



## 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 Friday, June 29, 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](http://www.gasupreme.us).*

### **PATTEN V. ARDIS (S18A0412)**

The Supreme Court of Georgia has ruled unconstitutional a provision of the Georgia statute that governs grandparents' visitation rights.

Under today's unanimous decision, written by **Justice Keith R. Blackwell**, the high court has ruled that grandparents of a child whose parent has died, is incapacitated, or is incarcerated must show by clear and convincing evidence that their grandchild would be harmed if visitation were not granted. The decision reverses a **Lowndes County** judge's ruling declining to find the statute unconstitutional.

**Mary Jo Ardis** is the grandparent in this case. In March 2015, her son, Robert Shaughnessy, and Katie Patten married. The couple conceived a child, but Shaughnessy died before the baby girl was born that November. In the ensuing months, Patten permitted Ardis to visit the child, but those visits apparently did not go well, although the parties have disputed the reasons why. In November 2016, Ardis filed a petition in Lowndes County Superior Court seeking court-ordered visitation with her granddaughter under Georgia Code § 19-7-3 (d). Subsection (d) of the Grandparent Visitation Rights Act of 2012 states that, "if one of the parents of a minor child dies, is incapacitated, or is incarcerated, the court may award the parent of the deceased, incapacitated, or incarcerated parent of such minor child reasonable visitation to such child during his or her minority if the court in its discretion finds that such visitation would be in the best interests of the child."

As background, in 1995, the Georgia Supreme Court ruled in *Brooks v. Parkerson* that the Grandparent Visitation Act of 1988 was unconstitutional because it authorized the granting of visitation to a grandparent over the objection of fit parents based simply on "the best interests

of the child,” without requiring a “clear and convincing” showing that failing to do so would be harmful to the child. Under *Brooks*, the high court ruled that under both the federal and state constitutions, parents have a fundamental right to the care, custody, and control of their children. Seventeen years later, the General Assembly enacted the Grandparent Visitation Rights Act of 2012, which included subsection (d).

In response to Ardis’s petition, Patten argued that subsection (d) unconstitutionally impairs a parent’s “right to raise his or her child without undue state interference,” and she asked the judge to dismiss Ardis’s petition for visitation. In May 2017, following a hearing, the trial judge upheld the constitutionality of subsection (d), denied Patten’s motion to dismiss, and granted Ardis’s petition for visitation, concluding that it was in the best interests of the child. Patten then appealed to the Georgia Supreme Court.

In today’s opinion, the high court has found that while subsection (d) of the statute applies to fewer cases than the statute it held unconstitutional in *Brooks*, “it suffers from the same constitutional infirmity – it permits a court to set aside the decisions of a fit parent about what is best for his or her child, without clear and convincing proof that those decisions have harmed or threaten to harm the child, and based simply on the conclusion of a judge that he knows better than the parent what is best for the child,” the opinion says. “Adhering to our decision in *Brooks*, we hold today that § 19-7-3 (d) violates the right of parents to the care, custody, and control of their children, as that fundamental right is guaranteed by the (Georgia) Constitution of 1983.”

“The right of parents to the care, custody, and control of their children is deeply embedded in our law,” the opinion says. More than 100 years ago, the Georgia Supreme Court in *Sloan v. Jones* (1908), identified this right of parents “as among the inherent rights that are derived from the law of nature.” Under the common law of England, adopted by the Georgia General Assembly in 1784, a parent “possessed the paramount right to the custody and control of his minor children.” The Georgia courts have acknowledged this “paramount right” but recognized that it could be overcome by a showing of harm to the child.

“The death, incapacity, or incarceration of a parent will frequently present a child with great difficulties, and we have no doubt that, in many cases, a close bond with grandparents may ease those difficulties,” today’s opinion states. “Even so, we find no strong reason to conclude that grandparent visitation is always (or almost always) essential to keep a child from actual or threatened harm upon the death, incapacity, or incarceration of a parent.”

“The trial court awarded visitation to Ardis under § 19-7-3 (d), and given the unconstitutionality of subsection (d), that award must be reversed,” the opinion concludes. The case is remanded to the trial court to determine whether Ardis is entitled to visitation by clear and convincing evidence that denying the grandmother’s visitation would harm the child.

