the attorney argues. "Georgia courts have expressly determined that simple misnomers or defects creating ambiguity in the identification of a material term of a guaranty, such as the slight misnaming or obviously mistaken designation of a principal debtor, are seen by these courts as instances of ambiguity and do not render these contracts unenforceable." The Court of Appeals, however, failed to apply well-established case law. "Effectively, the Court of Appeals enabled defendants, who held themselves out as principals of T&W Oil, Inc. to Colonial and even the federal government, to completely disregard debts they accrued operating under that name and to still reap the benefit of the assurances those guaranties were supposed to provide to Colonial. 'For a court to sanction that kind of opportunistic fraud would undermine both the purpose of the statute of frauds and the concept of justice,'" the attorney argues. The Georgia Supreme Court should reverse the Court of Appeals ruling and restore the decision of the trial court.

The attorney for Derby, Thompson, Lynchar, and T&W Oil argues that the two guaranties identify the principal debtor only by "a fictitious trade name," and the Court of Appeals correctly ruled that the guaranties were unenforceable. "Material defects are fatal to enforcing a standalone guaranty," the attorney argues in briefs. Guaranties are contracts obligating a person to pay the debt of another and are therefore subject to the Statute of Frauds. That statute says that to be binding, a promise "must be in writing and signed by the party to be charged therewith." "This Court has interpreted that requirement to mandate that a guaranty identify 1) the debt, 2) the principal debtor, 3) the promisor, and 4) the promisee," the attorney argues. Under its 2011 decision in *PlayNation Play Systems, Inc. v. Jackson*, the Georgia Court of Appeals upheld the trial court which ruled that because the guaranty listed the company's trade name as the principal debtor, it failed to identify the legal entity as the debtor and thus did not satisfy the Statute of Frauds. The facts in *PlayNation* were almost identical to those in this case, in which the guaranties identify the principal debtor only by a trade name, T&W Oil, Inc. "T&W Oil, Inc. is without independent legal existence," the attorney argues. "Like in *PlayNation*, the guaranties here are unenforceable because they fail to reference the corporate donor." The Court of Appeals correctly found that the guaranties are not ambiguous. "Even while recognizing that the guaranties might be defective, it rightly found that defects in contracts are not treated as ambiguities," the attorney argues. "The Court of Appeals decision below evidences a correct and systematic approach to the narrow facts presented here, and yet remains faithfully consistent to lengthy legal precedent concerning the interpretation of guaranties."

**Attorney for Appellant (Colonial):** Tracy O’Connell  
**Attorney for Appellees (Lynchar):** Benjamin Wallace

**NATIONAL CASUALTY COMPANY V. GEORGIA SCHOOL BOARDS  
ASSOCIATION-RISK MANAGEMENT FUND (S18Q0757)**

This appeal stems from a dispute in federal court between an insurance company and a risk management agency that covers several Georgia school boards. The two provide overlapping coverage and at issue is whose liability coverage is primary and whose is excess coverage that only comes into play once the other’s limits are exhausted.

**FACTS: National Casualty Company** is an insurance company that provides policies for liability insurance to the Professional Association of Georgia Educators, a professional association teachers and administrators. The insurance is a member benefit of PAGE to protect members if they are sued by a parent or student. National provided two policies to PAGE for the period July 1, 2012 through July 1, 2013, and for the period July 1, 2013 through July 1, 2014. National charged a premium of \$301,494 for the 2012 policy and a premium of \$301,380 for the 2013 policy. The **Georgia School Boards Association-Risk Management Fund** is a risk management agency created under Georgia Code § 20-2-2001 and formed by boards of education to share their liability risks. Risk Fund’s members include school boards from Columbia, Douglas, Muscogee and McIntosh counties. Under Georgia Code § 20-2-2004, a risk management agency such as Risk Fund “is not an insurance company or an insurer.”

