



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Tuesday, August 20, 2019

10:00 A.M. Session

GREEN V. THE STATE (S19A0644)

A man convicted of murder for crushing a woman with his truck is appealing his conviction and life-without-parole prison sentence, arguing the trial judge improperly refused to allow testimony of two expert witnesses who would have shown the incident was an accident.

FACTS: According to the State's case, on Jan. 25, 2014, Janice Pitts was driving her burgundy Lincoln Navigator to Lowe's Home Improvement store in **Douglas County** with her daughter and 4-year-old grandson in the car. As she approached the intersection on Douglas Boulevard, Pitts began moving over from the left lane to the turn lane. **Dewey Calhoun Green**, who was driving a black Chevrolet Silverado truck behind Pitts, also tried pulling into the turn lane and collided his truck with the rear end of Pitts's Navigator. Pitts put her car in park and walked to the rear of the vehicle to survey the damage. Witnesses said she began gesticulating and yelling at Green. Green, who had backed up his truck, then drove forward again, this time pinning Pitts between the rear of her car and the front of his truck. Pitts's daughter screamed and jumped onto Green's truck to get him to pull the truck away. However, the State claimed Green continued to rev the engine, backed up again, causing Pitts to fall to the ground, then proceeded to drive over Pitts's body. Green passed the Navigator and made an immediate right, cutting across all lanes of traffic and ending up in a Walgreens parking lot. When police arrived, Green

said, “Oh my God, what have I done.” Pitts was pronounced dead at the hospital from multiple blunt traumatic injuries. A sample of Green’s blood and urine later tested positive for Xanax and other central nervous system depressants.

Green was indicted by a grand jury for malice murder, felony murder, and aggravated assault. At trial, state prosecutors argued Green intentionally killed Pitts; defense attorneys argued Green suffered a concussion and amnesia from the accident and after the initial impact, did not accelerate or was even in control of the truck. In August 2015, following a three-week trial, a jury found Green guilty of all counts, and he was sentenced to life without parole plus 40 years in prison. Green now appeals to the Georgia Supreme Court.

ARGUMENTS: Green’s attorneys argue that 14 errors were made during his trial, his conviction and sentence should be vacated, and he should be granted a new trial. Among the errors, the trial court abused its discretion when it excluded the testimony of Sean Alexander, a noted expert accident reconstructionist, and Richard Franco, an expert neurologist. The trial judge excluded their testimony on the ground that defense attorneys had not provided a sufficiently detailed report of the experts’ opinions, stating that “the State has laid out its case and it still is – it’s a game of hide the ball, you know...,” and “the defense had plenty of notice of the need to do this.” Alexander was “absolutely critical” to the defense “because the defense needed to show that the truck could have taken the path it did without Mr. Green’s input,” the attorneys argue in briefs. “Likewise, Franco was the ‘linchpin’ for explaining Mr. Green’s medical condition, and without him the defense had no way to explain that Mr. Green had suffered a concussion and seizure. Without these experts, defense counsel was not able to explain in any meaningful way the defense’s theory of the case.” Under Georgia statutory law, even if the Georgia Supreme Court finds that Green’s attorneys failed to “timely and properly summarize the opinions of Alexander and Franco, exclusion of the experts was still an abuse of discretion because the State did not suffer any prejudice,” Green’s attorneys argue. “Second, the State was on notice the defense intended to present the opinions of Alexander and Franco and their opinions did not alter the State’s theory of the case.” And where the exclusion of testimony goes to the heart of a party’s theory, “it is not harmless error to exclude the testimony. Here, the trial court’s exclusion of Alexander and Franco cut the defense at its knees in a case where expert testimony was essential to explain how the accident occurred and to explain that Mr. Green was unconscious and could not form the intent to harm Ms. Pitts.” Among many other errors, Green’s attorneys argue the trial court also improperly limited the testimony of Green’s sole remaining expert, who would have testified that a person can suffer a brain injury in a low impact crash. And the trial court erred by allowing in character evidence of Green’s aggressiveness and alleged prior drug use. “An analysis of Mr. Green’s blood after this accident reflected only trace amounts of legal narcotics, and certainly none in any amount that would suggest in any way that Mr. Green was impaired on any drugs at the time of this incident,” the attorneys argue. “Indeed, the State did not charge Mr. Green with driving under the influence or vehicular homicide and did not request jury charges on either.”

The State, represented by the District Attorney’s and Attorney General’s offices, argues the trial court properly excluded testimony from Alexander and Franco at trial because Green “failed to comply with the discovery statute and the court’s instructions to provide written reports.” Georgia Code § 17-16-4 (b) (2) states that, “If the report is oral or partially oral, the defendant shall reduce all relevant and material oral portions of such report to writing and shall

serve opposing counsel with such portions no later than five days prior to trial.” Green failed to comply with the statute “as he did not provide a written report to the State from either expert.” The trial court had set a deadline of June 20, 2015 for Green’s attorneys to serve the State with the expert reports. Nearly a month later, the State still had not received any reports. At the start of the trial, the State filed a motion to exclude the testimony of the two experts on the basis that Green’s attorneys had failed to comply with the court’s prior directives to produce the reports and that Green was in violation of the statute. The State also argued it would be “prejudiced” – i.e. its case would be damaged – if the court allowed the experts to testify “based on the fact that the State had already put up all its evidence in the case without the benefit of the expert reports that were required to be produced by Appellant [i.e. Green] prior to trial,” the State argues. “Here, the record amply supports the trial court’s finding that Appellant acted in bad faith in failing to turn over the records and that this failure prejudiced the State in its presentation of evidence at trial.” The trial court also properly limited the testimony of an expert in neurology but only when he wandered into the topic of automotive construction in which he was not an expert. Contrary to Green’s contention, however, the doctor did testify that in a low-speed motor vehicle accident, a person “absolutely” can suffer a concussion. Among Green’s other enumerations of error, the State argues the trial court did not err in finding that Green had placed his character at issue in the trial when his attorneys questioned witnesses for Green, eliciting testimony that he never got into fights with anyone and was involved in his church. The trial court also properly admitted evidence of trace amounts of drugs found in Green’s blood, the State contends.