**Attorney for Appellant (Patten):** Gregory Voyles

**Attorneys for Appellee (Ardis):** Jim Bennett, Kari Bowden

### **WINFREY V. THE STATE (S17G1270)**

The Supreme Court of Georgia has reversed the convictions of a man who pleaded guilty to violating Georgia’s Street Gang Terrorism Prevention Act for his role in the 2015 drive-by shooting of rapper “Lil Wayne’s” tour bus on I-75 in Atlanta.

In his appeal, **Jimmy Carlton Winfrey** argued the trial judge improperly participated in the plea negotiations in violation of Uniform Superior Court Rule 33.5 (A) and that, as a result, his plea was involuntary.

In today's 7-2 opinion, **Justice Britt C. Grant** writes for the majority that, "We agree, and we therefore reverse Winfrey's convictions."

In July 2015, a **Cobb County** grand jury indicted Winfrey on 27 counts, including aggravated assault, racketeering (RICO) charges, and other crimes. At a pre-trial motions hearing, the prosecutor advised the judge that the State had made three plea offers, which Winfrey had rejected, with no additional offers anticipated. Winfrey's defense attorney explained that he had discussed the offers with Winfrey "ad nauseam," but that Winfrey was hesitant to plead guilty because of the effect Gang Act or RICO convictions could have on his ability to win parole. The judge then spoke directly to Winfrey, telling him, "This opportunity is going away. Go to trial and you get convicted, there's not going to be any of me being concerned about when you parole out... And I would also take into account that you didn't take responsibility for what a jury says you did, and I won't worry about your parole eligibility. And if you want to look around and see what happens to people in gangs in Cobb County, Georgia, you can look at what happened last week to the guy who went to trial and got convicted and pulled – was it 50 years?" The prosecutor responded: "One hundred to serve 50, Judge." The judge then commented, "My reputation is not that I'm an easy judge. I know it. You know it, the whole community knows it. So if that's what you want to go up against, be my guest."

Subsequently, as part of a negotiated plea bargain, Winfrey pleaded guilty to six counts of violating the Street Gang Terrorism Prevention Act, while the State agreed to "nolle prosequi" – or not prosecute – the remaining charges. He was sentenced to 10 years in prison followed by 10 years on probation.

Winfrey then appealed to the Georgia Court of Appeals, arguing that the trial judge had improperly participated in plea negotiations, rendering his plea involuntary. The Court of Appeals upheld Winfrey's plea and sentence. In its unanimous opinion, the intermediate appellate court conceded that this was "a close case" and that the judge's comments "appear to violate the spirit of Uniform Superior Court Rule 33.5 (A)." However, although the trial judge had "strongly suggested" Winfrey would face a harsher sentence if he went to trial and was convicted, she "never explicitly told Winfrey that he would be facing a longer sentence if he rejected the State's offer and went to trial." Winfrey then appealed to the Georgia Supreme Court, which agreed to review the case to determine whether the trial court improperly participated in the plea negotiations.

"We conclude that the trial court did participate in Winfrey's plea discussions in violation of Rule 33.5 (A) – in spite of the fact that many of the court's comments were implicit rather than explicit in their meaning," today's majority opinion says. "We also conclude that the level of the court's participation was so significant that it rendered Winfrey's guilty plea involuntary."

Rule 33.5 (A) simply says: "The trial judge should not participate in plea discussions." "In addition to the error inherent in a Rule 33.5 (A) violation, 'Judicial participation in plea negotiations is prohibited *as a constitutional matter* when it is so great as to render a guilty plea involuntary," the opinion says, quoting the Georgia Supreme Court's 2017 decision in *State v. Hayes*.

“Here, we agree with the Court of Appeals that although the plea court ‘never explicitly told Winfrey that he would be facing a longer sentence if he rejected the State’s offer and went to trial,’ the court ‘strongly suggested that result,’” the majority says. “We disagree, however, that because the plea court’s strong suggestion of a harsher sentence was not explicitly stated, the judge ‘did not improperly interject herself into the negotiation process.’”

“Let us be plain: if a trial judge communicates – either explicitly or implicitly – to a criminal defendant that his sentence *will* be harsher if he rejects a plea deal and is found guilty at trial, then Rule 33.5 (A) has been violated and the plea may be found involuntary.”

“The key distinction, then, is whether the trial judge threatens that a sentence *will* be harsher after conviction if a plea offer is rejected, or advises that the sentence *may* be harsher – the former should not occur, and it is of little significance whether the trial court accomplishes that communication with explicit or implicit language.”