From 2014 to 2016, several lawsuits were filed against PAGE members who were covered by National’s policies and Risk Fund’s “coverage agreements.” In June 2014, for example, an elementary school student’s family sued the principal for negligence after the boy fell from a playground ladder and was injured. In September 2015, a high school student sued her chemistry teacher after she was burned during a chemistry experiment. Similar lawsuits have been filed against other PAGE members in the four Risk Fund counties.

National refused to defend or pay out insurance to those covered by their policies until Risk Fund’s coverage was exhausted. In September 2016, National filed a motion for “summary judgment” in the United States District Court for the Northern District of Georgia. A court grants summary judgment after determining that a jury trial is unnecessary because the facts are undisputed and the law files squarely on the side of one of the parties. National sought a “declaratory judgment,” asking the court to declare that Risk Fund had the primary duty to defend and indemnify covered individuals against whom suits have been filed. National claimed that under its policies “Other Insurance” provision, it could only pay amounts that were in excess of Risk Fund’s obligations. Risk Fund filed a counterclaim, seeking a declaration that National was the primary insurer, or in the alternative, that the parties “must share coverage owed to jointly covered individuals on a pro rata basis.” Meanwhile, because National refused to provide primary coverage, Risk Fund went ahead, indemnified the covered individuals and paid settlement amounts on their behalf pending resolution of this case.

The federal court ruled in Risk Fund’s favor, granting its motion for summary judgment and denying National’s. The court determined that the “Other Insurance” provisions included in National’s policies and Risk Fund’s coverage agreements canceled each other out and therefore, the parties would have to share defense and indemnity on a pro rata basis. Both parties filed motions asking the federal court to reconsider. Risk Fund argued that National is a for-profit,

commercial insurer that charges premiums for its policies. In contrast, Risk Fund is an interlocal risk management agency created by Georgia statute. Both Georgia law and Risk Fund's coverage agreements state that Risk fund is not an insurance company that provides insurance, Risk Fund argued. Also, Risk Fund does not charge a premium for its coverage and does not generate a profit from the members' participation. Based on Risk Fund's argument, the federal court again reviewed cases in which there were irreconcilable excess coverage provisions and determined that all of the cases addressing irreconcilable, overlapping provisions appeared in contracts issued by traditional insurance companies. "The Court thus finds that the irreconcilable provisions rule has developed only in cases involving conflicts between commercial insurance policy provisions," the federal judge wrote in his order. "Whether that rule applies to coverage provided by an entity entrusted with public funds implicates Georgia public policy and the interpretation of Georgia law." The federal judge therefore decided that before he makes a final ruling in the case, the Georgia Supreme Court should determine whether the "irreconcilable provision rule," which requires each insurer to pay a pro rata share of the loss when there is overlapping coverage, applies not just when both parties are commercial companies but also when one is a risk management company created under Georgia Code § 20-2-2002.

**ARGUMENTS:** Attorneys for National Casualty Company argue that the Supreme Court should answer the certified question in the affirmative. "Contracts are to be applied as written unless prohibited by statute or public policy," they argue in briefs. If "Other Insurance" provisions do conflict, then the irreconcilable provision rule requires each insurer to pay a pro rata share of the loss under the Georgia Court of Appeals' 1974 decision in *State Farm Fire & Casualty Company v. Holton*. Under *Holton*, if the "Other Insurance" provisions cannot be reconciled, then the clauses will "cancel each other out, and the liability is to be divided equally" between the two coverages. "There is no exception to that analysis recognized in Georgia law, and one should not be created here," the attorneys argue. "There is no recognized Georgia public policy justifying a departure from the analysis articulated in *Holton*."