Attorneys for Appellant (Green): Ashleigh Merchant, John Merchant

Attorneys for Appellee (State): Ryan Leonard, District Attorney, David Emadi, Chief Asst. D.A., Sean Garrett, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Vanessa Sassano, Asst. A.G.

THE STATE V. GATES (S19A1130)

GATES V. THE STATE (S19X1131)

The State is appealing a **Muscogee County** court’s grant of a new trial to a man convicted more than 40 years ago of the rape and murder of a 19-year-old woman.

FACTS: In January 1977, **Johnny Lee Gates**, an African-American male, was charged in Columbus, GA with the murder, rape, and armed robbery of Katharina Wright, a white female. In September 1977, he was convicted by an all-white jury and sentenced to death. The Supreme Court of Georgia upheld his conviction and sentence on direct appeal in October 1979.

The high court ruled that the evidence showed the following: Prior to being assigned to Fort Benning, Wright’s husband had been stationed in Germany where he met and married Wright, a German native. On Nov. 30, 1976, the couple had been in the United States about a month and in their apartment in Columbus about 10 days. The husband left for work at Fort Benning about 6 a. m. on that date. Shortly after noon, Gates, who was 21 years old and had a sixth-grade education, knocked on the door of the apartment, posing as a gas company employee. Wright let him in, apparently thinking he had been sent in response to her request the day before that the gas heater be repaired. Once inside, Wright gave Gates a can of oil and directed him to the heater closet. After beginning to oil a fan, Gates walked to the bathroom where Wright was and told her he was there to rob her. He then raped her and forced her at gunpoint to give him

\$300 hidden under the mattress in the bedroom, and \$180 hidden in a tape player in the living room. Before leaving, Gates took Wright back into the bedroom, where he gagged and blindfolded her with her husband's army neckties and tied her hands behind her back with the belt to her bathrobe. He then shot her in her right temple, killing her.

After Gates's arrest on Jan. 31, 1977 on an unrelated murder charge, police questioned Gates about Wright's murder. Gates confessed to the crimes of murder and armed robbery but stated that Wright had voluntarily had sex with him. Subsequently, Gates's fingerprint was found on the heater in her home. A neighbor of the victim identified Gates as having knocked on his door at about noon the day Wright was killed, saying he was from the gas company.

On Sept. 1, 1977, a Muscogee County jury found Gates guilty on all counts of the indictment, and he was sentenced to death for murder and to 20 years consecutively in prison for armed robbery and rape. Gates appealed, and the state Supreme Court upheld his conviction and sentences. Following an intellectual disability trial in 2003 that ended in a mistrial, the State and Gates's attorneys agreed to remove the possibility of a death sentence, and Gates was resentenced to serve life in prison without the possibility of parole.

In October 2010, Gates – representing himself – filed an “extraordinary motion” for a new trial. In July 2015, representatives of the Georgia Innocence Project, which had become involved in his case, went to the District Attorney's office concerning physical evidence in Gates's case. Although the State's files showed that the bathrobe belt and military necktie from the crime scene had been destroyed in 1979, interns with the Georgia Innocence Project found them inside a manila envelope at the District Attorney's office. In August 2015, the Georgia Innocence Project filed an “Amended Extraordinary Motion for Post-Conviction DNA Testing and for a New Trial.” The motion requested “contact DNA testing,” which it stated was “a process that uses genetic material found in skin cells to provide a DNA profile.” There was no evidence that Gates had sought DNA testing before this time. Gates's defense attorney acknowledged that the District Attorney had brought the items to court in 2002, but he alleged the items could not have been tested for contact DNA until 2007 or 2008 because it was not until then that the GBI began doing “contact DNA” testing. In December 2016, Gates's defense attorney informed the trial court that the testing showed the presence of at least three individuals' DNA on the bathroom belt and necktie, but that the GBI was unable to conduct further testing. Gates's attorney then filed a motion for additional DNA testing using TrueAllele, a new method of DNA interpretation in which a computer, rather than a human, interprets complex DNA mixtures. TrueAllele, which the GBI later obtained for its own casework in 2018, uses computerized “probabilistic genotyping” to interpret DNA mixtures. The trial court granted Gates's motion for the additional testing. Based on the testing, True Allele excluded Gates as a contributor to the DNA on the bathrobe belt and necktie that had been used to tie up Wright.

In November 2017, attorneys with the Southern Center for Human Rights, who had joined Gates's defense team, filed another amended extraordinary motion, alleging that Gates was entitled to a new trial on the basis of newly discovered evidence involving DNA. At a May 2018 hearing on the motion, the defense presented the expert testimony of Dr. Mark Perlin, the scientist who created TrueAllele and trained the GBI in how to use it. He explained that Gates's DNA profile was excluded from the bathrobe belt and necktie found at the crime scene. He further testified that the perpetrator's DNA still would be present on the items and would not have been degraded completely.

