



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



CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

Please note: *These summaries are prepared by the Office of Public Information to help news reporters determine if they want to cover the arguments and to inform the public of upcoming cases. The summaries are not part of the case record and are not considered by the Court at any point during its deliberations. For additional information, we encourage you to review the case file available in the Supreme Court Clerk's Office (404-656-3470), or to contact the attorneys involved in the case. Most cases are decided within six months of oral argument.*

Wednesday, January 23, 2019

10:00 A.M. Session

HANHAM ET AL. V. ACCESS MANAGEMENT GROUP, L.P. (S18G1033)

A couple whose property was allegedly harmed by the landscaping of their next-door neighbor is appealing a Georgia Court of Appeals opinion that partially reversed a **Forsyth County** court's ruling that had been in their favor.

FACTS: James and Mary Hanham lived next door to Marie Berthe-Narchet in St. Marlo, a subdivision governed by the "Declaration of Covenants, Conditions, and Restrictions for St. Marlo." Under the covenants, St. Marlo's Board of Directors created a set of rules and regulations governing the construction, remodeling, maintenance, and landscaping of the subdivision's homes. The St. Marlo's Homeowner's Association hired **Access Management Group, L.P.** as the management agent that managed the administration of the Association's duties under the covenants. As the community management agent, Access Management was responsible for managing the homeowner application process for landscaping modifications submitted to St. Marlo's architectural committee. Toward that end, Access Management collected information, reviewed it for compliance with the architectural standards manual, and forwarded it to St. Marlo's architectural committee for review and approval of the request.

After landscaping that Narchet had done on her property allegedly resulted in the flooding of the Hanhams' property and restricted their view of the golf course, the Hanhams sued

Narchet, her landscaping company (GreenMaster Landscaping Service, Inc.) and Access Management. Narchet had submitted her application for architectural review to Access Management in July 2012. The Hanhams contended that Access Management approved the project without approval from the architectural committee, and that Access Management did not respond to their complaints regarding Narchet's landscaping project for five months.

At trial, Access Management filed a motion asking the court to direct a verdict in its favor on all of the Hanhams' claims. The trial court granted directed verdicts to Access Management on the claims for trespass and nuisance, but it denied the request with respect to the claims for negligence, breach of contract, and invasion of privacy. Following the trial, the jury awarded damages and entered a final judgment against Access Management and for the Hanhams totaling \$96,500 and allocated as follows: 1) \$5,000 for negligence associated with the water flow (plus \$12,000 in associated attorney fees); \$7,000 for negligence related to the obstructed view (plus \$10,000 in associated attorney fees); and \$40,000 for breach of contract (plus \$22,500 in associated attorney fees).

Access Management then appealed to the Court of Appeals, the state's intermediate appellate court. That Court affirmed the lower court's verdict on all issues except the breach of contract claim. Specifically, the appellate court ruled that the trial court had erred in denying Associated Management's motion for a directed verdict in its favor on the issue of breach of contract. It agreed that the Hanhams failed to present evidence that Access Management had breached the terms of the management agreement between it and St. Marlo's. While the agreement stated that Access Management's duties were limited to the common areas, "it appears the parties mutually agreed by course of conduct to extend the responsibilities of Access Management beyond the scope of the terms of the management agreement," the appellate court's opinion says. "It is the deficient performance (or arguably, the non-performance) of these non-contractual responsibilities that provides the only actionable basis for the Hanhams' claims against Access Management. Neither this, nor any, breach of contract claim can be founded upon responsibilities not specified in the contract." The Hanhams now appeal to the state's highest court, which has agreed to review the case to determine whether failure to perform responsibilities established by the parties' modification of a written contract can be the basis for a breach of contract claim.

ARGUMENTS: Attorneys for the Hanhams argue that the high court should vacate the Court of Appeals ruling and uphold the Forsyth County Superior Court's ruling. "The Court of Appeals erred in reversing the trial court's denial of the motion for directed verdict on the breach of contract claim," the attorneys argue in briefs. Access Management "had express contractual duties to Petitioners [i.e. the Hanhams] that it breached." Narchet, Access Management, the Association and the Hanhams "were all parties to a comprehensive interwoven set of contracts...and were intended beneficiaries of the interwoven relationship." "Petitioners presented evidence sufficient for a jury to consider regarding whether Access Management breached a contractual duty owed to members of the Association." The evidence showed that Access Management approved on its own accord applications intended for the architectural committee and in violation of the Architectural Standards Manual. There was evidence that Access Management "usurped the St. Marlo Association's decision making" regarding drainage changes, and Access Management "unquestionably was not permitted to make its own decisions" under the covenants or the Architectural Standards Manual, the Hanhams' attorneys argue.