“The comments in this case crossed the line. The trial court made repeated statements that referenced the judge’s own proclivity to sentence harshly, along with other statements strongly implying that if Winfrey were found guilty by a jury, his sentence would be (not could be) harsher than that recommended in the plea offer,” today’s majority opinion says. “The implication was unmistakable – if Winfrey rejected the plea offer and the jury found him guilty at trial, he would be sentenced more harshly.”

“We must conclude in light of these comments that Winfrey’s guilty plea was involuntary.”

In a dissent, **Justice Keith R. Blackwell** writes he agrees with the majority that “the statements by the trial judge about her propensity to impose especially harsh sentences crossed the line drawn by Uniform Superior Court Rule 33.5 (A), insofar as her statements impliedly threatened Jimmy Carlton Winfrey with a harsher sentence if he went to trial and were found guilty.” But he disagrees that Winfrey’s guilty plea was involuntary. “Judicial commentary of this sort certainly could render a subsequent guilty plea involuntary, but only if it actually induces the accused to enter his plea. The record in this case does not establish that the judicial commentary in question induced Winfrey to enter his plea, and I cannot, therefore, go along with the majority and conclude that his plea was involuntary.” As the U.S. Supreme Court stated in its 1970 decision in *Brady v. United States*, “improper threats may render a plea involuntary, but only to the extent that the plea is induced by the threats,” says the dissent, which is joined by Justice Nels S.D. Peterson. “Winfrey was represented by two seasoned criminal defense lawyers, neither of whom raised any objection when Winfrey entered his plea.” Winfrey stated to the judge that he had made his plea “upon his own free decision after discussing it with his attorneys.” Here, “the majority says nothing meaningful about inducement (an essential component of a claim that a plea is involuntary), and having found that the judge’s commentary violated Rule 33.5 (A), the majority jumps straight to the conclusion that the commentary itself, without more, shows the plea to be involuntary,” the dissent says in a footnote. “I am not so sure.”

**Attorneys for Appellant (Winfrey):** Steven Sadow, Matthew Winchester

**Attorneys for Appellee (State):** D. Victor Reynolds, District Attorney, Michael Carlson, Dep. Chief Asst. D.A., Gregg Jacobson, Spec. Asst. D.A., John Melvin, Chief Asst. D.A., John Edwards, Sr. Asst. D.A.

## **THOMPSON V. THE STATE (S18A049)**

The Supreme Court of Georgia has upheld a man's conviction for the 2015 murder of a construction worker in the parking lot of a now defunct Kroger grocery store located on Atlanta's Ponce de Leon Avenue next to City Hall East and the Beltline.

**Damarius Thompson** appealed his **Fulton County** convictions on a number of grounds, including that the evidence against him was insufficient to prove him guilty of the murder of Joshua Richey.

But in today's unanimous opinion, written by **Justice David E. Nahmias**, the high court has rejected Thompson's arguments and finds that the evidence at trial "was sufficient to authorize a rational trier of fact to find [Thompson] guilty beyond a reasonable doubt of all of the crimes of which he was convicted."

The case was highly publicized by local media, which helped lead to Thompson's arrest. According to the evidence at trial, on March 10, 2015, Richey and Jason Shelton were working a construction job near the Kroger on Ponce de Leon Avenue. Both had parked their pickup trucks in the grocery store's lot. Around 2:00 p.m., while they were sitting at their work site about 75 feet away from their trucks, Shelton noticed a man tinkering with the passenger door handle of his truck. He noticed another man, dressed in yellow, sitting inside Richey's truck. Richey and Shelton took off running toward the parking lot, and upon arriving at his truck, Richey slapped the driver's side window with his hand. The man in Richey's truck shot at Richey through the closed door, hitting him in the chest. The man then got out of the truck and into a two-door black BMW sedan with tinted windows that was parked between Richey's and Shelton's trucks. The other man was driving and the two fled from the scene. Richey died almost instantly from the gunshot wound. The bullet that killed him was fired from a gun consistent with the .357 Glock pistol Richey kept in the middle console of his truck. A .357 shell casing was found at the scene, but Richey's gun was not found.

Police obtained a video recording of the shooting from one of Kroger's surveillance cameras, and local news stations broadcast the video. The next day, Shenia Gaither saw the video on local news and told police she recognized the BMW, which her roommate Teresa Gurley had purchased the day before Richey's murder. Police found the car parked in Gurley's driveway. Gurley told them that on the day Richey was killed, she had lent her new car to her friend, "Mean," whom she later identified as Thompson in a photo lineup. In the backseat of the BMW, police found a Powerade bottle that testing later showed had Thompson's fingerprints and DNA on it. In a later interview with police, Gaither said that the day after the shooting, she had seen Gurley and Thompson burning yellow clothing in Gurley's garage and wiping down the BMW. She also said that when she had told Thompson she had seen him in the surveillance video, he told her that he had shot Richey because he "got too close."