Attorneys for the Georgia School Boards Association-Risk Management Fund argue that the Supreme Court should answer the certified question in the negative. The school boards' risk fund is not an insurance company, and the establishment of the group risk management fund does not constitute doing business as an insurer. National's "Other Insurance" provision is specifically "restricted to other *insurance* and thus, National Casualty seeks to ignore that the Coverage Documents are not insurance or it seeks to unilaterally classify the Coverage Documents as insurance contrary to the express wording of the Coverage Documents and § 20-2-2004," the attorneys argue. When initially before the U.S. District Court, National maintained that the irreconcilable provision rule of *Holton* did not apply because National's policies were excess coverage to Risk Fund's. In light of the federal court's rejection of its argument, however, National now "reverses direction" and embraces, at least temporarily, the irreconcilable provision rule. However, public policy "mandates" that commercial insurance be looked to first. "Georgia has a long standing public policy of protecting the public purse," the attorneys argue. "Consideration of that public policy in conjunction with the express wording of the Coverage Documents negates the need to apply the *Holton* irreconcilable rule." "That public funds for education should be given priority and protected so that they can be used for educational purposes is an explicit legislative mandate." Nothing in Georgia law "indicates an intent to sacrifice public funds to cover liabilities while safeguarding the funds of for-profit insurers who

issued primary policies.” “The coverage provided by the commercial insurer should always be looked to first before looking to the public coffers.” The state’s high court should rule that coverage agreements issued by an interlocal risk management fund “are excess to commercial insurance covering the same persons or entities for the same liabilities.”

**Attorneys for Appellant (National):** Michael Rust, Katie Myers, Jay Sever

**Attorneys for Appellee (Risk):** C. Michael Johnson, Thomas Wingfield

## **2:00 P.M. Session**

### **RUTH ET AL. V. CHEROKEE FUNDING, LLC, ET AL. (S17G2021)**

Two people who got an advance so they could sue after being injured in car wrecks are appealing a Georgia Court of Appeals ruling that the companies that advanced them the money did not violate Georgia laws against high interest loans. The appellate court concluded that the transactions were not “loans” but “investment contracts.”

**FACTS: Ronald Ruth** and Kimberly Oglesby were injured in unrelated car accidents and each retained attorney Michael G. Hostilo to file a personal injury lawsuit. Because they needed funds after their accidents, both signed powers of attorney with Hostilo who entered into separate “funding agreements” on their behalf with **Cherokee Funding** entities, owned by Reid Zeising. Cherokee provided funds to Ruth and Oglesby, each in a principal amount of less than \$3,000. In exchange for the funding, Ruth and Oglesby granted Cherokee a contingent interest in the potential proceeds from their personal injury lawsuits. Under the funding agreements, they only had to repay the advance if they succeeded in their lawsuits. The agreements stated: “If there is no recovery of proceeds by the client, then Cherokee Funding shall receive nothing and there is no associated obligation to pay the amounts advanced.” Both Ruth and Oglesby subsequently won settlements in their lawsuits. Cherokee, which had given Ruth about \$5,300 in cash advances, demanded payment of \$84,000 based on their agreements. (After initially receiving \$1,000 from Cherokee, Ruth had entered into additional funding agreements.) From Oglesby, Cherokee demanded \$1,000 after having given her \$400.

Ruth and Oglesby filed a statewide class action lawsuit in **Chatham County** State Court against Cherokee, Zeising and Hostilo. They claimed that Cherokee’s “litigation advances” on lawsuits at “astronomical rates of interest” amounted to illegal “loans” that violated the Georgia Industrial Loan Act and the state’s Payday Lending Act. Cherokee filed a motion to dismiss the complaint, arguing they were not subject to either statute because the “funding agreements” at issue were not “loans,” but rather were “high-risk investments” in Ruth’s and Oglesby’s lawsuits. As background, the Georgia Industrial Loan Act, adopted in 1955, regulates those in the business of making loans of \$3,000 or less. The purpose of the legislation was to address the growth in high-interest loans from unregulated sources and to prevent “usury,” the charging of illegally high rates of interest. Under the Act, a “loan” is “any advance of money in an amount of \$3,000 or less under a contract requiring repayment...” The Payday Lending Act, enacted in 2004, strengthened penalties for those engaged in illegal lending, including practices surrounding “advance cash services.” The Act states it “encompasses all transactions in which funds are advanced to be repaid at a later date, notwithstanding the fact that the transaction contains one or more other elements.” The trial court ruled that the funding agreements were not subject to the

Georgia Industrial Lending Act but that the plaintiffs' claims under the Payday Lending Act could go forward. Both parties appealed to the Court of Appeals, which ruled that neither statute applied to Cherokee's cash advances. Because repayment was not absolutely required, the intermediate appellate court ruled the advances were not "loans" that ran afoul of either the Industrial Lending Act or the Payday Lending Act. Instead, the appellate court held that the cash advances provided by Cherokee were part of an "investment contract." Ruth and Oglesby now appeal to the Georgia Supreme Court.

