



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Tuesday, October 9, 2018

10:00 A.M. Session

SOUTHERN STATES CHEMICAL, INC. ET AL. V. TAMPA TANK, INC. ET AL. **(S18A1256)**

Two companies are appealing a **Fulton County** court ruling that was in favor of the two companies they sued over the alleged faulty renovation of a tank.

FACTS: This case has been tied up in litigation for years. The record shows that **Southern States Chemical, Inc.** and Southern States Phosphate and Fertilizer Co. (collectively "Southern") manufacture, buy, sell and store sulfuric acid in bulk at a facility in Savannah. In 2000, Southern contracted with **Tampa Tank, Inc.** to renovate a 24-foot tall, 130-foot wide storage tank to store up to 2.2 million gallons of sulfuric acid. The contract between Tampa and Southern contained a one-year warranty that stated: "All material and workmanship are guaranteed for a period of 12 months from the date of completion of this work." Tampa subsequently subcontracted with Corrosion Control, Inc. (CCI) to provide design, materials, on-site technical assistance, and testing of a "cathodic" corrosion control system necessary for the renovation. CCI did not assist with the installation onsite. The tank's renovation was substantially completed in January 2002, after which CCI performed a post-installation inspection of the cathodic system and issued a report stating that the system was working and

had been properly installed. More than nine years after the renovation of the tank was complete – on July 3, 2011 – a security guard discovered sulfuric acid leaking from the base of the tank.

On Jan. 6, 2012, Southern sued Tampa and CCI for breach of contract, negligence, fraud, punitive damages, and attorney’s fees. The parties dispute the cause of the leak, with Southern arguing that the hole in the tank resulted from improper installation and “a defective or otherwise unsuitable cathodic protection system,” and Tampa arguing that inadequate maintenance caused sludge to form inside the tank which interacted with the sulfuric acid and caused a hole to form on the inside of the tank. In 2013, Tampa Tank and CCI filed motions asking the court to grant them “summary judgment” in their favor. A court grants summary judgment after determining that a jury trial is unnecessary because the facts are undisputed and the law falls squarely on the side of one of the parties. Tampa argued that Southern’s claims were barred by the “statute of repose,” which is similar to the statute of limitations and which under Georgia Code § 9-3-51 bars a lawsuit for recovery of damages more than eight years after “substantial completion” of construction of an improvement to real property. In 2017, the trial court granted summary judgment to Tampa and CCI, ruling in part that the statute of repose barred Southern’s claims, including Southern’s claims for breach of warranties lasting longer than the eight-year repose period. Southern and CCI now appeal to the state Supreme Court.

ARGUMENTS: Southern’s attorneys argue that the trial court erred in its ruling and the Supreme Court should reverse the summary judgment in favor of Tampa. “Tampa’s renovation was a failure,” they argue in briefs. “From the outset, CCI failed to properly design, test, and commission the project’s cathodic protection system.” Furthermore, both companies “knew full well the extent of their failures,” the attorneys contend. “Yet CCI’s Post-Installation Report, given first to Tampa and then by Tampa to Southern, not only failed to reveal Appellees’ (i.e. Tampa’s and CCI’s) failures detailed above, but went further into affirmative misrepresentations concerning the tank and its cathodic system.” The trial court erred in applying the statute of repose to bar Southern’s contract claims, including its claims for breach of warranties. It erred in ruling that the statute of limitations also bars Southern’s contract claims. It erred in ruling as a matter of law that Southern failed to exercise “due diligence” to discover Tampa’s and CCI’s fraud. And it erred in dismissing Southern’s breach of contract claim, Southern’s attorneys argue.

The attorney for Tampa (echoed by the attorney for CCI) argues that this case “involves a straightforward application of the eight-year statute of repose for claims arriving from improvements to real property, Georgia Code § 9-3-51.” “In its third order granting summary judgment, the trial court correctly decided that the statute of repose applied to, and barred, Southern States’ breach of warranty claim.” First, there is no issue in this case of a warranty longer than the eight-year period of repose, contrary to Southern’s assertion that the case involves a 43-year or 45-year warranty made by statements in a report issued by CCI. This appeal is the first time that claim has been mentioned. “The only warranty alleged in the fourth and fifth amended complaints is Tampa Tank’s 12-month warranty,” the attorney argues in briefs. “Because the case does not involve a warranty longer than the repose period, (Southern’s) assertion of a conflict between the constitutional right to freedom of contract and the statute of repose is based on a hypothetical state of facts and this Court lacks jurisdiction.” Second, contrary to Southern’s arguments, the plain language of the statute of repose, which begins, “No action to recover damages,” compels a ruling that the statute applies to (Southern’s) contract and warranty claims, the attorney argues. “If this Court elects to exercise jurisdiction over this

appeal, it should affirm the trial court's judgment in favor of Tampa Tank because (Southern's) enumerations of error are without merit."

Attorneys for Appellants (Southern): Jeffrey Lewis, J. Tucker Barr, Andrew Stevens, George Carley, Edwin King, Jr.