In January 2019, the trial court granted Gates a new trial, crediting Dr. Perlin's testimony and applying the six-part test established in the Georgia Supreme Court's 1980 decision in *Timberlake v. State*. That test in part requires that a party asking for a new trial on the ground of newly discovered evidence satisfy the court: "1) that the evidence has come to his knowledge since the trial; 2) that it was not owing to the want of due diligence that he did not acquire it sooner; 3) that it is so material that it would probably produce a different verdict...." The trial court found that Gates was diligent in obtaining the DNA evidence because due diligence did not require him to request probabilistic genotyping earlier, noting that TrueAllele was not adopted by the GBI until 2018. Also, the court found that Gates was diligent because he requested DNA testing immediately after locating the items in the District Attorney's office. As to the materiality requirement of *Timberlake*, the trial court found that Gates's DNA was not present on the items and that "the perpetrator's DNA would be embedded in the bathrobe belt and necktie because of the way the crime occurred." The DNA was evidence, the trial court explained, "because it demonstrates that Gates was not the person who bound the victim's hands."

However, the trial court denied Gates's request for new trial based on race discrimination. Although the trial court found that the "evidence of systematic race discrimination during jury selection in this case is undeniable," it found that Gates failed to meet the diligence requirement for an extraordinary motion for new trial on that issue.

The State now appeals the granting of a new trial based on the DNA evidence. In a cross appeal, Gates appeals the trial court's denial of his extraordinary motion for new trial on the ground of race discrimination.

ARGUMENTS (S19A1130): The State, represented by the District Attorney's and Attorney General's offices, argues that the "important interest in the finality of convictions" for both Gates and the State "have been frustrated in this case." "Gates was tried for his crimes more than four decades ago," the State argues in briefs. "He exhausted his criminal appeal and separate state and federal habeas challenges more than three decades ago." Now Gates seeks to overturn "his valid conviction for murder which amounts to little more than an attack on settled precedent." The trial court's grant of a new trial should be reversed. "The trial court abused its discretion by granting Gates's extraordinary motion for new trial on his DNA claim," the State argues. "It incorrectly applied *Timberlake* to clearly erroneous facts in determining that Gates showed due diligence and materiality. Gates did not make the required showing." Dr. Perlin acknowledged there was degradation in the DNA samples from the bathrobe belt and necktie. "As a result, DNA could be present on the sample items, but due to the degradation, the DNA is no longer detectable," the State argues. Also, the trial court's finding that Gates's defense team did not know about the existence of the items until 2015 "is clearly erroneous," the State contends. "The team knew about the items' existence since trial and did nothing to preserve them until 2015." Among other arguments, the trial court's finding that Gates could not have secured DNA testing with TrueAllele until the GBI adopted it also "is clearly erroneous." Furthermore, under the materiality standard, "Gates failed to show that his DNA test results would probably produce a different verdict." The evidence against Gates at trial "was overwhelming," the State argues. He gave a detailed oral confession that was reduced to a signed written statement. He confessed the same on videotape. He has never alleged that the confession was false. He also left fingerprints at the crime scene. In addition, a witness identified Gates in a pre-trial lineup and at

trial as having visited his apartment the day of Wright's murder as a serviceman from a gas company, "which is precisely how Gates confessed to introducing himself to Mrs. Wright."

Attorneys for Gates argue that the trial court did not abuse its discretion in ruling that Gates is entitled to a new trial based on the DNA evidence. "Gates satisfied the diligence requirement because he requested computerized probabilistic genotyping in December 2016," the attorneys argue in briefs. "He appears to have been the very first litigant to have sought TrueAllele testing in Georgia." Yet the State urges this Court to find that Gates should have requested that testing "as early as 2005." "But in 2005, TrueAllele had never been used in a criminal case in the United States, and the GBI was still 13 years away from adopting it for its own casework." In the alternative, Gates satisfied the diligence requirement because he requested the DNA testing immediately after locating the bathrobe belt and necktie in 2015. "The superior court's factual finding that the bindings were thought to have been destroyed but then were discovered in 2015 is supported by the record, and therefore it is not clearly erroneous," the attorneys argue. The trial court also correctly found that the new DNA evidence was material under *Timberlake* "because it demonstrates that Gates was not the person who bound the victim's hands." "The perpetrator's DNA would be present on the bathrobe belt and necktie, and Gates's DNA is not present on either item," the attorneys argue. Finally, "the State underestimates the strength of the DNA evidence and overstates the strength of the prosecution's case." In its brief, "the State relies heavily on Gates's confessions to the police." But those confessions contain many red flags, the attorneys argue. "First, the police elicited confessions from two different people. Lester Sanders, a white man who was found fondling the victim's body at the funeral home, gave a detailed confession revealing facts that, according to the police only the perpetrator would know." Second, Gates's confessions "are inconsistent with the physical evidence."