**ARGUMENTS:** Attorneys for Ruth and Oglesby argue the Court of Appeals erred in ruling that neither statute applied to Cherokee's cash advances since repayment was not required, and they were therefore not loans, but investment contracts. The Court of Appeals has ignored the General Assembly's intent that each statute was to have broad application, and "tricks or schemes to disguise the true nature of a 'loan' were not disqualifiers from the statutory umbrellas," the attorneys argue in briefs. Indeed, the language relied upon by the Court of Appeals and Cherokee "to escape classification of the transaction as a 'loan' is merely one of the types of clever artifices that the General Assembly has warned against and flatly prohibited under both the Payday Lending Act and the Georgia Industrial Lending Act." Here, Ruth and Oglesby were each injured, out of work, and facing immediate medical bills. They needed small, short-term loans to provide living capital. Both were directed to sign powers of attorney by their attorney, who on their behalf executed a "funding agreement" with Cherokee. Neither saw the agreement, and no one explained it to them. The Georgia Legislature passed the Payday Lending Act out of concern that lenders used "certain schemes and methods in order to attempt to disguise these transactions" as something other than loans so they could evade Georgia's usury and lending laws. The Court of Appeals incorrectly rejected the claims under the Georgia Industrial Lending Act, and there is "no language in the Payday Lending Act so much as hinting that loans (and lenders) are covered by the act only when the transaction at issue includes an unconditional repayment guarantee," the attorneys argue. Even Cherokee advertises itself on its website and elsewhere as a "full service **direct lending company.**" And: "Cherokee's funding program (commonly known as lawsuit cash advances, pre-settlement funding, and non-recourse financial assistance) is **cash loaned to plaintiffs** awaiting judgments of settlements in lawsuits." The plaintiffs' allegations under the Payday Lending Act are sufficient to state a claim, the plaintiffs' attorneys argue. "The statute encompasses Cherokee's cash advance scheme." The Court of Appeals' decision also ignores that prior Georgia decisions "**squarely** rejected the concept that contingent repayment was enough to remove an advance from the Payday Lending Act and Georgia Industrial Lending Act umbrella," the attorneys argue.

Cherokee's attorneys argue that the Court of Appeals ruled correctly and this Court should uphold its decision. "Cherokee's funding contract is not a 'loan' under the Georgia Industrial Lending Act because it is not a contract 'requiring repayment.'" And "Cherokee's contracts are exempt from the Payday Lending Act because they are permissible transactions under the Georgia Industrial Lending Act." "These statutes ban only funding contracts having unconditional repayment obligations, and it is undisputed that Cherokee's contracts have only contingent payment obligations. Thus, as the Court of Appeals correctly held, plaintiffs' claims fail because the plain language of the statutes expressly exempts these transactions." Cherokee's contracts clearly disclosed "the contingent nature and potential pay-off of Cherokee's high-risk investment," its attorneys argue. Cherokee's contracts contain "unambiguous and transparent

terms disclosing that 1) the funding recipient has no unconditional obligation to repay the funds; 2) Cherokee can collect on its high-risk investment in the potential litigation proceeds *only if* the plaintiff recovers on his or her lawsuit; and 3) if Cherokee does collect, that amount cannot exceed the amount of the plaintiff's recovery." Case law supports Cherokee's interpretation of the Industrial Lending Act. "Cases analyzing funding transactions make clear that a 'loan' requires an advance of money plus an unconditional obligation to repay the principal," the attorneys argue. "Before the Georgia Industrial Lending Act was even enacted, this Court held that a repayment contingency would remove the contract from the scope of laws like the Georgia Industrial Lending Act." Finally, contrary to plaintiffs' suggestions, "the majority of courts that have addressed these issues have concluded that the contingent nature of the funding company's recovery renders the agreements valid and enforceable," Cherokee's attorneys contend.