Access Management’s attorney argues the Court of Appeals properly reversed the trial court’s denial of the management agent’s motion for a directed verdict on the Hanhams’ breach of contract claim. “Access Management’s duties and obligations as the property manager for the Association for which Petitioners are members are governed by the four corners of the management agreement,” the attorney argues in briefs. “Under the contract, Access Management’s authority and duties were confined to the common areas and did not include the supervision and management of private residences – such as Petitioners’ and Narchet’s properties.” The Hanhams contend the management agreement required Access Management to administer the rules in the Architectural Standards Manual for their benefit as members of the Association, “but failed to reference any such provision in the management agreement,” Access Management’s attorney argues. “That is because no such provision exists.” “Because Petitioners failed to present any evidence establishing a breach of the explicit terms of the management agreement, the Court of Appeals properly reversed the trial court’s denial of a directed verdict on the breach of contract claim against Access Management.”

Attorneys for Appellees (Hanhams): Stuart Teague, Keisha Chambless

Attorney for Appellant (Access Management): Ian Rapaport

THE STATE V. ORR (S18G0994)

The State is appealing a Georgia Court of Appeals ruling that upholds a **Floyd County** court decision granting a new trial to a man convicted of family violence.

FACTS: **Otto Jabar Orr** was convicted in Floyd County Superior Court of family violence battery and cruelty to children in the third degree. According to state prosecutors, the charges stemmed from an argument Jan. 26, 2015 between Orr and his wife while at their home in Rome, GA. He struck her with both fists in the face and back while their 3-month-old infant son was in the room. The fight continued into the bedroom where Orr pushed his wife to the floor and kicked her in the stomach. Orr then called a friend to pick him up, and he left.

At his trial, Floyd County Police Officer Michael Poster testified that he saw the wife’s swollen face and concluded she had been punched in the face with considerable force. Orr was not arrested until June 3, 2015. He gave no statement to police upon his arrest.

Orr’s sister, Ebony Orr, testified in his defense that she was on the phone with her brother while he and his wife were fighting. She claimed she heard screaming, and that Orr’s wife believed he was having a relationship with another woman. She testified she heard Orr cry out in pain, and he told her his wife had just hit him with a glass ashtray. Orr later went to his sister’s home, where she said she saw a gash on his head. During cross examination, the sister acknowledged that Orr did not report the incident to police, although she said she encouraged him to do so.

Orr’s cousin, Meisha Caldwell, offered similar testimony, saying she had seen Orr late that night and he had a “goose egg” on his head where the skin was split and bleeding. During cross examination by the prosecutor, she too acknowledged that Orr did not report his wife’s conduct to police or take a picture of his wound, explaining that he did not want to get his wife in trouble.

Orr also testified in his own defense, admitting he had struck his wife but only after she had hit him with a large glass ashtray “upside the head.”

During closing argument, the prosecutor stated that Orr “wants to now claim self-defense. I find that particularly convenient. He never told the story to the police, never once said: ‘Hey, wait, wait, wait. I’m the victim here. She came at me with an ashtray.’ I submit to you that this is something made up because he has an interest in the outcome of this case.”

Orr’s trial attorney immediately objected to this argument and asked the trial court to declare a mistrial on the ground that the State impermissibly commented on Orr’s right to remain silent and not to incriminate himself. The trial court denied the motion, and on Sept. 11, 2015, the jury found Orr guilty on both counts of the indictment. Orr was sentenced as a repeat offender to serve five years.

In November 2015, Orr’s attorney filed a motion requesting a new trial, arguing that the trial court erred in denying Orr a mistrial after the State impermissibly commented on Orr’s failure to come forward. In May 2017, the trial court granted the motion, stating it had previously erred. In granting Orr a new trial, the trial court relied on the Georgia Supreme Court’s 1991 decision in *Mallory v. State*, which held that in criminal cases, the State could not comment upon a defendant’s silence or failure to come forward. In relying on *Mallory*, the Georgia Supreme Court has explained that there is “a bright-line rule in Georgia that the State may not comment on either a defendant’s silence prior to arrest or failure to come forward voluntarily.” The State then appealed to the Court of Appeals, which in March 2018 upheld the trial court’s decision. The State now appeals to the Georgia Supreme Court.