ARGUMENTS (S19X1131): If the Supreme Court declines to uphold the trial court's order granting him a new trial based on the DNA evidence, Gates's attorneys request that this Court grant it based on race discrimination. The trial court found that the prosecutors at Gates's 1977 capital trial engaged in "undeniable" and "systematic" discrimination in violation of the U.S. Supreme Court's 1965 opinion in *Swain v. Alabama*. The judge explained that the prosecutors "identified the black prospective jurors by race in their jury selection notes, singled them out for peremptory strikes, and struck them to try Gates before an all-white jury. The same prosecutors engaged in the same acts of discrimination in all death penalty trials of black males in the Chattahoochee Circuit for the years 1975-1979." Yet, the court denied relief on the discrimination issue. "Gates respectfully submits that he satisfied the diligence requirement with regard to the State's discrimination and is entitled to a new trial on that ground," his attorneys argue in briefs. Furthermore, Gates is entitled to a new trial "due to the State's 'undeniable' and 'systematic' race discrimination," the attorneys argue. The trial court correctly determined that the State engaged in systematic race discrimination, and under *Swain*, the ultimate question "is whether the prosecutors intended to exclude black citizens from juries systematically." "Gates respectfully submits that the court erred in its diligence analysis and that the State's discrimination requires a new trial," Gates's attorneys argue.

The State argues that the trial court did not abuse its discretion by denying Gates relief on his *Swain* claim. "Under *Swain*, a defendant is denied due process under the Constitution if he can show 'systematic exclusion of black jurors by use of peremptory strikes by the [State] in case after case, whatever the crime and whoever the defendant or victim may be,'" the State argues in

briefs. “The trial court did not abuse its discretion when it found that Gates was not entitled to relief on this claim. This claim is an allegation for which habeas is Gates’s exclusive remedy. Alternatively, the trial court correctly applied Georgia Code § 5-5-41 to Gates’s claim and found that he failed to raise this claim sooner.” Therefore, “the trial court’s finding regarding Gates’s failure to show due diligence in bringing his claim sooner is not clearly erroneous,” the State contends. The trial court’s judgment should be upheld.

Attorneys for State: Julia Slater, District Attorney, Frederick Lewis, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Sabrina Graham, Sr. Asst. A.G., Channell Singh, Asst. A.G.

Attorneys for Gates: Patrick Mulvaney, Southern Center for Human Rights, Clare Gilbert, Georgia Innocence Project

COLLINS ET AL. V. ATHENS ORTHOPEDIC CLINIC, P.A. (S19G0007)

In what may be the first large data-breach case to reach the Georgia Supreme Court, patients of a **Clarke County** medical clinic whose computer databases were hacked are appealing a ruling by the Georgia Court of Appeals that because they have suffered no financial loss or harm, they are not entitled to recover damages for potential, future injury.

FACTS: In June 2016, a hacker known as the “Dark Overlord” stole the personally identifiable information of at least 200,000 current and former patients of Athens Orthopedic Clinic, including Social Security numbers, addresses, birth dates, and health insurance details. Among the patients were the eventual plaintiffs in this case: **Christine Collins**, Paulette Moreland, and Kathryn Strickland. After discovering the hack, the clinic refused to pay the ransom demanded by the hacker to unlock its databases. At least some of the stolen identity information was offered for sale on the so-called “dark web,” and some of the information was made available, at least temporarily, on Pastebin, a data-storage website.

After being notified of the breach in August 2016, Collins and the other plaintiffs sued the clinic, asking the Athens-Clarke County Superior Court to certify their lawsuit as a class action. In their suit, they alleged negligence, breach of implied contract, unjust enrichment, and violation of the Georgia Uniform Deceptive Trade Practices Act (Georgia Code § 10-1-370). They sought a declaratory judgment from the court requiring the clinic to take certain actions to ensure the future security of class members’ identity information. They also sought reimbursement for their legal costs, and they sought reimbursement for costs incurred and future costs that would be incurred for the purchase of credit monitoring and identity theft protection. Each plaintiff alleged that she had “spent time calling a credit reporting agency and placing a fraud or credit alert on her credit report to try to contain the impact of the data-breach and anticipates having to spend more time and money in the future on similar activities.” Collins also alleged that she had received fraudulent charges on a credit card shortly after the data-breach and had to spend time getting the charges reversed by the credit card company. The clinic filed a motion asking the court to dismiss the lawsuit, and on June 26, 2017, the trial court granted the motion in a two-sentence order.

The plaintiffs then appealed to the Court of Appeals, the state’s intermediate appellate court. In June 2018, that court upheld the dismissal in a 2-to-1 ruling, finding that the plaintiffs’ failure to suffer an injury that could be legally compensated was fatal to some of their claims. In regard to the negligence and breach of implied contract claims, the majority noted that Collins

had not alleged that her fraudulent credit card charges were caused by the data-breach, and it concluded that the costs of prophylactic measures such as credit monitoring and identity theft protection are not recoverable damages and thus insufficient to state a claim that can be litigated in court under Georgia law. The majority held that the declaratory judgment claim failed because the pleadings did not identify any dispute that a court declaration would resolve. The majority held that the claim under the Deceptive Trade Practices Act was properly dismissed because the plaintiffs did not allege any future, non-speculative harm that an injunction would remedy. And the majority held that the unjust enrichment claim failed because it was not pleaded as an alternate theory of recovery based on a failed contract.

Collins and the other plaintiffs now appeal to the Georgia Supreme Court, which has agreed to review the case to determine whether the Court of Appeals erred in affirming the dismissal of the lawsuit on the ground that the plaintiffs failed to allege a compensable injury.