**Attorneys for Appellants (Ruth):** Darren Summerville, Angela Fox, Jeremy McKenzie, C. Dorian Britt, R. Bartley Turner, Kathryn Pinckney

**Attorneys for Appellees (Cherokee):** Laurie Daniel, Matthew Friedlander

### **MERCER V. JOHNSON, WARDEN (S18A0748)**

A man is appealing a lower court's refusal to throw out his conviction for kidnapping, arguing that under the Georgia Supreme Court's 2008 decision in *Garza v. State*, the evidence was insufficient to convict him of the crime.

**FACTS:** According to the facts, the night of Jan. 26, 2004, Richard Love and his wife, Parchando Love, were asleep in bed when they were awakened by the noise of three men breaking into their house in **Fayette County**. Mrs. Love ran into the closet and activated an alarm while Mr. Love jumped under the bed to retrieve his wife's gun. The three intruders entered their upstairs bedroom and pointed their guns at Mrs. Love's head. She begged the intruders not to hurt her. They placed her on the ground and taped her hands and feet, demanding to know where her husband was. Mr. Love then emerged from under the bed and pleaded with them not to hurt his wife. The intruders pointed their guns at him, ordered him to get back on the floor, threatened to kill him, and taped his hands and feet. Meanwhile, the alarm was beeping. One of the intruders grabbed Mrs. Love, threw her against the aquarium in their bedroom that was next to the alarm control pad and demanded she turn off the alarm. She turned off the alarm sounds but simultaneously entered the code for "panic mode," which silently notified police. One of the intruders then threw Mrs. Love back on the floor next to her husband, and again she pleaded with them not to hurt her husband or her. One of the intruders told her to shut up or he would kill her. The assailants demanded money, asking the Loves to tell them where the safe was. One of the men, later identified as **Jessie James Mercer, Jr.**, grabbed Mrs. Love by the hair and dragged her from the couple's bedroom, through an adjoining bathroom, and into a closet where the safe was located. He then noticed her wedding ring, which he stole from her. After Mercer searched the safe, finding it empty, he dragged Mrs. Love back to the bedroom and pushed her back down next to her husband.

Mr. Love later testified that Mercer and his wife were gone from the bedroom, searching for the safe, for "a couple of seconds." Mrs. Love testified that the distance she was moved was about 20 to 30 feet.

At one point, while two of the men were guarding Mr. Love, he was able to break free of the tape binding him. He got to his knees and started to lunge at the intruder, but the assailant

quickly pointed the gun at Mr. Love's head, threatening, "I got to kill him." One of the other intruders, however, screamed, "No, don't kill him!" After that, the intruders "were running around" the house, eventually leaving with a plasma TV from the basement and \$5,000 cash they found hidden under the Loves' mattress.

Three days later, the Loves identified Mercer in a photographic lineup. Mercer's co-defendant, George Roberts, Jr., later testified that he and Mercer went to the Loves' house that night "to collect some money." Roberts drove the getaway car while Mercer and two other men entered the Loves' home.

In March 2004, Mercer was indicted in Fayette County Superior Court for one count of armed robbery, two counts of aggravated assault, and two counts of kidnapping Richard and Parchando Love. In November 2004, the jury found him guilty on all five counts. He was sentenced to 20 years in prison for the armed robbery, and 15 years for each of the remaining counts to run concurrently with each other but consecutively to the 20 years for armed robbery. One of his co-defendants, Rasaul Malik Rayshad, was indicted for the same five charges, tried separately and also found guilty on all five counts.