ARGUMENTS: The State, represented by the District Attorney’s office, argues that the “bright-line evidentiary rule” set forth in *Mallory v. State* has been abolished by Georgia’s new Evidence Code. “The Court of Appeals erred in affirming the trial court’s grant of the motion for new trial because the *Mallory* analysis is no longer required under Georgia’s rules of evidence,” the State argues in briefs. The new code states that, “It is the intent of the General Assembly to revise, modernize, and reenact the general laws of this state relating to evidence while adopting, in large measure, the Federal Rules of Evidence.” Many provisions of the new Evidence Code were borrowed from the Federal Rules of Evidence, “and when Georgia courts consider the meaning of these provisions, they look to decisions of the federal appeals courts construing and applying the Federal Rules, especially the decisions of the Eleventh Circuit.” In criminal cases, the U.S. Court of Appeals for the Eleventh Circuit has held that, “The government may comment on a defendant’s silence if it occurred before the defendant was in custody and given *Miranda* warnings.” The State’s argument that Orr never told his self-defense story to police is admissible “because this failure to come forward came before Orr was taken into custody and given *Miranda* warnings.” The trial court should have considered Georgia Code § 24-4-403 before ruling the evidence inadmissible. That statute, part of the new Evidence Code, states that relevant evidence may be excluded if its “probative value” – or its value in proving or disproving something – is “substantially outweighed” by the danger of “unfair prejudice” – or damage to one’s legal rights. “This Court should remand the case and instruct the trial court to consider whether the probative value of evidence of Orr’s failure to come forward is substantially outweighed by the danger of unfair prejudice,” the State argues.

Orr’s attorney argues the trial court correctly granted a new trial to Orr based on “current, binding precedent.” The prosecutor’s comment on Orr’s failure to come forward was improper and inadmissible based on federal and Georgia law. The State argues that this Court should look to federal court precedent when reviewing provisions of Georgia’s new Evidence Code that were

borrowed from the Federal Rules of Evidence. “However, the conclusion Appellant [i.e. the State] draws from its review of the Federal Rules as it applies to the salient question in this case is incorrect,” the attorney argues in briefs. The State’s comments on Orr’s pre-arrest silence are “clearly more prejudicial than probative.” Here, it is clear from the record that based on the State’s repeated comments at trial on Orr’s pre-arrest silence, these arguments and questions were far more damaging to Orr than they were helpful to proving the truth of the State’s allegations. “It is unclear whether or not the new Evidence Code has completely abrogated the ‘bright line’ rule under *Mallory*,” Orr’s attorney argues. “However, even if the Court finds that the *Mallory* rule has been abrogated, the Court should still affirm the grant of a new trial to Appellee [i.e. Orr] because in Georgia the State’s comment and reliance upon Appellee’s pre-arrest silence was extremely prejudicial and clearly outweighed the probative value of that evidence and argument.”

Attorneys for Appellant (State): Leigh Patterson, District Attorney, Luke Martin, Asst. D.A.
Attorney for Appellee (Orr): Benjamin Pierman

BUDHANI V. THE STATE (S18G0976)

A man is appealing his conviction for selling illegal drugs on the grounds that the indictment against him was defective and therefore void, and that his admission to police following his arrest was inadmissible because officers induced it with a slight hope of benefit.

FACTS: Mahemood Budhani, an immigrant from India, worked as a cashier at a gas station in **Newton County**. The evidence shows that in October and December 2014, officers from the Covington Police Department used a confidential informant to conduct three controlled buys of XLR11, a synthetic form of marijuana, from Budhani. After the December sale, officers obtained executed a search warrant for the gas station, seized additional packets of XLR11, and arrested Budhani, who had some of the marked bills in his pocket. Each packet of the drug had a label stating that the contents were “not for human consumption.” After his arrest, Budhani was taken to the police station where he was advised of his constitutional rights under the U.S. Supreme Court’s 1966 decision in *Miranda v. Arizona*. *Miranda* rights include the right to remain silent, the warning that anything one says can and will be used against him in court, and the right to an attorney before any questioning, even if unaffordable. Budhani waived his rights and spoke with two officers in a recorded interview. Officers asked him how long he had been selling synthetic marijuana, and he initially said only for about two to three weeks. The officers pressed Budhani that he was not being truthful, stating, “You want to help yourself, I’m giving you an opportunity to....” The officers told him he would face no additional charges if he admitted that he had been selling the drugs for a longer time. Budhani then confessed to selling XLR11 for no more than two months.