ARGUMENTS: Attorneys for Collins and the other plaintiffs argue they should be given the opportunity to prove their injuries and the Court of Appeals decision should be reversed. They argue that data breaches are increasing in frequency, future litigation is a near certainty, and “those future data-breach litigants will be looking to this Court for guidance on exactly what their legal rights are, if any, and how they can go about protecting those rights.” “By ruling that the plaintiffs have failed to allege a compensable injury, the message delivered thus far in this case has been that data-breach victims in Georgia have no legal rights, regardless of how careless the defendant’s data security practices may have been,” the attorneys argue in briefs. As of the filing of this lawsuit, the clinic still had not taken any steps to increase its security since the breach. “It continues to store the plaintiffs’ personally identifiable information on computer systems that employ the same lax security measures that permitted the hacker to access and steal the plaintiffs’ information,” the attorneys argue. The Court of Appeals erred by finding that the plaintiffs had not pleaded recoverable injury or damages, despite the fact that the Athens clinic “enabled criminals to obtain and sell the plaintiffs’ personal information.” The plaintiffs have pleaded a compensable injury and therefore sufficiently pleaded a cause of action for negligence under Georgia law. “Courts presiding over the largest data-breach cases in the country applying Georgia law have found that allegations similar to plaintiffs’ here were sufficient to plead a compensable injury,” the plaintiffs’ attorneys argue. Even if the plaintiffs had failed to allege a present injury – and they did not given Collins’s fraudulent credit card charges – their claims should have been sustained because “a present injury is not a required element for the plaintiffs’ breach of contract, unjust enrichment, declaratory judgment, or injunctive relief claims under Georgia law.”

The clinic’s attorney argues that the Court of Appeals correctly upheld the dismissal of the plaintiffs’ lawsuit because the plaintiffs failed to plead a compensable injury. “Both the trial court and the Court of Appeals applied existing and well-established Georgia law to the plaintiffs’ claims, and reached a result consistent with hundreds of other reported ‘data-breach’ cases filed in state and federal courts throughout the country – neither the mere exposure of personal data, the speculative risk of future harm nor prophylactic measures to purportedly ward off any such harm are legally cognizable or compensable injuries,” the attorney argues in briefs. “Notably, had the Court of Appeals ruled in favor of the plaintiffs, it would have been the first appellate court in the United States to hold that plaintiffs in a data-breach case who suffered no financial loss, may nevertheless recover damages for potential future injury.” Contrary to the

plaintiffs' arguments, the dismissal of their complaint does not leave them or anyone else who is **actually injured** as a result of a data-breach stranded...with no available remedy or recourse." The Court of Appeals simply ruled "that a claim arising out of a data-breach is no different than any other such claims – it is not legally cognizable until all elements, including injury/damages, are present." The clinic's attorney argues that under the plaintiffs' theory, a shopper in a grocery store could bring suit if he saw a grape on the floor.

Attorneys for Appellants (Collins): David Bain, Mark Goldman, Douglas Bench

Attorney for Appellee (Clinic): John Dalbey

2:00 P.M. Session

BALLIN V. THE STATE (S19A1087)

A **DeKalb County** woman is appealing her conviction and life prison sentence for the murder of her husband.

FACTS: Pamela Lelieth Ballin and her husband, Derrick "Ricky" Ballin, Sr., started a landscaping business together in 1980. Five years later they married and had a son, Derrick, Jr. Throughout their marriage, both had extramarital affairs. He had two children with another woman during the marriage. He started another relationship in September 2009 and confided in the woman that he was planning to leave Pamela. He told a landscaping friend that he was sleeping at the office because of problems at home. He also told his brother, George, that his marriage was not working, that Pamela was cold, and that he planned to leave her, move to New York, and work with George. George made plans to come to Atlanta in December 2009 to open a joint bank account in which Derrick could stash money in preparation for the move.

Pamela was also unfaithful. She had a sexual relationship with a former police officer and told him she was having marital problems. She had a relationship with another man in 2009, confiding in him that she and her husband were not getting along. She told her neighbor, who saw her coming and going from the home late at night, that she planned to get some money out of the business so she could move.

In September 2009, Pamela and Derrick obtained a new life insurance policy for Derrick for \$750,000; Pamela was the primary beneficiary and their son was the secondary beneficiary. Pamela was also a beneficiary of a \$500,000 Allstate life insurance policy that the couple had taken out in 2002. Like the other, she was the main beneficiary and their son was the other.

In the early hours of Dec. 29, 2009, Pamela called 911 and reported a burglary and home invasion. The officers who were dispatched observed that the windows, back door and front door were secure and locked. After Pamela let them in the front, they discovered Derrick lying at the bottom of the stairs, struggling to communicate. He had been struck in the head multiple times and a bloody, broken statute was found nearby. An emergency medical technician, who was rendering aid to the victim, asked Pamela if he had a medical history. "I don't know," she said, then stepped over her husband and walked off. Responding officers and the EMT said she showed no emotion, did not seem concerned, did not ask to go to the hospital, and did not try to help or comfort Derrick. She told police she'd been asleep and had gotten up to use the restroom when she heard her husband say, "Don't hit me." She thought she had heard the door chime, a sign the assailants may have left, but then heard a loud sound downstairs, so she ran into a closet

and called 911. Officers described the house as “disturbed” – i.e. furniture was knocked over - but the scene appeared staged. There was no blood nearby and nothing had been taken. An expert on blood pattern analysis later testified that it appeared Derrick had been sitting in the recliner when he was struck multiple times from behind. The expert opined that the victim received several more blows at the bottom of the stairs where he was found. Derrick was transported to Grady hospital at 3:16 a.m. After the trauma surgeon determined that that Derrick could benefit from surgery, he called Pamela, but she refused to give permission to operate. Later that morning, he was taken off life support and pronounced dead. A week following his death, Pamela or the son contacted the insurance companies, but the companies were unable to issue payment as by then a criminal investigation was underway.

