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

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DEBELBOT ET AL. V. THE STATE (S18A1073)

The Supreme Court of Georgia has vacated the denial of the motion for new trial filed by a U.S. Army couple who were convicted in **Muscogee County** of killing their 2-day-old baby girl by fracturing her skull.

With today's unanimous decision, written by **Justice Nels S.D. Peterson**, the high court is sending the case back to the trial court because "the nature of the order below prevents meaningful review" of a number of the claims the couple has made on appeal.

Ashley and Albert Debelbot met while serving in the Army overseas and married in November 2007. Albert received orders transferring him to the Fourth Ranger Battalion School at Fort Benning in Columbus, GA, and not long after, Ashley became pregnant with their first child. On May 29, 2008, she gave birth at Martin Army Community Hospital in Columbus to a daughter they named McKenzy. The birth took place without incident, and on May 31, at around 12:30 p.m., the couple took their new healthy infant home. They were the only caretakers of McKenzy and later said she did fine all day. After going to bed, however, they awoke after midnight and discovered a lump on the baby's forehead. Ashley called the hospital and staff directed her to bring the baby to the hospital. At about 1:30 a.m., the couple returned to the hospital with McKenzy. Hospital staff examined the baby and took x-rays and CT scans. A little more than two hours later, McKenzy was pronounced dead on June 1, 2008.

A medical examiner for the Georgia Bureau of Investigation (GBI) conducted an autopsy on June 2. She found extensive fractures on the right side of the baby's head and bleeding in the brain. The medical examiner would later testify that "the autopsy disclosed very severe head

trauma." She concluded that McKenzy had died from "blunt force head trauma," either by a series of blows to the head or by "a crushing type of injury" that had occurred within hours of her death. She assigned the manner of death as a homicide, calling it "an intentional act." After the medical examiner reported her findings to the Columbus police, Ashley and Albert Debelbot were arrested.

In June 2009, a grand jury indicted both parents for malice murder, felony murder, and cruelty to children in the first degree in connection with the death of McKenzy Debelbot. At trial, Albert and Ashley denied any knowledge of how the baby's skull was fractured. But the State presented testimony from a man who had shared a holding cell with Albert and said Albert had told him that the night the baby came home, he had gone out to buy crack cocaine and returned to find the baby not moving. Albert told the man that when he asked Ashley what had happened, she told him she had "spanked" the baby. During the proceedings, neither Albert nor Ashley presented any medical experts to rebut the expert medical testimony of the GBI medical examiner.

Following a joint trial, Albert and Ashley were found guilty of all charges and sentenced to life in prison. Subsequently, both filed motions requesting a new trial. At hearings on the motions, the Debelbots presented four expert witnesses who testified that they believed the baby's injuries were caused by a defect that occurred prior to her birth or during her birth. State prosecutors also presented two medical experts who testified in support of the medical examiner's opinion that the injuries to the couple's baby were non-accidental and a homicide. Although the motion-for-new-trial court had qualified all four of the Debelbots' expert witnesses as experts, the trial judge determined that the Debelbots' witnesses, all doctors, were not credible, and the judge denied the motion for a new trial. The Debelbots then appealed to the Georgia Supreme Court, arguing in part that the evidence was insufficient to sustain their convictions because the State failed to present direct evidence that either of them inflicted, or helped the other inflict, the alleged injuries to the baby.

In today's opinion, however, the high court disagrees. "We conclude that the evidence was sufficient to support the convictions of both Albert and Ashley," **Justice Nels S.D. Peterson** writes for a unanimous court. Under the law, even if a person is not directly responsible for the crime, he or she may be convicted as a party to the crime. "Whether a person is a party to a crime may be inferred from that person's presence, companionship, and conduct before, during, and after the crime," and "where the crimes involve relatives with close relationships, slight circumstances can support the inference that the parties colluded. The evidence in this case, although entirely circumstantial as to who committed the crimes, was legally sufficient to support the malice murder convictions."

The Debelbots also argued on appeal that their respective trial attorneys had rendered "ineffective assistance of counsel" in violation of their constitutional rights, and that their convictions could not stand for other reasons.

"While we are deeply troubled by at least two of the claims of ineffective assistance of counsel, we conclude that the nature of the order below prevents us from reviewing meaningfully the most significant alleged deficiency by trial counsel for both Ashley and Albert – their failure to offer an alternative explanation for McKenzy's injury," the opinion says. "Accordingly, we vacate the court's order denying the Debelbots' motion for new trial and remand for further proceedings."

The trial court concluded in its order in a single sentence that all of the Debelbots' witnesses were not credible, despite having qualified them as expert witnesses. It also concluded that all of the Debelbots' medical evidence was inadmissible under the Georgia Supreme Court's 1982 decision in *Harper v. State*. Under *Harper*, the test for determining the admissibility of a scientific procedure is whether the procedure has reached a scientific stage of "verifiable certainty."

Today's opinion states that "the sweeping nature of these broad conclusions precludes our meaningful review at this time, requiring that we vacate and remand for more precision." "Whether either trial counsel acted reasonably under the circumstances of this case depends largely, if not entirely, on whether the proffered evidence was admissible and credible."