Police arrested Thompson on March 26, 2015. Cell phone records showed that his cell phone was near the Kroger at the time of the shooting and near Gurley's house the day after. The State also presented evidence that Thompson previously had been convicted for illegally entering an automobile in another parking lot. Thompson did not testify at trial, and although he was represented by counsel before trial and during jury selection, he then asked to represent himself, which he was allowed to do. Following a May 2016 trial, Thompson was found guilty of malice murder and other crimes. He was sentenced to life plus 42 and one half years in prison. (The other man with Thompson the day of the murder, Shontavious Chestnut, was found guilty of

entering an automobile and attempting to enter an automobile and sentenced as a recidivist to 90 months in prison.) Thompson then appealed to the Georgia Supreme Court.

Among his 10 arguments, Thompson contends that there was no evidence that he killed Richey with malicious intent in support of a malice murder conviction, or that he took anything from Richey in support of an armed robbery conviction. He also complained that the conviction of tampering with evidence was based solely on Gaither's testimony. "But the State's evidence showed that Appellant [i.e. Thompson] broke into Richey's truck, leaving his fingerprint on the door; took Richey's pistol from the console and shot Richey with it when Richey ran up to the truck to confront him; fled in the BMW seen on the surveillance video, which he had borrowed from Gurley, taking the pistol with him; burned the clothes he was wearing that day and wiped down the getaway car; and admitted to Gaither that he killed Richey because he 'got too close,'" today's opinion says.

"Evidence that the defendant acted where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart is sufficient to establish the malice required for a malice murder conviction," the opinion says, citing one of the Court's earlier opinions. "Moreover, 'The testimony of a single witness is generally sufficient to establish a fact,' and 'It was for the jury to determine the credibility of the witnesses and to resolve any conflicts or inconsistencies in the evidence.'"

In today's 20-page opinion, the Court has responded to each of Thompson's remaining arguments, rejecting them all. "Judgment affirmed," the opinion says. "All the Justices concur."

**Attorney for Appellant (Thompson):** Damarius Thompson, representing himself pro se  
**Attorneys for Appellee (State):** Paul Howard, Jr., District Attorney, Lyndsey Rudder, Dep. D.A., Burke Doherty, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Aimee Sobhani, Asst. A.G.

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

Under a decision today by the Georgia Supreme Court, a medical malpractice lawsuit against the **Atlanta Medical Center** is allowed go forward.

In its appeal, the hospital had argued that an amendment to the lawsuit, which added a new claim against the hospital for the alleged negligence of a nurse who was not named in the original lawsuit, was barred by a two-year statute of limitation.

But in today's opinion, which upholds a ruling by the Georgia Court of Appeals, **Chief Justice P. Harris Hines** writes for a unanimous court that the liability claim in the second amended complaint "relates back" to the date of the original complaint, which was filed within the required two years. Therefore, "that new claim is not barred by the applicable two-year statute of limitation."

In May 2012, **Lorraine Thomas** was in a car wreck. At the scene, paramedics secured her neck with a cervical spine collar, placed her on a backboard, and took her by ambulance to Atlanta Medical Center in **Fulton County**. At the hospital, Dr. Robin Lowman, an emergency room physician, ordered a CT scan and other tests on Thomas. When completed, Lowman had the CT scan sent to Dr. Clifford Grossman, a radiologist, who concluded Thomas had not suffered a cervical spine fracture. Based on Grossman's reading, Lowman ordered Thomas's discharge from the hospital. A nurse then removed the spine collar and hospital staff wheeled

Thomas, who was heavily medicated, to the curb to wait for her brother to pick her up. When the brother arrived, Thomas was slumped over and unresponsive in the wheelchair. She was rushed back into the emergency room and readmitted to the hospital where following a cervical spine MRI, another physician concluded that Thomas did in fact have a fractured spine. Physicians determined that when the nurse removed the cervical spine collar, the fracture in Thomas's spine was displaced, which caused a compression of her spinal cord, neurological damage, and quadriplegia. Nursing personnel were instructed to place a cervical collar back on Thomas.