Attorney for Appellees (Tampa): Bradley Wolff

CITY OF STOCKBRIDGE ET AL. V. LUNSFORD ET AL. (S19A0087)

The appeal in this case stems from legislation signed by the governor earlier this year that takes part of the **City of Stockbridge** and creates the new city of Eagle's Landing. The Mayor of Stockbridge and other opponents argue that creation of the new city will harm its tax base, and they are challenging as unconstitutional an act by the General Assembly that creates the new city and calls for a Nov. 6 voter's referendum to approve it. The City of Stockbridge now appeals a **Henry County** court decision allowing the referendum to proceed.

FACTS: On April 5, 2018, the General Assembly passed Act 548 and Gov. Nathan Deal signed it into law May 8, 2018. Act 548 provides for the incorporation and boundaries of Eagle's Landing, which is created from some of Stockbridge's existing territory. The creation of Eagle's Landing and the "de-annexation" of Stockbridge's territory would take effect only after certification of the referendum approving Act 548. Only prospective residents of Eagle's Landing may vote in the referendum. Also on April 5, 2018, the General Assembly passed Act 559, and Gov. Deal signed it as well on May 8, 2018. Act 559 provides for new boundaries and a new charter for the City of Stockbridge. Act 559 sets forth the portions of Stockbridge that are to be handed over to Eagle's Landing, which also would not take effect until after the referendum approving Act 548.

On May 17, 2018, the City of Stockbridge sued County Elections and Registration Director **Tina Lunsford** and members of the Henry County Commission, seeking a declaration from the trial court that Acts 548 and 559 were unconstitutional. The City also sought an injunction preventing the referendum from going forward. On July 30, 2018, the trial court denied the City's petition for a declaratory judgment and the motion for an injunction. The City of Stockbridge now appeals to the state Supreme Court. It has requested that the high court either expedite its review of the case and resolve the matter prior to the Nov. 6 referendum, or that it grant a stay of the special referendum election until the case is resolved.

ARGUMENTS: Attorneys for the City of Stockbridge argue that both Acts 548 and 559 are unconstitutional because each refers to more than one subject matter and each contains matters different from that expressed in its title. The Georgia Constitution states that, "No bill shall pass which refers to more than one subject matter or contains matter different from what is expressed in the title thereof." The purpose of the constitutional clause "is to protect the people against covert and surprise legislation." Act 548, which provides for the incorporation of Eagle's Landing, does not mention Stockbridge, yet it surrenders half of Stockbridge's total territory to create Eagle's Landing. Likewise, Act 559, which provides for new boundaries for Stockbridge, makes no reference to the proposed City of Eagle's Landing. In its 1950 decision in *Schneider v. City of Folkston*, "This Court held the challenged act was unconstitutional and void because it affected the charters of two different municipalities and, thus, referred to more than one subject matter," Stockbridge's attorneys argue in briefs. The referendum must be stopped to avoid "the problematic consequences of 'un-creating' a new city," the attorneys contend. Although the

“appellees” – i.e. Lunsford and the County Commissioners – argue that “allowing the referendum to continue does not inevitably lead to de-annexation,” the fact that only citizens residing within the potential City of Eagle’s Landing are permitted to vote in the referendum “creates an overwhelming likelihood that the referendum will pass.” If the referendum proceeds, experts say Stockbridge likely will lose its ability to borrow money and the credit rating of every municipality in Georgia will suffer. “These harms are much more substantial and much more difficult to reverse than the delay that enjoining the referendum would cause,” Stockbridge’s attorneys argue.

Attorneys for citizens supporting creation of the City of Eagle’s Landing argue that, “There is no question that the General Assembly has the authority to de-annex land from the city of Stockbridge. Likewise, there is no question that the General Assembly has the authority to incorporate a new city.” The U.S. Supreme Court has long upheld the power of the state to alter the boundaries of cities. “In the present case, the General Assembly clearly has the authority to de-annex land from the City of Stockbridge to create the City of Eagles Landing,” the attorneys argue in briefs. “The General Assembly accomplished this goal through two separate bills.” The attorneys further argue that Acts 548 and 559 are constitutional and that the incorporation of the City of Eagles Landing does not refer to two subject matters. “According to the appellants (i.e. Stockbridge et al.), the General Assembly does not have the authority to pass one bill de-annexing property and another bill creating a new city,” the lawyers argue in briefs. “This argument is not supported by law, and the Court should decline to adopt the appellants’ interpretation.” The incorporation of the City of Eagles Landing does not contain matters different from its title, the attorneys contend. They also argue that, “An expedited review of the case is not necessary.” The City of Stockbridge will not be harmed if the referendum proceeds in November. The portions of Acts 548 and 559 with which Stockbridge takes issue would not take effect until Jan. 1, 2019, and the appellants would retain their ability to challenge the constitutionality of the Acts after the referendum. Furthermore, if the referendum on the City of Eagle’s Landing fails, “the appellants’ appeal will be moot and there will be no need for any further litigation.” The citizens say, however, that they do not object if the Supreme Court wishes to proceed with this case on an expedited basis. But they do oppose staying the referendum. “In the present case, the Court should deny the appellants’ request for an injunction and maintain the status quo,” the attorneys argue. If this Court were to grant Stockbridge’s request to stay the referendum, “the General Assembly, the citizens of the proposed City of Eagles Landing, and the citizens entitled to vote on the annexation in the City of Stockbridge would all suffer immediately from an injunction,” the attorneys argue. An injunction pending the appeal “would cause more damage to the public interest than proceeding with the referendum in November. Interfering with the referendum silences the citizens and their ability to decide how they should be governed.” Finally, “contrary to the appellants’ contentions, delaying the referendum will cost the public more fiscally,” the attorneys argue.