A Newton County grand jury indicted Budhani for Sale of a Schedule I Controlled Substance and Possession of a Schedule I Controlled Substance with Intent to Distribute. Budhani’s attorney filed a motion to suppress his admission to police on the ground that it was involuntary because he had been told by police that if he cooperated he could benefit from a reduction of charges, elimination of charges, or a reduced sentence. The trial court denied the motion after finding that Budhani’s statement had been voluntary because he gave it without the “hope of benefit.” Following trial, Budhani was convicted of the charges against him. He appealed to the Georgia Court of Appeals, the state’s intermediate appellate court, but that court

upheld the trial court's ruling. Budhani now appeals to the state Supreme Court, Georgia's highest court, which has agreed to review the case to answer whether the Court of Appeals erred in holding that the indictment was not fatally defective, and whether the "slightest hope of benefit" that under Georgia law makes a statement involuntary and thus inadmissible includes a promise to an arrestee of no additional charges.

ARGUMENTS: Budhani's attorneys argue that the possession or sale of XLR11 is not per se illegal and the indictment failed to allege all the material elements that make it a crime. Therefore, the Court of Appeals erred by holding that the indictment was not fatally defective. In 2014, Georgia Code § 16-13-25 (12) (N) considered SLR11 a Schedule I Controlled Substance "...unless specifically utilized as part of a manufacturing process by a commercial industry of a substance or material **not intended for human ingestion or consumption**, as a prescription administered under medical supervision, or research at a recognized institution..." "Therefore, the sale or distribution of XLR11 is not a crime, per se," the attorneys argue in briefs. For it to be a crime, the indictment must allege – and the State must prove – that XLR11 was not 1) specifically used as part of a manufacturing process by a commercial industry of a substance not intended for human ingestion or consumption, 2) administered under medical supervision, or 3) used for research. Therefore, "all counts of this indictment are void as the Grand Jury completely failed to allege this material element of these offenses," Budhani's attorneys argue. Additionally, his confession and all his statements should have been suppressed because they were induced by the slightest hope of benefit. Under Georgia Code § 24-8-824, "to make a confession admissible, it shall have been made voluntarily, without being induced by the slightest hope of benefit or remotest fear of injury. A Covington police officer explained to Budhani prior to recording him that although Budhani did not have to speak with law enforcement officers, if he did, "this could potentially benefit Appellant [i.e. Budhani] in this criminal case," the attorneys contend. "In fact, Appellant testified that he was told that if he was truthful with law enforcement, he may face no criminal charges, no further criminal charges, reduced charges or a reduced sentence." "Since Appellant was promised, both prior to the recording and on the recording, that potentially there would be reduced charges or punishment, or no additional charges if Appellant was truthful with the authorities, Appellant's statements are the product of a hope of benefit and hence, all of Appellant's statements made to law enforcement must be deemed involuntary and thus, should have been inadmissible at trial," the attorneys argue.

The State, represented by the District Attorney's office, argues that the Court of appeals correctly ruled that the indictment was not void. Budhani "was properly charged with the elements of the crimes of sale of and possession with the intent to distribute XLR11, a Schedule I controlled drug. Under Georgia statutory law, it is clear that XLR11 is a Schedule I controlled substance, unless, as the law says, it is "specifically utilized as part of the manufacturing process by a commercial industry of a substance or material not intended for human ingestion or consumption, as a prescription administered under medical supervision, or research at a recognized institution." A defendant who is charged with possession or sale of XLR11 as a Schedule I controlled substance "is on notice that he is charged with its possession or sale while it was not being specifically utilized as" one of those three exceptions. "Requiring every indictment or accusation that charges a defendant with possession or sale of XLR11 as a Schedule I controlled substance to *also* allege that it did not fall into one of the listed exceptions would be redundant," the State argues. The indictment did not "leave him wondering in what

manner he violated the code section or with what substance.” Furthermore, the legislature has made clear its intent, writing in Georgia Code § 16-13-50 (a) that, “It is not necessary for the state to negate any exemption or exception in this article in any complaint, accusation, in indictment, or other pleading....The burden of proof of any exemption or exception is upon the person claiming it.” The State also argues that no hope of benefit was given that would cause Budhani’s statement to be rendered involuntary. The investigators did not promise or imply that he would receive a lighter punishment or no punishment for the charges he was facing in exchange for an incriminating statement. During trial, Budhani alternated between claims that the lieutenant said he would try to help him get no charges, to acknowledgments that the officer did not promise him anything but said that if Budhani told the truth, he would try to help him by telling the District Attorney he’d been cooperative. “There is no reliable evidence to support that Appellant’s statement was induced by an illicit hope of benefit, and ample evidence to show that Appellant made the statement with full understanding of his rights and the roles of the officers.”

Attorneys for Appellant (Budhani): Brian Steel, Miguel Debon

Attorneys for Appellee (State): Layla Zon, District Attorney, Jillian Hall, Dep. Chief Asst. D.A.