After the trial court denied Mercer's motion requesting a new trial, he appealed to the Georgia Court of Appeals. In 2008, the intermediate appellate court upheld all but one of Mercer's convictions and sentences. It vacated the sentence for one of the aggravated assault convictions and remanded it to the trial court with direction to merge that count into the armed robbery count.

Nine months later, the Georgia Supreme Court issued its decision in *Garza v. State*, in which the Court adopted a new test to determine whether the movement of a victim constitutes "asportation," a critical element of kidnapping. "Asportation" is a legal term for the abduction or stealing away of a victim. Prior to *Garza*, Georgia law required the State to prove only "movement of the victim, however slight." *Garza* requires courts to consider four factors in determining whether movement of a purported kidnapping victim is sufficient to establish "asportation:" 1) the duration of the movement; 2) whether the movement occurred during the commission of a separate offense; 3) whether such movement was an inherent part of that separate offense; and 4) whether the movement itself presented a significant danger to the victim independent of the danger posed by the second offense. "The purpose of the *Garza* test is to determine whether the movement in question is in the nature of the evil which the kidnapping statute was originally intended to address – namely, whether the movement served to substantially isolate the victim from protection or rescue," the Georgia Supreme Court stated in its 2014 decision in *Levin v. Morales*.

One month after *Garza* was decided, the appeal of Mercer's co-defendant, Rasaul Malik Rayshad, went before the Court of Appeals. In his case, the appellate court reversed Rayshad's kidnapping convictions, finding the evidence insufficient to prove asportation under *Garza*.

In February 2011, Mercer filed a petition for a "writ of habeas corpus." Habeas corpus is a civil proceeding that allows already convicted prisoners to challenge their conviction on constitutional grounds in the county where they're incarcerated. They generally file the action against the prison warden, who in this case was **Glen Johnson**. Among his arguments, Mercer claimed his kidnapping convictions were upheld under the old rule for asportation, which subsequently was overturned by the new rule in *Garza*, and that new rule applied retroactively to his case because it was a "substantive" change. The habeas court denied Mercer's petition. Mercer

now appeals that denial to the Georgia Supreme Court, which has agreed to review the case to determine whether the evidence supporting Mercer’s kidnapping convictions was sufficient under *Garza*.

**ARGUMENTS:** Mercer’s attorneys argue that the habeas court did not properly apply *Garza* to this case, and therefore the habeas court’s order should be reversed. “None of the conduct for which Mercer was convicted amounts to asportation under *Garza*, because all of the movements: 1) were instantaneous; 2) occurred during an ongoing, relentless assault and robbery; 3) were inseparable from and incidental to the ongoing assault and robbery; and 4) did not present significant danger to the victims independent of the danger already posed by the assault and robbery,” his attorneys argue in briefs. In deciding *Garza*, the Supreme Court even cited Mercer’s case as “an example of how the application of Georgia’s kidnapping statute had run amuck.” “The facts of this appeal present a clear example of the constitutional issues this Court sought to ameliorate in *Garza*,” the attorneys conclude. “Mercer was convicted and sentenced to 15 years for conduct that was inseparable from underlying offenses of assault and robbery. Moreover, the conduct found here to constitute kidnapping is conduct that no reasonable person of ordinary intelligence would ever associate with kidnapping or the evil sought to be forbidden by the kidnapping statute. Accordingly, the habeas court’s order should be vacated, and the case remanded for full consideration and application of relevant facts and legal precedent.”