In May 2017, Pamela Ballin went on trial for the murder of Derrick Ballin. The jury found her guilty on all counts and she was sentenced to life in prison with the possibility of parole. She now appeals to the Georgia Supreme Court.

ARGUMENTS: Attorneys for Pamela argue the trial court erred when it admitted evidence about the insurance policies as a motive for murder over the “strenuous objections” of her attorneys. In its 1991 decision in *Stoudemire v. State*, the Georgia Supreme Court held that to admit evidence of a life insurance policy where the accused was the beneficiary of the deceased’s policy, “there must be independent evidence creating a nexus between the crime charged and the existence of the insurance policy.” Here, her attorneys argue, the evidence at trial proved that: 1) Pamela never discussed the life insurance proceeds with anyone and there was therefore no nexus proven related to this killing; 2) the policies were obtained at the behest of the independent insurance agents, as is commonplace in most fiscally secure households; 3) Pamela voided the Allstate policy by failing to pay the premium and had no idea the policy was even in effect at the time of her husband’s murder; and 4) she had no direct dealings in attempting to collect proceeds on the life insurance. “Thus, in the case at bar, the prosecutor walked on thin ice, broke Appellant’s [i.e. Pamela’s] right to a fair trial, and violated the fundamental fairness of the trial process by introducing extremely prejudicial evidence that did not, in any proper manner, prove Appellant’s motive for this killing,” her attorneys argue in briefs. Also, the trial court wrongly denied Pamela’s motion for a mistrial when the prosecutor improperly proclaimed that she knew who committed this crime. “In the case at bar, the prosecutor, by impermissibly giving her unequivocal, personal opinion that Appellant committed this crime is egregious, unthinkable, and was purposefully done to poison the petit jury against Appellant,” the attorneys argue, adding that the trial court’s curative instruction was not strong enough to “send a clear message of how wrong this statement was....” Pamela Ballin’s “convictions and sentences must be reversed,” her attorneys argue.

The State, represented by the District Attorney’s and Attorney General’s offices, argues there was sufficient evidence of a nexus between the life insurance policies and Pamela’s motive to kill her husband to support the trial court’s admission of the life insurance evidence. Among the pieces of evidence: 1) The couple had marital difficulties and Derrick had indicated he was going to leave; 2) if he did leave her, she would suffer financially, creating a motive for the murder so she could collect the proceeds from the policies; 3) their company had financial difficulties and Derrick believed she was stealing money; 4) she was aware of both policies and had been involved in discussions about getting the \$750,000 policy several months before Derrick’s death; 5) she was quick to lay claim to the proceeds; and 6) she displayed no emotion

after his death. Also, the trial court did not abuse its discretion in denying Pamela’s motion for mistrial as the curative instruction and rebuke given by the judge sufficiently mitigated any potential harm from the prosecutor’s statement. The judge instructed jurors that the statement by the prosecutor “that she has knowledge who committed the crime in this case was improper and should be disregarded by you.” Ultimately, whether to declare a mistrial “is a question committed to the discretion of the trial judge, and the denial of a mistrial is reversible error only if it appears that a mistrial was essential to preserve the defendant’s right to a fair trial,” the State argues, quoting the state Supreme Court’s 2017 decision in *Coleman v. State*. “Here a mistrial was not necessary to preserve Appellant’s right to a fair trial.”

Attorneys for Appellant (Ballin): Brian Steel, Keith Adams

Attorneys for Appellee (State): Sherry Boston, District Attorney, Yolanda Mack, Dep. Chief Asst. D.A., Zina Gumbs, Asst. D.A., Deborah Wellborn, Dep. Chief Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Elizabeth Brock, Asst. A.G.

SMITH V. THE STATE (S19A1148)

A woman is appealing the convictions and life prison sentence she received in **Richmond County** for the murder of her toddler son.

FACTS: In 2013, **Mary Katherine “Katie” Smith** reconnected with a high school friend, Jeremy Kitchens, who lived with his parents in Hephzibah, GA in Richmond County. At the time, Smith had three children: Robert Smith, who was about 19 years old, Jamie Smith, who was about 14 years old, and Mason “Tucker” Smith, who was a 1-year-old baby. Katie frequently went out with friends, leaving Tucker with Jamie. After reconnecting with Kitchens, she began spending progressively more time with him, staying at his parents’ house sometimes for days or even weeks at a time. Jamie, although only a teenager, became a quasi-mother to Tucker. As several people observed, Jamie was the one who most nurtured the baby. In the summer of 2013, Tucker fell out of a bean bag chair and appeared to have a seizure. Katie would later tell people that Tucker had “breath-holding syndrome,” holding his breath until he became unconscious.

In the summer of 2014, Katie, who worked as a hospice nurse, moved in with Kitchens at his parents’ house, taking Jamie and Tucker with her. After Jamie returned from a week-long stay with family members during the 4th of July, she noticed that Tucker, by then 2 years old, had unusual bruising and a cut lip. The night of July 30, 2014, Jamie told her mother she wanted to spend the night at a friend’s. Her mother agreed to drive her to her friend’s house, and Jamie went to take a shower. When Jamie went into Kitchens’s room after her shower, her mother was wiping Tucker with a wet washcloth. He was lying on the bed next to his mother and Kitchens was sitting in a chair. Katie told Jamie that Tucker had just had an “episode,” i.e. he had held his breath and passed out. Neither Katie nor Kitchens ever admitted to witnessing the “episode,” although Kitchens later said he saw Katie shake Tucker “a little bit.” Jamie tried to wake the unconscious toddler and noticed he was not acting normal. Katie assured Kitchens and Jamie that Tucker would be fine, and she left to take Jamie to her friend’s house.