Attorneys for Appellants (Stockbridge): Michael Bowers, Christopher Anulewicz, Robert Wilson, Stephen Quinn, Michael Williams

Attorneys for Appellees (Lunsford): Timothy Tanner, Thompson Kurrie, Jr., Emily Macheski-Preston

FEDERAL DEPOSIT INSURANCE CORPORATION V. LOUDERMILK ET AL.
(S18Q1233)

In this appeal, a federal court is asking the state Supreme Court whether under Georgia law, millions in damages must be apportioned among a bank's directors and officers who were found negligent in making loans.

FACTS: In December 2009, during the financial crisis, the Georgia Department of Banking and Finance closed the Buckhead Community Bank, which had been in business since 1998. The banking and finance department, which regulated and oversaw the bank, ordered it be closed after the failure of several large commercial loans the bank had issued. The **Federal Deposit Insurance Corporation** (FDIC) took receivership of the bank. Subsequently, the FDIC filed a lawsuit against eight former directors and officers of the bank, including **R. Charles Loudermilk, Sr.**, in the United States District Court for the Northern District of Georgia, alleging that the directors and officers had been negligent under Georgia law in their approval of 10 commercial real-estate loans. Seven of the directors were members of the bank's loan committee, and one underwrote one of the loans at issue. The FDIC sought to recover nearly \$22 million in losses suffered from the negligence. In response, the bank's directors filed a motion asking the court to dismiss the FDIC's claim, arguing that Georgia's "business-judgment rule" precluded them from being held liable for negligence. The District Court determined that the issue was unsettled under Georgia law and certified the question to the Georgia Supreme Court of whether the business-judgment rule did indeed bar the directors and officers from being held liable. In its 2014 decision in *FDIC v. Loudermilk*, the Supreme Court answered the question in the negative, holding that Georgia Code § 7-1-490 (a) authorizes ordinary negligence claims against bank officers and directors if the claims are based on a "failure to exercise ordinary care with respect to the way in which business decisions are made."

The case continued, and prior to trial, the parties filed various motions. Among them, the bank's directors filed a motion asking the District Court to instruct the jury that it should "apportion" damages among the eight bank officers if it found them liable, based on their individual degree of liability. The court denied the request and the case proceeded to trial. During the trial, the District Court again denied the directors' request to instruct the jury to apportion damages. Following the trial, the jury concluded the directors and officers were negligent in approving four of the 10 loans in question. It therefore found the directors liable and awarded the FDIC \$4.98 million in damages. The judgment held the directors and officers "jointly and severally liable," meaning it would be left to them to come up with the total and sort out and litigate among themselves their respective individual proportions of liability and payment. The directors then appealed to the United States Court of Appeals for the Eleventh Circuit, arguing that some of the directors should be held more liable than others. Before resolving the matter, the federal court has sent three questions to the Supreme Court of Georgia, including whether Georgia's apportionment statute, Georgia Code § 51-12-33, applies to claims for purely money losses against bank directors and officers and whether in a negligence action, a decision of a bank's board of directors is a "concerted action," meaning the board members should be held "jointly-and-severally liable."

ARGUMENTS: Georgia's apportionment statute says: "Where an action is brought against more than one person for *injury to person or property*, the trier of fact...shall...apportion

its award of damages among the persons who are liable according to the percentage of fault of each person.” FDIC’s attorneys argue that under the plain language of the statute, § 51-12-33 “must be read to apply only to physical injury or harm to realty or tangible personalty, and not to purely pecuniary losses.” The only Georgia appellate decision to consider the construction of the phrase, “injury to person or property,” ruled that it applies only to injury to person or tangible property. “No authority supports the contrary view urged by the directors and officers,” the FDIC attorneys argue in briefs. They also argue that the apportionment statute did not abolish the common-law rule of joint-and-several liability for concerted action. “Courts in Georgia and elsewhere have held that joint-and-several liability survives when damages cannot rationally be apportioned or when a defendant fails to present supporting evidence of same,” the attorneys contend. “Because the concerted action of the directors and officers here cannot rationally be apportioned, joint-and-several liability applies.” The bank’s loan committee acted in concert, approving loans at weekly meetings. If one member objected to a loan, it would not be approved. “Georgia has not abolished joint-and-several liability for joint (wrongdoers) acting in concert,” the FDIC argues.