The State, represented by the Attorney General’s office, argues that the evidence of asportation was sufficient. Attorneys for the State argue that “though slight, the evidence of asportation is nonetheless sufficient to sustain the conviction for kidnapping Richard Love. Although the duration of Mr. Love’s movement was minimal – being ordered from standing by the bed to lying on the floor near the foot of the bed – the movement neither occurred during the commission of a separate offense nor was it intrinsic in another offense.” The armed robbery did not occur until after the Loves had been bound and forced to the ground. The kidnapping of Mr. Love also did not occur during the aggravated assault. As to the fourth factor, being duct-taped posed a significant danger to Mr. Love as he was restrained and unable to escape and call for help. “The asportation evidence of Mrs. Love’s kidnapping was stronger than that for her husband, and more than sufficient to warrant the habeas court’s denial of relief,” the State’s attorneys contend. “Mrs. Love was repeatedly dragged and thrown about by the intruders.” The forced movement of Mrs. Love, including being dragged by her hair from one room to another, was not inherent in the other offenses, as the aggravated assaults and armed robbery did not require the assailants to duct-tape and move her. “Additionally, the movements did pose a danger to Mrs. Love as they gave the gunmen greater control over her.” This Court should uphold the habeas court’s order denying Mercer relief.

**Attorneys for Appellant (Mercer):** Foss Hodges, Sarah Gerwig-Moore, J. Scott Key

**Attorneys for Appellee (State):** Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Scott Teague, Asst. A.G.

### **KENNEBREW V. THE STATE (S18A0711)**

A man being retried for murder in **DeKalb County** is appealing the denial of his motion to suppress evidence found in his backpack when the case again goes to trial.

**FACTS:** This is the second time this case has come before the Georgia Supreme Court. According to the facts, around noon on Oct. 18, 2010, Marvin Evans was at home at the Wellington Court Apartments near Decatur when he heard a commotion in the apartment below him. From his second-floor balcony, he saw two men – one running toward, and the other standing beside – a white Chevrolet Malibu sedan. When the men realized Evans had noticed them, they jumped into the car and began to leave. Evans knew the two men who lived in the apartment downstairs, and he tried calling them on their cell phones. He got no answer from Breyon Alexander, but he did reach Darius Oliver, whom Evans knew as “Dough Boy.” Oliver, who was away from the apartment, asked Evans to go downstairs and check on the apartment. On Evans’ way downstairs, he passed a third man leaving the two men’s apartment. Inside, Evans found Alexander hogtied, semi-conscious and bleeding in the middle of the living room floor. His throat had been cut and he had been beaten about his face and neck. Evans called 911 and Alexander was transported to Grady hospital where he later died. Items found stolen from the apartment included two flat-screen TVs, gaming machines, two laptop computers and guns and ammunition, including a 12-gauge shotgun, 12-gauge shotgun shells, a .40 caliber pistol and .40 caliber Smith & Wesson ammunition. The investigation found no evidence of forced entry. The lead investigator learned from the victim’s sister that co-defendant Mason Babbage, a friend of Alexander’s, drove a white Chevrolet Malibu. Because of their friendship, Babbage knew that Alexander kept guns, money and marijuana at the apartment. Further investigation led police to consider **Phillip Warren Kennebrew** and co-defendant Samuel Hall as additional suspects. DNA from a cigarette butt collected from the loveseat later matched Kennebrew. Oliver testified at trial that neither Kennebrew nor Hall had ever been to their apartment before. An arrest warrant was issued for Kennebrew and he was located and taken into custody at his girlfriend’s dorm room at Georgia Gwinnett College. After handcuffing and removing Kennebrew from the room, police seized the backpack and book bag belonging to Kennebrew from the girlfriend’s room, as well as his cell phone. Police later found inside the bag four live 12-gauge shotgun shells, .40 caliber Smith & Wesson ammunition, and a combat knife in a holster. Cell phone records showed that Kennebrew and Babbage talked seven times the day of the murder.

In a joint trial, the jury convicted Kennebrew, Babbage and Hall of murder, armed robbery and other crimes. Babbage and Hall were sentenced to life in prison with no chance of parole. In January 2015, this Court upheld their convictions and sentences. Kennebrew was sentenced to life in prison with the chance of parole plus 25 years. But on Oct. 31, 2016, this Court reversed Kennebrew’s convictions, finding he had received ineffective assistance of counsel at trial based in part on his attorney’s failure to file a motion to suppress the evidence found in Kennebrew’s bookbag. The high court remanded the case to the trial court, stating that although it was reversing Kennebrew’s convictions, “we find that the evidence presented at trial was legally sufficient to support the convictions, so the State may retry him if it chooses.” In April 2017, before Kennebrew’s retrial, the State obtained a search warrant from the DeKalb County Superior Court. Two weeks later, Kennebrew’s attorney filed a motion to suppress the evidence seized from the backpack. The trial court denied his motion, and Kennebrew again appeals to the Georgia Supreme Court, which has agreed to review the case to determine whether the trial court erred in denying Kennebrew’s motion to suppress.