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

The hospital sought dismissal of the amendment on the ground that it did not "relate back" to the original complaint and was therefore barred by the statute of limitation. The trial court agreed and dismissed the amendment, concluding that under Georgia Code § 9-11-15 (c), the new claim did not relate back to the original complaint because it did not arise from the "same conduct, transaction, or occurrence" set forth in the original complaint, which was "devoid of allegations of liability on the part of the Atlanta Medical Center nursing staff." Georgia Code § 9-11-15 (c) states that, "Whenever the claim or defense asserted in the amended pleading arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

Thomas appealed to the Court of Appeals, which reversed the trial court's decision, finding that both the original and amended complaints set out allegations about the improper removal of the cervical spine collar by a hospital employee, which caused Thomas's injuries. Therefore, the intermediate appellate court concluded, the claim in Thomas's amended complaint arose from the same "conduct, transaction, or occurrence" set forth in the original complaint and was not barred by the statute of limitations. The hospital then appealed to the state Supreme Court, which agreed to review the case to determine whether the Court of Appeals correctly ruled that the allegations in the amended complaint involved the "same conduct, transaction, or occurrence" described in the original complaint.

In today's opinion, the high court has concluded that the Court of Appeals was correct. As it wrote in its 2012 decision in *Jensen v. Yong Ha Engler*, "the question of relation back of the amendment turns on fair notice of the *same general fact situation* from which the claim arises."

"Thomas's original complaint alleged that hospital nurses were involved in her care and treatment at the hospital's emergency room following the motor vehicle accident and that the negligent acts and omissions of two doctors caused Thomas to be discharged just three and a half hours later with a dangerously unstable spine that resulted in serious injury after hospital personnel removed her cervical collar," the opinion says. "The new imputed liability claim in

Thomas's second amended complaint alleged that this same removal of the C-collar was the negligent act of a hospital nursing employee in violation of a hospital policy." The facts alleged in the second complaint occurred at the same time as certain facts in the original complaint. They occurred at the same location and involved the same subject matter – the negligent treatment of Thomas's dangerously unstable spine. "Finally, the allegations were part of the same events that led up to the same ultimate injury for which Thomas is seeking damages."

"The fact that Thomas's second amended complaint invoked a legal theory – the imputed simple negligence of the hospital nurse who removed the C-collar – that was not in the original complaint does not prevent this new claim from relating back," today's opinion says. "For the same reasons, relation back is not prevented by the fact that Thomas's second amended complaint alleged that the hospital was vicariously liable for the conduct of a different individual than the individuals on whose conduct the original claim of imputed liability against the hospital was based."

"Accordingly, we conclude that the imputed liability claim in Thomas's second amended complaint relates back to the date of her original complaint pursuant to § 9-11-15 (c) and that, as a result, that new claim is not barred by the applicable two-year statute of limitation," the opinion says. "The Court of Appeals, therefore, correctly reversed the trial court's dismissal of Thomas's new imputed liability claim as time-barred."

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

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

### **INQUIRY CONCERNING JUDGE EDDIE ANDERSON (S18Z1333)**

The Supreme Court of Georgia has ordered that a **Tattnall County** judge be publicly reprimanded for violating the Georgia Code of Judicial Conduct, which sets down the standards of ethical conduct by which judges must abide.

In this judicial discipline matter, the Director of the Judicial Qualifications Commission (JQC) brought formal charges against Tattnall's Chief Magistrate **Judge Eddie Anderson** for judicial misconduct arising from the repossession of a woman's vehicle by the owner of an automobile dealership. Among the charges, the judge allegedly violated rules of the Code of Judicial Conduct that require judges to "respect and comply with the law" and to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." He did this by calling the owner of the dealership and demanding that the owner either return the woman's repossessed vehicle or remit the money paid to the dealership for the vehicle and reimburse the woman for her insurance costs. When the owner refused the judge's demands, the judge advised the woman to sue the owner in court, which she subsequently did.

"Judge Anderson undermined the public integrity and impartiality of the judiciary by advising the woman to file a case by making ex parte demands before a case was even filed," says today's opinion. "Moreover, Judge Anderson's demands and the woman's subsequent lawsuit violated clearly established law."

With today's ruling, the high court has accepted an agreement reached between the Director of the JQC and Judge Anderson, agreeing to the public reprimand for Judge Anderson's admitted violations. The Investigative Panel of the JQC authorized the Director to enter into the agreement with the judge, and the JQC's Hearing Panel voted 2-to-1 to accept the agreement and