In its effort to preserve the verdict in this case, the FDIC is now asking the state Supreme Court “to upend a common-sense, plain reading of Georgia law that would create uncertainty across businesses in Georgia and disrupt countless pending legal disputes involving joint tortfeasors,” attorneys for Loudermilk and the other bank directors and officers argue. (Tortfeasor is a legal term meaning “wrongdoer.”) Georgia law requires the court to apply the apportionment statute in actions against more than one defendant. This is true whether the alleged claims involve physical injury to tangible property or purely economic losses due to wrongdoing. “No Georgia statute says otherwise, and the FDIC points to no Georgia decision that holds otherwise,” the attorneys argue in briefs. “The apportionment statute applies here. Joint-and-several liability does not.” Georgia’s apportionment statute replaced joint-and-several liability on wrongdoers who act in concert. The decisions of the individual bank officers and directors were not concerted, and “the factfinders had volumes of evidence at trial of individual conduct by each of the officers and directors such that fault, if any, could be apportioned.” “There is no basis under Georgia law or the factual record to find defendants acted in concert.” The jury found liability on only four of the 10 loans, the attorneys point out. “For three of the loans on which the jury found liability, the jury assigned liability to defendants who did not even approve the loans, as they were not in attendance during the approval,” the attorneys argue. Georgia’s apportionment statute applies to claims against bank directors and officers involving purely pecuniary losses. “Georgia courts have long interpreted ‘property’ to mean tangible and intangible property,” the attorneys contend. “Other state courts interpreting the phrase, ‘injury to person or property,’ have applied it to claims for economic harms.”

Attorneys for Appellant (FDIC): J. Scott Watson, J. Stuart Tonkinson, Joyce Lewis, George Shingler

Attorneys for Appellees (Bank Directors): Robert Long, Theodore Sawicki, Elizabeth Clark, Lauren Macon

LAFONTAINE ET AL. V. SIGNATURE RESEARCH, INC. (S18G0078)

A couple is appealing a **Douglas County** court decision, upheld by the Georgia Court of Appeals, that dismissed their lawsuit against a Georgia company after determining it would be better to litigate the matter in the Dominican Republic.

FACTS: In May 2014, **Francis LaFontaine** and her husband, residents of Michigan, took a vacation in the Dominican Republic. While participating in a zipline course operated by Cumayasa Sky Adventures, the zipline collapsed and La Fontaine fell to the ground, suffering serious injuries. She was initially treated in the Dominican Republic before returning to Michigan, where she continued to receive extensive medical care.

Signature Research, Inc. is a Georgia corporation with its principal place of business in Douglas County, GA. Signature inspects “Challenges Courses,” including ziplines, and certifies that such courses are in compliance with the standards published by the Association for Challenge Course Technology. Signature inspected the Cumayasa zipline and issued Certificates of Inspection in December of 2011, 2012, and 2013. In a May 2014 letter to Signature, Cumayasa’s president wrote that the collapse of the zipline had occurred when an eye-bolt used to attach a guy wire to a terminal pole failed. When the eye-bolt failed, the guy wire came loose, the terminal pole tilted, and the line carrying LaFontaine dropped to the ground.

LaFontaine and her husband sued Signature and three other defendants, including Cumayasa, in the United States District Court for the Southern District of Florida. Signature filed a motion to dismiss the suit on grounds of “forum non conveniens,” which is Latin for an “unsuitable court.” This legal doctrine, which allows a court to divest itself of jurisdiction for the convenience of litigants and in the interest of justice, was codified in a Georgia statute (Georgia Code § 9-10-31.1) in 2005. The statute says: “If a court of this state, on written motion of a party, finds that in the interest of justice and for the convenience of the parties and witnesses a claim or action would be more properly heard in a forum outside this state..., the court shall decline to adjudicate the matter under the doctrine of forum non conveniens.” The federal court dismissed LaFontaine’s suit on the ground of forum non conveniens. She and her husband then filed their suit against Signature in Douglas State Court. Signature again filed a motion to dismiss on forum non conveniens grounds and the trial court granted the motion, finding that the location of witnesses, the site of the accident, and the inability of a Georgia court to compel Dominican Republic witnesses to appear tilted the balance toward dismissing the case on the basis of forum non conveniens. On appeal, the Georgia Court of Appeals upheld the decision, and LaFontaine and her husband now appeal to the Georgia Supreme Court, which has agreed to review the case to determine whether the trial court properly applied § 9-10-31.1 in dismissing the lawsuit against a Georgia corporation in favor of it being filed in a foreign country.

ARGUMENTS: Attorneys for the appellants (i.e. LaFontaine and her husband) argue that “the cause of the collapse of the zipline was the substandard method of attaching the guy wire to the terminal pole by use of an eye-bolt. This hardware deficiency should have been noticed during Signature’s multiple inspections of the course in 2011, 2012, and 2013.” Signature “has not identified any action by any persons in the Dominican Republic that caused Ms. LaFontaine’s injury, independent of the failed eye-bolt. If this decision is allowed to stand, “Appellants will never have an opportunity to seek justice,” the attorneys argue in briefs. The trial court erred by failing to apply the plain language of § 9-10-31.1. The statute “only contemplates dismissals to ‘other states.’” Under the Georgia Supreme Court’s 2001 decision in