**ARGUMENTS:** Kennebrew’s attorney argues that under the “law of the case” rule, “any ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent

proceedings in that case in the lower court and in the Supreme Court or the Court of Appeals as the case may be.” Based on this rule, the trial court lacks the discretion to disregard the Supreme Court’s first ruling concerning the search of the book bag. “The trial court should have entered an order suppressing the same,” the attorney argues in briefs. “To allow a trial court to disregard or reevaluate an appellate court’s ruling would serve to undercut the appellate structure of the court system of this state.” The trial court erred in failing to suppress evidence collected from the book bag. And the recently obtained search warrant does not cure the unconstitutional defect in the search. “By pursuing and obtaining a search warrant, the state seeks a ‘do over’ or worse, to pretend the illegal search never happened.” Furthermore, the discovery of the evidence in Kennebrew’s book bag was not “inevitable,” as the State claimed. “Despite the trial court’s reliance on the inevitable nature of an inventory search by the evidence collection team of the police department, no evidence was presented that a lawful inventory was conducted,” the attorney argues.

The State, represented by the District Attorney’s office, argues that this Court’s first ruling in Kennebrew’s case does not deprive the trial court of the discretion to hear and deny Kennebrew’s motion to suppress evidence on grounds not previously addressed by this Court or litigated by the parties. “This Court never held that the backpack evidence must be suppressed,” the State argues in briefs. Rather, it stated that the performance of Kennebrew’s original trial attorney was deficient because he failed to raise a Fourth Amendment claim against unreasonable searches and seizures. Georgia courts have ruled that the “law of the case” doctrine “does not prohibit trial courts from receiving new evidence that changes the evidentiary posture of the case,” the State contends. “Specifically, this Court has held that the ‘law of the case’ doctrine applies only when the same issue has been ‘actually litigated and decided.’” The issue before this Court now – whether Appellant’s [i.e. Kennebrew’s] backpack could be reasonably seized and subsequently lawfully searched as an “inventory search – was not litigated in Kennebrew’s original appeal. The State is not “legally precluded from taking a new look at the evidence after this Court’s reversal of a conviction,” the State argues. The trial court correctly denied Kennebrew’s motion to suppress “because the seizure of the backpack was reasonable and the subsequent search was a lawful inventory search.” By pure happenstance, Kennebrew had the backpack with him when he was arrested at his girlfriend’s dormitory room. Police had a choice of either leaving it with his girlfriend or taking it. They chose to take it for two reasons: 1) Based on policy, DeKalb police are responsible for the personal property that people have with them when arrested; and 2) if left with the girlfriend, she could have destroyed the property. No one disputes that the police were legally at the dormitory room to arrest Kennebrew and that his girlfriend freely and voluntarily consented to the search of her dorm room and cooperated with police. The subsequent search of the backpack was a lawful inventory search. “When police take custody of an arrestee’s belongings, such as a bag or suitcase, they are permitted to open the item and itemize its contents pursuant to standard inventory procedures,” the State contends. “The trial court was within its discretion to deny Appellant’s motion to suppress because the evidence produced at the hearing showed that the conduct of DeKalb Police was reasonable in seizing the backpack, and subsequently searching the backpack was a lawful inventory search.”

**Attorney for Appellant (Kennebrew):** Beau Worthington, Sr.

**Attorneys for Appellee (State):** Peter Skandalakis, District Attorney Pro Tempore, Sheila Ross, Asst. D.A. Pro Tem