



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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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, the high court has ruled that patients of a **Clarke County** medical clinic whose computer databases were hacked may proceed with a lawsuit against the clinic.

With today's unanimous ruling, written by **Justice Nels S.D. Peterson**, the Supreme Court has revived the plaintiffs' lawsuit, which had been dismissed by an Athens-Clarke County trial court. The Georgia Court of Appeals upheld the dismissal, ruling that the cost of preventative measures such as credit monitoring and identity theft protection could not provide the basis for a lawsuit under Georgia law.

According to their complaint, the plaintiffs alleged that in June 2016, an anonymous hacker identified only as the "Dark Overlord" stole the personal data 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. And their complaint alleged that, "Even class members who have not yet experienced identity theft or are not yet aware of it nevertheless face the imminent and substantial risk of future injury." 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 others appealed the ruling to the Georgia Supreme Court, which 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 "cognizable injury."

"We conclude that the injury the plaintiffs allege that they have suffered is legally cognizable," today's opinion says. "Because the Court of Appeals held otherwise in affirming dismissal of the plaintiffs' negligence claims, we reverse that holding. Because that error may have affected the Court of Appeals's other holdings, we vacate those other holdings and remand the case."

In reaching its conclusion, the Court of Appeals relied on inapplicable case law – specifically two of its own opinions that addressed the exposure of sensitive personal information – to conclude that "the fact of compromised data is not a compensable injury by itself in the absence of some loss or damage flowing to the plaintiff's legally protected interest as a result of the alleged breach of a legal duty," the opinion explains. "But there are two fundamental differences between those cases and this one."

For one thing, the key Georgia decisions relied on by the appellate court "were not issued in the context of a motion to dismiss." In addition, the Court of Appeals's prior cases "involved a sort of exposure of data fundamentally different than the actual data theft in this case." In the prior cases, there was no reason to believe that the data in question had fallen into a criminal's

hands. Here, “plaintiffs allege that their data was stolen by a criminal whose alleged purpose was to sell the data to other criminals.” They allege that the thief demanded a ransom for the data’s return and that all class members face the “imminent and substantial risk” of identity theft.

“Assuming the truth of these allegations, as we must at this stage, we must presume that a criminal actor has maliciously accessed the plaintiffs’ data and has at least attempted to sell at least some of the data to other wrongdoers,” the opinion says. “These allegations raise more than a mere specter of harm.”

Furthermore, recent “persuasive federal district court decisions applying Georgia law in similar cases are consistent with our conclusion that the plaintiffs have pleaded a legally cognizable injury here,” the opinion says. “Because the Court of Appeals erred in concluding that the trial court properly dismissed the plaintiffs’ negligence claims due to failure to plead a legally cognizable injury, we reverse that holding. Because that error may have affected the Court of Appeals’s other holdings, we vacate those other holdings and remand the case.”

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

Attorney for Appellee (Clinic): John Dalbey

SPENCE V. THE STATE (S19A1334)

The Supreme Court of Georgia has upheld the murder conviction and life prison sentence given to an Atlanta woman for killing a 16-month toddler who was in her care.

Mary Ann Spence appealed her **Fulton County** convictions for murder, aggravated assault, and child cruelty to the state Supreme Court, arguing that the evidence was insufficient to convict her. But in today’s unanimous opinion, written by **Justice Michael P. Boggs**, the high court disagrees, concluding that “the evidence was sufficient to authorize a jury to find beyond a reasonable doubt that Spence was guilty of murder.”

According to today’s opinion, the evidence at trial showed the following: In April 2011, Spence was staying with her daughter and three grandchildren – a 5-year-old boy, J.P., a 1-year-old baby boy, and a 9-year-old girl – in Atlanta’s Carver Homes. Her daughter’s best friend, Jennifer Miller, also was staying with them, along with her two children, 16-month-old Samuel Miller and his 3-year-old sister. On April 3, 2011, Spence’s daughter left in the early morning hours to go to work. Later in the morning, while Miller was preparing to go to church, Spence offered to stay with the three boys, recognizing that it would be difficult for Miller to handle a 5-year-old, 16-month-old, and 1-year-old at church. Miller accepted the offer and left for church, taking her daughter and Spence’s 9-year-old granddaughter with her.