AT&T v. Sigala, the only actions that can be dismissed to a foreign country are those involving lawsuits filed in Georgia state courts by nonresident aliens who suffered injuries outside this country. Under Georgia statutory law, LaFontaine and her husband, as residents of Michigan, have the right of access to sue in Georgia Courts, and § 9-10-31.1 cannot override that privilege, LaFontaine's attorneys argue. The state Supreme Court has never approved the use of forum non conveniens to force U.S. citizens to bring a civil action against a Georgia defendant in a foreign nation. The trial court also erred by failing to properly apply the burden of proof required under § 9-10-31.1. Signature has the burden of establishing that an adequate alternative forum exists, i.e. that a remedy is available to LaFontaine and her husband in the Dominican Republic, and Signature has not shown that the laws of that country recognize liability for negligent inspection. The trial court erred in its analysis of the seven factors listed in § 9-10-31.1, which include the availability and cost of compelling unwilling witnesses to appear and the ease of access to sources of proof. Finally, "Under the common law and constitution a Georgia court could not dismiss this action," the attorneys argue. "When forum non conveniens was codified, the statutes granting the right to appeal to Georgia courts were not amended, thus leaving the underpinnings of citizens' constitutional right of access to Georgia courts intact." "To tell a United States citizen that she cannot sue another United States citizen in its home state and county, but must instead sue that United States citizen in a third world country, is anathema to the right to petition the government for redress of grievances," LaFontaine's attorneys argue.

Signature's attorneys argue the trial court properly dismissed appellants' lawsuit on grounds of forum non conveniens as codified in § 9-10-31.1 after balancing the interests of justice and the convenience of the parties in determining that the lawsuit would be more properly tried in the Dominican Republic. "However, Appellants continue to challenge § 9-10-31.1 by their flawed analysis of *AT&T v. Sigala*, which not only pre-dated the statute but also represented a limited application of the doctrine of forum non conveniens under very specific facts peculiar to that case," the attorneys argue in briefs, adding they have been unable to find any Georgia case that has adopted "the limited interpretation of the doctrine Appellants urge upon this Court." If applied as LaFontaine urges, the unjust result in this case would be to "unduly burden the trial court's efficient administration of justice" and preclude Signature from effectively defending itself against LaFontaine's claims. The trial court properly applied § 9-10-31.1 and properly exercised its discretion in dismissing appellants' case. "The forum non conveniens statute does not deny access to Georgia courts and does not violate the provision in the Georgia Constitution that superior courts shall have jurisdiction in all cases," the attorneys argue. The statute "permits dismissal to a forum outside the United States." Subsection (a) of the statute "speaks in terms of an alternative 'forum outside the state' with no express geographical limitations specified." "If, as Appellants contend, the statute was intended to limit dismissals only to 'sister states' of the United States, the legislature would have stated so in subsection (a) of the statute." Furthermore, LaFontaine's status as an American citizen does not preclude dismissal to a forum outside the United States. Signature met its burden of proof. Necessary evidence is located in the Dominican Republic, and an adequate alternative forum exists in the Dominican Republic, the attorneys argue. Also, the trial court correctly weighed the seven factors in § 9-10-31.1 to determine the appropriate and alternative forum, Signature's attorneys contend.

Attorneys for Appellants (LaFontaine): Jefferson Callier, Mark Schwartz

Attorneys for Appellee (Signature): Barbara Marschalk, Rebecca Schmidt

2:00 P.M. Session

IN THE INTEREST OF H.G.D. ET AL., CHILDREN (S18G0199)

Grandparents of a young boy and girl are appealing a lower court's denial of their motion asking the court to allow them to present evidence so they can regain custody of their grandchildren. At issue in this case is whether under Georgia law, the term "temporary legal custodian" is included in the term "legal custodian."

FACTS: James and Gena Clark are considered the grandparents of two children, **H.G.D.**, a 3-year-old boy, and **H.D.**, a 9-year-old girl. (James Clark is the stepfather of the children's mother, whom he helped raise, and Gena Clark is his wife.) In February 2016, the **Thomas County** Department of Family and Children Services filed a petition in juvenile court alleging that the children were not safe in their mother's care. The child welfare department found that the home the children shared with their mother was filthy, the mother was abusing methamphetamine, and the mother had admitted domestic violence between her boyfriend and her. The children already had lived five months with the Clarks, and at the hearing a child welfare worker testified that the children were happy living with the Clarks. Following the hearing, the juvenile court granted "temporary legal custody" of the children to the Clarks.

However, while living with the Clarks, **H.D.** and **H.G.D.** exhibited behavioral problems that resulted in another court hearing. Specifically, **H.D.**, who was 9, had to be admitted to a psychiatric hospital after tying a dog leash around her neck and yanking it in an apparent suicide attempt. Gena Clark had called the child welfare department asking what she should do, and she was advised to take the child to Archbold Northside Hospital in Thomasville, a mental health hospital, which she immediately did. There, she and the two children had to wait up to four hours for **H.D.** to be admitted, and while they waited, they were observed by video surveillance by a crisis therapist. The therapist reported seeing Mrs. Clark smack the leg of **H.G.D.**, the 3-year-old, and slap him in the face. She also said Mrs. Clark allowed the boy's older sister, **H.D.**, to slap him in the face. However, she reported that she never saw any marks on **H.G.D.**, and she never saw the little boy cry. Following these incidents, on July 18, 2016, the juvenile court removed the children from the Clarks' custody and gave temporary custody to the Thomas County Department of Family and Children Services (DFCS). The child welfare department subsequently placed the children in two separate foster homes, and visitation was not allowed by the Clarks or the children's mother.