During the next few hours, Tucker’s condition declined. He threw up several times. Kitchens grew increasingly concerned, in part because Katie was a nurse yet did not appear concerned. At 9:53 that night, Kitchens convinced Katie to call 911. Katie explained to the

dispatcher that the little boy had breath-holding syndrome and had had an episode earlier that day. She said he had not been alert for a couple of hours and that within the past 10 minutes, his breathing had become more strained and he was turning purple. Kitchens was visibly upset when paramedics arrived and during his interview with police the following day.

On the way to the hospital, Kitchens and Katie picked up Jamie in the middle of the night from her friend's house. Kitchens was crying. When Jamie asked her mother what had happened to Tucker, Katie said she did not know.

When admitted to the hospital, Tucker's pupils were fixed and he was unresponsive. The treating physician found all three symptoms for non-accidental head trauma: subdural hemorrhage, bleeding from the eyes, and minimal visible signs of an external injury. The physician found the symptoms consistent with shaken baby syndrome. The symptoms would have been immediately evident, particular to somebody with medical knowledge. Although the physician was familiar with breath-holding episodes, she was unfamiliar with any syndrome. Furthermore, the physician said that regardless of any syndrome, breath-holding could not account for the severity of Tucker's injuries. Tucker died several days later.

An autopsy revealed bruising on his face, scalp, and mouth and an extensive amount of blood on his brain. There was a large amount of blood in and around his eyes, consistent with head trauma and excessive acceleration in the head, which can be caused by shaking. Nine of the child's ribs had been broken up to four weeks earlier based on their stage of healing. The medical examiner concluded Tucker had died from blunt impact trauma to the head. She found he had suffered a combined injury, with his head contacting some object, but his head also had undergone rotational force that comes from shaking. A social worker who spoke to Katie a few days after Tucker was hospitalized noted that Katie had a flat affect and abnormal demeanor. When asked about her child's injuries, Katie simply said he had fallen into a piece of furniture.

An investigator who was dispatched to the home found apparent blood spatter in the corner where Tucker was often put for "time out." Investigators learned that the day Tucker had been taken to the hospital, Katie and Kitchens had used methamphetamines. Kitchens denied seeing Katie hurt Tucker, but when asked who had done this to the child, he replied, "I guess Katie did," because "she was the only other one there."

In September 2015, Katie was indicted by a Richmond County grand jury for malice murder, two counts of felony murder, aggravated assault and cruelty to children in the first degree. Following an August 2016 trial, the jury found her guilty on all counts except malice murder and she was sentenced to life in prison plus consecutive terms of 20 years each for aggravated assault and child cruelty. Mary Katherine Smith now appeals to the Georgia Supreme Court.

ARGUMENTS: Attorneys for Smith argue the evidence was insufficient to convict her beyond a reasonable doubt. Her conviction was based on circumstantial evidence and should be reversed because the facts did not exclude every other reasonable hypothesis except that of Smith's guilt. Georgia Code § 24-14-6 states that, "To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused." "The evidence in this case showed that Tucker was alone with Kitchens in the bedroom not only at the time he fell, but also for a period of time when Smith went downstairs to prepare dinner," Smith's attorneys argue in briefs. "When Jamie left Tucker in the bedroom with Kitchens, he was normal.

After that, Tucker became unconscious.” Here, there was “no evidence that Kitchens, or anyone for that matter, saw Smith inflict injuries to Tucker,” the attorneys argue. “There was no physical or forensic evidence in this case that linked Smith to Tucker’s injuries. There was simply insufficient circumstantial evidence for a jury to conclude that Smith committed the underlying felonies of cruelty to children in the first degree and aggravated assault beyond a reasonable doubt. The evidence showed that any physical contact Smith had with Tucker was to care for and awaken him after he became unconscious.” The trial court also erred when it removed a juror without sufficient cause, the attorneys contend. Prosecutors and others, including jurors, complained that Juror 124 had been late twice for the trial and was sleeping during parts of it. “There is no evidence that this juror was in fact sleeping as opposed to merely having her eyes closed and the trial court never inquired into that issue,” Smith’s attorneys argue. Finally, the trial court erred by refusing to instruct the jury on Smith’s “good character.” Two witnesses – Smith’s mother and son – had testified about her good temperament with children. “The evidence adduced at trial from at least four witnesses was that Smith’s prior actions with her children were inconsistent with the allegations against her.”

The State, represented by the District Attorney’s and Attorney General’s offices, argues that the evidence against Smith was legally sufficient to support her convictions. For one thing, the State does not agree that its case was built purely on circumstantial evidence. When Jeremy Kitchens denied the defense’s theory that he had killed Tucker, his denial was direct evidence, not circumstantial evidence. After her arrest, Smith also denied that Kitchens had harmed her child and stated, “Jeremy loves this baby like his own.” Her statement “was also damning in that it repeated the assertion, bolstered by her status as a nurse, that her child had received his injuries accidentally after a fall related to his habit of holding his breath,” the State argues. These claims were not supported by the evidence. One physician stated the child had suffered a “severe brain injury” and that previous rib fractures were a sign of “intentional abuse.” “The fact that a defendant solely responsible for the care of a child has offered explanations for his or her child’s injuries which were inconsistent with the reality and the enormity of these injuries has been considered as important evidence of guilt,” the State argues. Also, the State presented evidence that Smith put her relationship with Kitchen above that of Tucker. Her daughter, Jamie, testified that her mother began putting “Jeremy first,” and Smith’s cousin said Smith was obsessed with Kitchens. The trial court also properly removed the juror whom the prosecutor had seen sleeping and who was twice late for court, one time holding up the proceedings for 35 minutes. Finally the trial court properly refused to give a jury charge on good character simply because her older son described his mother as his “go-to” person who had never injured him as a child, the State contends.