In a concurrence, **Justice Charles J. Bethel** agrees with the judgment but writes separately to emphasize the "erroneous nature" of the state prosecutor's closing argument at trial. In speaking about "reasonable doubt," the prosecutor told jurors that "reasonable doubt does not mean beyond all doubt. It does not mean to a mathematical certainty….You don't have to be 90 percent sure. You don't have to be 80 percent sure. ***You don't have to be 51 percent sure***." Here, the State suggested to the jury "that reasonable doubt is less than 51 percent – functionally less than a preponderance of the evidence," the concurrence says. "Proof beyond a reasonable doubt is the highest standard of proof recognized in our system of jurisprudence…The State's closing argument invited the jury to apply a significantly lower standard, which is repugnant to our system of criminal justice and its requirement of proof beyond a reasonable doubt to support a conviction."

Attorneys for Appellant (Albert): Carrie Sperling, Thomas Flourney, III
Attorneys for Appellant (Ashley): Brandon Bullard, Jimmonique Rodgers, James Bonner, Jr., A. James Anderson, Anna Halsey
Attorneys for Appellee (State): Julia Slater, District Attorney, Sadhana Dailey, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Ashleigh Headrick, Asst. A.G.

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

In response to three certified questions from the United States Court of Appeals for the Eleventh Circuit, the Supreme Court of Georgia has ruled that Georgia's apportionment statute applies in tort cases in which alleged losses are purely monetary.

The certified questions come from a case in which a nearly $5 million judgment was handed down against former bank directors and officers who were found negligent in making a number of loans.

In today's opinion, written by **Justice Sarah H. Warren**, the high court has ruled that the damages sought by the **Federal Deposit Insurance Corporation** (FDIC) are not excluded from being apportioned simply because the losses are purely economic.

The case, which has a lengthy history, began in December 2009 after the Georgia Department of Banking and Finance closed the Buckhead Community Bank. The banking and finance department, which regulated and oversaw the bank, ordered the bank's closure after the failure of several large commercial loans the bank had issued. The department appointed the FDIC as the bank's receiver. Subsequently, the FDIC sued multiple 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 and "grossly 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, prompting an earlier certified question to the Georgia Supreme Court, which the Court answered in a 2014 decision.

The case continued, and prior to trial in 2016, 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 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 that some of the directors and officers were negligent in approving four of the 10 loans in question. It therefore found them liable and awarded the FDIC $4.98 million in damages. The judgment held the directors and officers "jointly and severally liable." The directors and officers then appealed to the United States Court of Appeals for the Eleventh Circuit, arguing that the jury should have been allowed to divide the damages.

On appeal, the former directors and officers argued the district court erred by failing to instruct the jury on apportionment which they say is required under Georgia Code § 51-12-33. The 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." The former directors and officers argued that pecuniary harms – or purely money losses, such as the losses here – are included in the statute as an "injury to person or property." The FDIC, however, argued that "property" in the statute refers only to real estate or other tangible property.

The Eleventh Circuit then sent three questions to the Supreme Court of Georgia:

* Does Georgia Code § 51-12-33 apply to claims for purely money losses against bank directors and officers;

* Did the apportionment statute abolish Georgia's common-law rule imposing joint and several liability on wrongdoers who act in concert; and

* Is a decision by a bank's board of directors a "concerted action" so that the board members should be held "jointly-and-severally liable" for negligence?

In today's 35-page opinion, the Georgia Supreme Court answers yes to the first question, no to the second, and declines to further answer the third.

"For the reasons that follow, we conclude that § 51-12-33 does apply to tort claims for purely pecuniary losses against bank directors and officers," the opinion says. ("Tort" generally refers to a civil wrong; "tortfeasors" are wrongdoers.)

The critical question for the first certified question, the opinion says, is whether this action is brought "for injury to person or property." Although the FDIC argues that the term "injury to person or property" limits apportionment to actions brought for injury to tangible property, "We disagree," the opinion says. "We instead adopt the usual and customary meaning of the term 'property,' as used in a legal context, and conclude that 'injury to person or property'

in § 51-12-33 (b) includes…injuries to tangible and intangible property. Importantly, this broad definition of 'property' comports with long-standing Georgia precedents that have, in various contexts, determined that injuries to 'property' are not restricted to tangible property."

However, "Our answer to the first certified question does not necessarily answer whether damages in this case can be apportioned, because our textual interpretation of 'injury to person or property' does not decide whether certain common-law rules for imposition of joint and several liability survive enactment of § 51-12-33 (b)," the opinion says.

"Georgia historically has recognized this principle: 'It has always been true that where concert of action appears, a joint tortfeasor relation is presented and all joint tortfeasors are jointly and severally liable for the full amount of plaintiff's damage,'" the opinion says. "And where the fault of one person is legally imputed to another person who is part of the same joint enterprise, we cannot say that there is a legal means of dividing fault 'among the persons who are liable.' Under these circumstances, we hold that concerted action does survive the apportionment statute and damages (if any) will be awarded jointly and severally."

"We emphasize, however, that this holding encompasses only traditional concerted action, as it was understood at common law, for the basic reason that fault in such scenarios is not divisible. We reach this conclusion after employing the touchstone inquiry set forth by the apportionment statute – whether fault is divisible – and direct courts to use the same inquiry when evaluating whether the apportionment statute applies in future cases," the opinion says.

As to the third question, "We do not engage in, and do not take a position on, the record-intensive evaluation of whether the FDIC alleged, offered evidence of, and proved (and whether the jury was properly instructed on) the type of concerted action that fits the legal paradigm we have explained today, and for which fault is truly indivisible as a matter of law," the opinion says. "Therefore, we respectfully decline to provide a further response to the Eleventh Circuit's third question."

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