The Clarks filed a motion for custody with the juvenile court in which they complained that DFCS had failed to file a dependency action against them. They also filed a motion to intervene in the permanency action regarding the children. At an August 2016 hearing, which the Clarks attended, the juvenile court determined that the safest placement for the children would be in DFCS custody. The court denied the Clarks' motion to intervene based on a lack of standing, and it denied them custody of the children based on the evidence that had led to their removal from the Clarks' custody. On appeal, the Georgia Court of Appeals – the state's intermediate appellate court – upheld the juvenile court's ruling. It rejected the Clarks' argument that the juvenile court was required to find the children "dependent" a second time before changing custody, noting that the juvenile court was entitled to modify its order regarding temporary custody "where it found the change to be in the best interest of the children." It also rejected the Clarks' argument that the juvenile court should have let them intervene because they were "legal

custodians” and thus parties to the case. The Clarks now appeal to the state Supreme Court, which has agreed to review the case to answer a single question: “Did the trial court err by determining that temporary legal custodians are not included in the term ‘legal custodian,’ as it is used in Georgia Code § 15-11-181?”

ARGUMENTS: A person who has temporary legal custody under a court order is a “legal custodian” within the meaning of the definition of that term as used in § 15-11-181, the Clarks’ attorney argues. “Temporary legal custodians are parties to a case under § 15-11-2 (52) and therefore they have rights in juvenile proceedings under § 15-11-19, including ‘the right to be present, to be heard, and to present evidence material to the proceedings.’” The Clarks ask the state Supreme Court to reverse the August 2016 order and any other order removing legal custody of H.G.D and H.D. from the Clarks. They further request “that this Court order that physical and legal custody of the minor children be immediately returned” to them. In a separate proceeding following removal of custody from the Clarks, Gena Clark appealed the inclusion of her name on the state’s Child Abuse Registry, which had been based on the same facts that led to the removal of the children from their grandparents’ home. Following a hearing, in January 2017, an Administrative Law Judge reversed DFCS’ action and ordered the removal of Gena Clark’s name from the registry. The judge found that “DFCS failed to prove by a preponderance of the evidence that Petitioner neglected or physically abused” H.G.D. or neglected H.D. The grandmother had been unaware of the girl’s previous suicide ideations and had called DFCS the minute she saw her with the dog leash. Gena Clark “never failed to respond to the needs of either H.D. or H.G.D.,” the judge wrote.

The child welfare agency, represented by the state Attorney General’s office, argues that neither party addressed the question in the lower courts now asked by the state Supreme Court, and therefore the high court should dismiss the appeal. However, if it decides to address the merits of the question about whether the term “legal custodian” also refers to “temporary legal custodians,” the Clarks’ reading of the state’s Juvenile Code “is inconsistent with the text of the statute as a whole and would render significant portions of the Code internally contradictory,” the State argues in briefs. “No reasonable reading of the Juvenile Code supports a conclusion that dependent children cannot be removed from temporary legal custody...absent an *additional* finding that the children are dependent in the custody of their temporary legal custodians.” Under the Juvenile Code, the phrase “parent, guardian, or legal custodian” refers to people with permanent custody, the State argues. “The term ‘temporary legal custody,’ by contrast, refers to an interim form of custody assigned to persons or government agencies during the pendency of dependency actions. The terms are not interchangeable, nor does the former include the latter, and temporary legal custodians are not, as the Clarks argue, afforded the same rights as parents during such proceedings.” Furthermore, by the time the Clarks filed a motion to intervene, the juvenile court had already removed the children from their temporary custody eight days earlier, meaning they had no legal basis to intervene, the State contends.

Attorney for Appellants (Clarks): Heath Bassett

Attorney for Appellee (DFCS): Christopher Carr, Attorney General, Ross Bergethon, Dep. S.G., Annette Cowart, Dep. A.G., Shalen Nelson, Sr. Asst. A.G., Penny Hannah, Sr. Asst. A.G., Victoria Powell, Asst. A.G.

THOMPSON V. THE STATE (S18A1340)

A young man is appealing his murder conviction and life prison sentence for shooting to death his girlfriend who was pregnant with his child.

FACTS: At trial, prosecutors for the State presented the following case: During the early morning hours of June 6, 2008, **Jovan Elshawn Thompson**, then about 22 years old, carried the body of Sarhonica Thrasher into the emergency room of the **Muscogee County** Health Center in Columbus, GA. She had been shot in the left temple, was not breathing, and had no pulse. Thompson told hospital staff that Thrasher was his girlfriend and that she had been killed in a “drive-by” shooting, but he left before providing any further information. Although Thompson did not mention it, hospital staff soon discovered Thrasher was seven months pregnant. Although they were unable to save Thrasher, an emergency cesarean section saved the infant girl’s life.

Earlier that night, Thompson’s mother had called 911. The Columbus police officer who responded to the scene on 23rd Street found Thrasher’s car in the driveway still running. When Thompson came to the door, he was covered in blood. Thompson told the officer that his girlfriend had been killed during a drive-by shooting and he had just returned from the hospital. Thompson said Thrasher had decided to leave his home in the middle of the night, and after she’d gone outside, he heard two gunshots. He ran outside where he found her lying on the ground just as a Nissan Altima was speeding away.