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Attorneys for Appellee (State): Natalie Paine, District Attorney, Joshua Smith, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Elizabeth Brock, Asst. A.G.

NORFOLK SOUTHERN RAILWAY COMPANY V. HARTRY ET AL. (S19G0008)

A railway company is appealing a Georgia Court of Appeals ruling that was in favor of one of its engineers who sued the company after he was injured in a collision with a truck that the engineer said was due to a faulty railroad crossing.

FACTS: On June 16, 2010, crossing gates were down at a public railroad crossing on East Conley Road in Clayton County, which normally indicates that a train is approaching. Occasionally gates will be down if a railway is performing maintenance or if the gates are malfunctioning. As a 28-foot-long truck owned by Ron Johnson Jr. Enterprises approached the railroad crossing, the truck driver saw that the gates were down but cars nevertheless were driving around the gates and over the crossing. The truck driver followed suit, driving around the crossing gates and into the path of an oncoming train that was being driven by engineer **Winford Hartry**. Hartry, who worked for **Norfolk Southern Railway Company**, was injured in the collision. Witnesses in the area claimed that the crossing gates had been down for at least 25 hours prior to the collision – since 9:00 a.m. the day before. Because no trains were coming during most of that time, drivers were traversing the crossing despite the gates being down. One delivery driver said he had crossed the tracks at least 15 to 20 times while the gates were down on June 15 and 16. Johnson’s truck driver had crossed a number of times the day before the collision without incident. Norfolk Southern Railway Company employees were also working in the area of the crossing on June 15 when, according to witnesses, the gates were down and signaling without trains actually approaching. The employees later contended, however, that they did not witness any malfunctions.

Hartry and his wife sued Johnson Enterprises, alleging claims of negligence, loss of consortium, bad faith, and punitive damages. They also brought claims against Norfolk Southern under the Federal Employers’ Liability Act, which allows rail workers to sue their employers for on-the-job injuries caused by the employer’s negligence. But the Hartry’s withdrew all but their claim that Norfolk Southern was responsible for maintaining the crossing gates, which they alleged had dangerously malfunctioned, resulting in Norfolk Southern’s failure to provide Hartry with a reasonably safe place to work. Specifically, Hartry alleged that Norfolk Southern was negligent because it failed to install technology to monitor the signal equipment at the crossing, leaving the crossing’s warning system in a state of “false activation” for hours even though no train was nearby.

Norfolk Southern filed a motion asking the **Spalding County** State Court to grant “summary judgment” in its favor. (A court grants summary judgment when it determines there is no need for a jury trial because there is no genuine debate over the facts and because the law clearly falls on the side of one of the parties.) The trial court granted summary judgment to Norfolk Southern after finding that the railway had not received a credible report of a false activation as required by regulations for railroad safety that are created by the Federal Railroad Administration under the Federal Railroad Safety Act. Therefore, the trial court concluded that Hartry’s claims under the Federal Employers’ Liability Act were precluded by the regulations promulgated under the Federal Railroad Safety Act.

The Hartry’s appealed to the Georgia Court of Appeals, arguing that the trial court erred by granting summary judgment to Norfolk Southern and by concluding that no question of fact existed as to whether Norfolk Southern had notice of a gate malfunction. The intermediate appellate court agreed with Hartry and reversed the grant of summary judgment to Norfolk Southern. It concluded that the trial court erred in determining that Hartry’s claim against Norfolk Southern under the Federal Employers’ Liability Act was precluded by the Federal Railroad Safety Act and in determining that questions of fact did not exist as to the claim.

Norfolk Southern now appeals to the state Supreme Court, which has agreed to review the case to determine whether, and to what extent, a claim under the Federal Employers' Liability Act is precluded by a regulation under the Federal Railroad Safety Act.

ARGUMENTS: Attorneys for Norfolk Southern argue that a railroad that has complied with federal safety regulations covering the subject matter cannot be held negligent under the Federal Employers' Liability Act (FELA). If a federal safety regulation under the Federal Railroad Safety Act (FRSA) covers the subject matter of a FELA claim, that regulation provides the standard of care, as the FRSA and its regulations explicitly establish the "federal standard of care" in "every area of railroad safety." The key question for the Georgia Supreme Court, the attorneys for Norfolk Southern argue, is whether a railroad regulation under the FRSA "covers" or "substantially subsumes" the subject matter of the plaintiff's FELA claim. If it does, the railroad can be liable only if it did not comply with the regulation.

Hartry's attorneys argue that Norfolk Southern's argument that it didn't violate FRSA regulations is premature because, as the Court of Appeals found, there is a question of fact as to whether Norfolk Southern employees observed the gates to be malfunctioning and did nothing in response, which would be in violation of FRSA regulations. Furthermore, Norfolk Southern has not shown that FRSA regulations "substantially subsume" the subject matter of Hartry's claim. FELA is intended to be a compensation statute for workers, Hartry's attorneys argue. It does not prohibit a railroad from being negligent, and under the plain statutory language, FRSA does not limit claims under FELA.

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