After they left, at some point 5-year-old J.P. looked into one of the bedrooms and saw his grandmother with Samuel, who was sobbing. J.P. later said Spence picked up the crying baby, shook him several times, threw him down onto a “hard” bed, then threw him against the wall, causing his eyes to go “to sleep.” Other than Spence, there were no other adults in the apartment. At about 12:45 p.m. that day, Spence ran into the apartment across the hall of Sharon Blackwell and said Samuel was not breathing. The two women returned to the apartment where Samuel was lying motionless on a futon in the living room and was cold to the touch. Blackwell’s friend and another neighbor also came into the apartment and tried to resuscitate the baby while Spence called 911. Paramedics transported the baby to an Atlanta hospital, where he was pronounced dead shortly after his arrival.

Back at the apartment, Spence told a responding officer that she had been cleaning in the back of the apartment while Samuel and the other boys played in the living room. When she heard Samuel crying, she returned to the living room and assumed he had fallen and bumped his head on a table. She said she picked him up, gave him some juice, then put him down for a nap. An hour later, she said she found the baby unresponsive and foaming at the mouth. That was when she went to Blackwell's apartment. She later told an Atlanta Police detective J.P. told her Samuel had fallen.

Initially police did not consider Spence a suspect until the medical examiner who performed the autopsy ruled Samuel's death a homicide. The M.E. found multiple bruises on the baby's body and found that his face and head were swollen. He determined that blunt force trauma to the head killed Samuel and that "tremendous" blows to his head punched a hole in his skull and caused complex fractures across the surface of his skull. He said that the baby could not have sustained his injuries from playing or roughhousing, but rather he would have had to fall from a building's second story or higher. He also said Samuel would not have been functioning enough to drink juice following such a devastating head injury.

In July 2011, a Fulton County grand jury indicted Spence for malice murder, felony murder, aggravated assault, and cruelty to children in the first and second degrees. Following a January trial, the jury found her guilty on all counts and she was sentenced to life in prison. Spence then appealed to the state Supreme Court. Among her arguments, she contended that the State's case entirely depended on circumstantial evidence and failed to exclude every reasonable hypothesis of her innocence, including that Samuel's death could have been the result of a preexisting physical ailment or a hard fall.

"We disagree," today's opinion says. First, the State did not rely solely on circumstantial evidence. J.P. testified that he saw Spence slam the baby on a "hard" bed which caused Samuel's eyes "to sleep." "That was direct evidence of Spence's guilt," the opinion says. Secondly, "the jury was presented with ample circumstantial evidence on which to conclude that she was guilty beyond a reasonable doubt of murder, and also that her hypotheses of innocence were unreasonable."

Spence also argued that the trial court erred in permitting four witnesses to testify about statements J.P. said in the weeks following Samuel's murder, as they amounted to improper bolstering of J.P.'s testimony. In today's opinion, the Supreme Court has concluded the trial court did not err. And Spence argued that the trial judge erred by failing to instruct the jury about her "sole defense" of accident.

"We disagree," the opinion says. "Here, even if Spence could show that the trial court obviously erred in not charging the jury as to the defense of accident, she has failed to carry her burden of demonstrating that any such error likely affected the outcome of her case."

Attorney for Appellant (Spence): Edward Silverbach

Attorneys for Appellee (State): Paul Howard, Jr., District Attorney, Lyndsey Rudder, Dep. D.A., Stephany Luttrell, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Youn, Asst. A.G.

BALLIN V. THE STATE (S19A1087)

A **DeKalb County** woman who was sentenced to life in prison after she was convicted of bludgeoning to death her husband of 24 years has lost her appeal in the Supreme Court of Georgia.

In this highly publicized case, **Pamela Lelieth Ballin** argued the trial court erred in allowing in evidence that she stood to gain more than \$1.2 million from two life insurance policies upon the death of her husband, Derrick “Ricky” Ballin, Sr. However, in today’s opinion, written by **Justice Charles J. Bethel**, the high court disagrees.

“Although the trial court erroneously applied an evidentiary standard from cases decided under the former Evidence Code in admitting evidence of the life insurance policies and related testimony, we hold that the overall strength of the evidence against Ballin rendered harmless any error,” the opinion says.

According to the facts at trial, the Ballins had been married since 1985 and owned a landscaping business. Throughout their marriage, both had extramarital affairs and both had confided in others that they planned to leave the marriage.