Initially, Thompson was not a suspect in the killing, but further investigation revealed evidence that caused law enforcement to doubt his version of events, including discovery that the gunshot wound that had killed Thrasher had been at “point blank” range. Officers subsequently read Thompson his *Miranda* rights and again questioned him about the shooting. After they swabbed his hands for gunpowder residue, Thompson amended his account, saying Thrasher had decided to leave his house that night because she couldn’t sleep. He had walked her outside, bringing his gun for protection in light of a recent drive-by shooting of his home. Thompson said he was trying to put the safety on the weapon when it “fell out of his hand” and accidentally fired into the victim. He said he then ditched the weapon in a sewer and disclosed to them where.

At trial, the State presented evidence that contradicted this version of events. The medical examiner testified that Thrasher had sustained a “contact gunshot wound,” i.e. the gun muzzle had been touching her skin when it was fired. In addition, the victim’s mother, Diane Thrasher, testified that Thompson had told her multiple times he was going to kill her daughter if she left him to be with her ex-boyfriend. Thompson testified in his own defense, stating again that he accidentally shot Thrasher after his gun slipped out of his hand.

Following the April 2009 trial, the jury convicted Thompson of felony murder based on aggravated assault, criminal attempt to commit feticide, possession of a firearm during the commission of attempted feticide, and other crimes, and he was sentenced to life in prison plus five years. The jury acquitted Thompson of malice murder. Thompson now appeals to the state Supreme Court.

ARGUMENTS: Thompson’s attorney argues the trial court made three errors and this Court should reverse his conviction and grant him a new trial. The trial court abused its discretion when it admitted “irrelevant, unfairly prejudicial evidence” of suspected marijuana found in the toilet by police when they responded to the 911 call. Prior to trial, Thompson’s attorney had made a motion to exclude the evidence about the marijuana as impermissibly placing Thompson’s character into evidence. The marijuana evidence was not admissible

because it was irrelevant to any issue at trial, and it unfairly prejudiced Thompson by debasing his character with no legal justification, his attorney argued. Although the State argued repeatedly that Thompson's apparent effort to dispose of the marijuana showed a "scheme or motive" to hide his crimes, on the contrary, a police officer testified that Thompson had not even changed out of his blood-soaked clothing when they arrived at the scene. The trial court also erred in failing to instruct jurors that if they returned a guilty verdict on the murder charge, the sentence to life in prison was mandatory. The failure to instruct jurors about the sentence denied Thompson his constitutional right to due process, his attorney argues. Finally, the evidence was insufficient to prove Thompson's guilt, and the jury's verdict is "strongly against the weight of the evidence."

The State, represented by the District Attorney's and Attorney General's offices, argues the trial court properly admitted evidence relating to the marijuana found in Thompson's toilet. The responding officer had discovered the evidence shortly after the shooting, and it appeared that Thompson had recently attempted to flush down a larger amount of the drug. It was relevant in demonstrating Thompson's consciousness of guilt, the State contends, along with the firearm he had ditched in the sewer and the "rag or towel" found in Thrasher's blood-soaked car – all indications of Thompson's effort to sanitize the crime scene after the shooting. Even if the court erred in admitting the evidence, however, such an error would be harmless in light of the "overwhelming" evidence against Thompson. Thompson's argument that the trial court erred by failing to instruct the jury he would receive a life prison sentence if found guilty of murder is also without merit, the State contends. In its 1982 decision in *Camp v. State*, the Georgia Supreme Court ruled that, "In all felony cases, except those involving the death penalty, it is error to allow the jury to have the issue of the consequences of the possible verdicts before it while considering guilt and innocence." Finally, the evidence against Thompson is sufficient to authorize the jury to find him guilty beyond a reasonable doubt, the State contends.

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Attorneys for Appellee (State): Julia Slater, District Attorney, Raymond Tillery Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew O'Brien, Asst. A.G.

THE STATE V. JOHNSON (S18A1275)

The **Fulton County** District Attorney is appealing a judge's ruling that grants a new trial to a man convicted of felony murder. Central to this case is a Georgia statute involving the corroboration of a witness's testimony who also happens to be an accomplice to the crime. Georgia Code § 24-14-8 states: "The testimony of a single witness is generally sufficient to establish a fact. However, in certain cases, including...felony cases where the only witness is an accomplice, the testimony of a single witness shall not be sufficient. Nevertheless, corroborating circumstances may dispense with the necessity for the testimony of a second witness...."

FACTS: According to the facts of the case, on New Year's Eve in 2005, **John Johnson**, Albert Reaux, Michael Williams, and Brandon Scott were driving around in a red car partying, clubbing, and drinking. Williams was driving, Johnson was in the front passenger seat, and Scott and Williams sat in back. In the early morning hours of Jan. 1 on the way to drop off Reaux at his girlfriend's house, Scott said something to Johnson and they "went to fussing." In an audiotaped statement to a detective that was later played for the jury, Reaux said Johnson and

Scott were arguing about drugs when Johnson pulled out a gun, turned around facing Scott, and shot him. Reaux fled the vehicle and ran to the home of his girlfriend, Kevia Eaglin. She later testified that at about 3 or 4 a.m., Reaux knocked on her window and after letting him in, “He told me that him and John had just killed Brandon.” She said Reaux told her they had been riding around when Johnson and Scott began to argue about an alleged drug debt Scott owed Johnson and when they got to Eaglin’s street, “John turned around and shot Brandon and they pushed him out of the car.” The next day, Johnson, Reaux, and Williams returned to New Orleans where they had lived before Hurricane Katrina and come to Atlanta.