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 the main beneficiary of a \$500,000 Allstate life insurance policy that the couple had taken out in 2002.

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, bleeding profusely, and struggling to communicate. He had been struck in the head multiple times and a bloody, broken statute was found nearby.

Pamela told officers she’d been asleep and had gotten up to use the restroom when she heard Ricky struggling with someone downstairs. She said that when she heard a loud sound, she ran into a closet to hide and called 911. Officers described the house as “disturbed” – i.e. furniture was knocked over – but the scene appeared staged 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 but later that morning was pronounced dead.

In August 2013, Pamela was indicted for malice murder, felony murder predicated on aggravated assault, and aggravated assault. Prior to trial, the State filed a motion to admit at trial evidence of the life insurance policies, arguing that they provided motive for Pamela to kill Ricky. In a pretrial hearing, her attorney objected to mention of the policies, but the trial court ruled that the policies could be admitted at trial as evidence of motive. Following a May 2017 trial, the jury found Pamela guilty on all counts and she was sentenced to life in prison with the possibility of parole. She then appealed to the Georgia Supreme Court.

In today’s opinion, the high court concludes that the evidence “was sufficient to enable a rational trier of fact to find Ballin guilty beyond a reasonable doubt of malice murder.”

In response to her argument that evidence of the insurance policies should not have been admitted, “This Court previously held that evidence of insurance could be properly admitted where the State established some connection, or nexus, to the crime,” the opinion says, citing a

number of cases. However, the opinion points out that, “each of those cases was decided before Georgia adopted the current Evidence Code, which largely mirrors the Federal Rules of Evidence. And Georgia appellate courts have repeatedly reminded both bench and bar of the importance of applying and arguing the correct law to evidentiary questions.”

Under Rule 403 of Georgia’s current Evidence Code, “relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice.” In this case, however, there is no indication that the trial court exercised its discretion in performing that balancing test. “Even so, the trial court’s failure to exercise its discretion under the proper standard is harmless here,” the opinion says. “In sum, given the overall strength of the other evidence of Ballin’s guilt, we conclude that it is highly probable that the insurance evidence, even assuming it was erroneously admitted under Rule 403, did not contribute to the jury’s verdict.”

Pamela also argued on appeal that the trial court erred in denying her motion for a mistrial after the prosecutor made an improper statement by stating to a defense witness, “I’m clear on who killed him.” The high court agrees with Ballin that the statement was improper but concludes that it did not warrant reversal of the trial court’s judgment.

“Although the prosecuting attorney ought not to have shared with the jury her personal belief regarding the guilt of the accused, this would have been a patently obvious reality, as the State was, in fact, arguing Ballin’s guilt,” today’s opinion says. “In light of the considerable discretion afforded the trial court to deal with improper argument, and especially because the trial court promptly indicated that the statement was improper and told the jury to disregard it, we cannot conclude that the trial court abused its discretion when it denied a mistrial.”

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.

IN OTHER CASES, the Supreme Court of Georgia has upheld **murder** convictions and life prison sentences for:

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| * Bernard M. Bullard (Bibb Co.) | <u>BULLARD V. THE STATE (S19A1017)</u> |
| * Dundell Cash (Muscogee Co.) | <u>CASH V. THE STATE (S19A1280)</u> |
| * Shawn Anthony Clark (Douglas Co.) | <u>CLARK V. THE STATE (S19A1344)</u> |
| * Calvin Denson (Muscogee Co.) | <u>DENSON V. THE STATE (S19A1396)</u> |
| * Jason Dozier (Gwinnett Co.) | <u>DOZIER V. THE STATE (S20A0100)</u> |
| * Franklin George Gebhardt (Spalding Co.) | <u>GEBHARDT V. THE STATE (S19A1582)</u> |
| * David McGuire (Lamar Co.) | <u>MCGUIRE V. THE STATE (S19A1215)</u> |
| * Ramon Naieem Nichols (DeKalb Co.) | **<u>NICHOLS V. THE STATE (S19A1006)</u> |
| * Marques Nicholson (DeKalb Co.) | **<u>NICHOLSON V. THE STATE (S19A0992)</u> |
| * Juan Carlos Ramirez (DeKalb Co.) | <u>RAMIREZ V. THE STATE (S19A1504)</u> |
| * Hentrez Reed (Newton Co.) | <u>REED V. THE STATE (S19A1342)</u> |