In October 2006, Johnson, Reaux, and Williams were jointly indicted and charged with malice murder, felony murder, aggravated assault with a deadly weapon, and possession of a firearm during the commission of a felony for the shooting death of Scott. In June 2008, the Fulton County Deputy District Attorney dismissed the charges against Reaux and Williams. Judge Marvin Arrington subsequently granted Johnson’s motion to dismiss the charges against him due to a violation of his right to a speedy trial, which the state Supreme Court later reversed, sending the case back to the trial court. The case was reassigned to a new judge and Johnson’s trial commenced March 20, 2014.

When it was time for the jury to go into deliberations, the judge instructed jurors on the law, telling them that the testimony of a single witness, if believed, was sufficient to establish a fact. Here, Reaux – at one time a co-indictee – was the only witness who testified from personal knowledge of the crimes. Neither party requested that the judge give an instruction on the law requiring corroboration of testimony by a witness who was also an accomplice. And the judge, on her own, did not give such an instruction.

The jury found Johnson guilty of all charges except the firearm possession charge and he was sentenced to life plus five years in prison. His attorney filed a motion requesting a new trial, and following a hearing, the judge granted it, conceding that “in felony cases, like the present case, where the only witness is an accomplice, the testimony of a single witness will not be sufficient.” The judge determined that Georgia Code § 24-14-8 had therefore been violated and a new trial was warranted. The State, represented by the District Attorney, now appeals to the Georgia Supreme Court.

ARGUMENTS: The State argues that the order granting Johnson a new trial should be reversed and his murder conviction be reinstated. “The evidence is legally sufficient and amply corroborated,” the State argues in briefs. Although Reaux did not cooperate at trial as a witness for the State, his identification of Johnson as the shooter in an audiotaped statement to law enforcement that was later played at trial “was in fact corroborated by Reaux’s incriminating admission to Kevia Eaglin the night Brandon Scott was killed that ‘him and John shot Brandon.’” In addition, “Evidence that only a single firearm was involved tacitly corroborates Reaux’s identification of Johnson as the shooter.” “There is also slight corroboration of Johnson’s involvement in that Brandon Scott owed Johnson money for drugs. Further, the incident happened while they were in the red Grand Am belonging to Johnson’s family that Johnson was frequently seen driving.” There is no error in the trial court’s failure to give a jury charge that no one requested on accomplice corroboration because it was not “plain and obvious” that § 24-14-8 applied to the situation “where the accomplice refuses to testify and implicate the defendant but his knowledge comes in through other witnesses.” Reaux and Williams were reluctant witnesses at trial, and Reaux never *testified* that Johnson killed Scott. “Consequently,

per the law at the time of this appellate review, the trial court's exercise of discretion in granting a new trial was based on an erroneous theory of law and requires reversal."

"The State presented no evidence corroborating Reaux's statements that Appellee (i.e. Johnson) participated in the murder of Brandon Scott," Johnson's attorney argues in briefs. "No other witnesses testified that this murder took place in a red Pontiac Grand Am. No other witnesses placed Appellee in the car where the murder allegedly occurred or at the time it occurred. No other witnesses testified that Appellee possessed a gun. There were also no other witnesses who identified Appellee as the person who shot Brandon Scott. In addition to the complete lack of any corroborating witnesses, there was no corroborating *evidence*. The vehicle allegedly used in the incident was never located; no shell casings were found; and no firearm was ever produced. There were no fingerprints, there was no DNA, and there was no cell phone data, etc. In fact, the total sum of the evidence at trial was the story from accomplice Reaux and the parroting of that same story by Kevia Eglin and Detective O'Neill." The trial court did not abuse its discretion in granting Johnson's motion for a new trial, based on the state Supreme Court's 2016 decision in *Stanbury v. State*. At the hearing on the motion for new trial, even the State told the judge that, "you are duty bound to follow [*Stanbury*] and grant a new trial," and "It is plain error under the *Stanbury* case to fail to charge on the corroboration of an accomplice even though it is not requested." "To *concede* that the court's failure to charge was plain error and that the court *must* grant a new trial, and then appeal that decision and complain that the trial court's analysis was somehow deficient, borders on unconscionable," Johnson's attorney argues. The trial court's failure to instruct the jury on the necessity of corroboration regarding Reaux's accomplice testimony was "plain error," meaning the error was obvious, likely affected the outcome of the proceedings, and seriously affected the fairness, integrity, or public reputation of the judicial proceedings. In fact, Reaux did testify at trial, and his testimony, in addition to his recorded statement, took up 28 pages of the trial transcript. The evidence in this case was insufficient to convict Johnson because Reaux's accomplice testimony was never corroborated, the attorney argues.

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