



Supreme Court of Georgia

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SUMMARIES OF OPINIONS

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JACKSON ET AL. V. RAFFENSPERGER (S20A0039)

Under an opinion today by the Supreme Court of Georgia, a group of Certified Lactation Counselors, who sued Secretary of State Brad Raffensperger, will get another chance to make the case for why their lawsuit should go forward.

With today's decision, written by **Justice Michael P. Boggs**, the high court finds that the **Fulton County** Superior Court erred in dismissing the plaintiffs' challenge of a state law as unconstitutional, which they argued would put hundreds of lactation care providers out of work and "drastically reduce access to breastfeeding care and advice, particularly in rural Georgia."

"In sum, we reverse the trial court's dismissal of Appellants' substantive due process and equal protection claims, and we remand the case with direction to the trial court to reconsider the motion to dismiss for failure to state a claim," today's opinion says.

Mary Nicholson Jackson is a Certified Lactation Counselor with decades of experience who works at Grady hospital in Atlanta. She helped found the non-profit, Reaching Our Sisters Everywhere, Inc. (ROSE), to provide underserved communities with breastfeeding education, advocacy, and support. Breastfeeding is the preferred method of feeding infants in their first year due to the substantial health benefits. Although many women have no trouble breastfeeding their babies, many need help, and lactation care providers offer guidance and support. They work in

people's homes and in clinical settings, and although they often have physical contact with their clients, they are not medical providers and cannot diagnose or treat medical conditions. To earn certification, Certified Lactation Counselors (CLCs), such as Jackson, must attend a 45-hour seminar on "breastfeeding counseling, assessment, and support skills," and pass an exam, but the CLC process does not include supervised clinical experience.

In 2016, the Georgia General Assembly passed the Georgia Lactation Consultant Practice Act, which prohibits providing "lactation care and services" for compensation without obtaining a license from the Secretary of State. The General Assembly said the purpose of the Act was "to protect the health, safety, and welfare of the public by providing for the licensure and regulation of the activities of persons engaged in lactation care and services." Under the Act, only "International Board Certified Lactation Consultants" are eligible to get a license. Certification to be an International Board Certified Lactation Consultant (IBCLC) requires completing eight college-level health and science classes, six health-related continuing education courses, 300 hours of supervised clinical experience, and passing an exam. A substantially similar bill died in committee several years earlier after the Georgia Occupational Regulation Review Council concluded that: 1) there was no evidence that requiring lactation care providers to become licensed would improve Georgians' health or safety; 2) the bill would decrease Georgians' access to breastfeeding support; and 3) Certified Lactation Counselors and International Board Certified Lactation Consultants are equally qualified to provide lactation care settings. In Georgia, there are only 335 International Board Certified Lactation Consultants. They are concentrated in metro Atlanta and other urban areas, often are nurses or other healthcare providers associated with hospitals, and tend to charge more. By comparison, there are 800 Certified Lactation Counselors who work throughout the state and are more available to rural and minority Georgians.

In June 2018, Jackson and her organization, ROSE, sued Secretary of State Raffensperger. They alleged that the Act makes the education and training requirements too stringent and harms mothers and infants by reducing access to lactation care and services. Jackson and ROSE filed two legal claims: a due-process claim alleging that the Act denies Certified Lactation Counselors the right to practice their chosen profession free from unreasonable interference, and an equal-protection claim alleging that the Act treats a small group of lactation care providers differently based on criteria unrelated to the Act's purpose. The Secretary of State filed a motion to dismiss the action for failure to state a claim upon which legal relief could be granted. The superior court granted Raffensperger's motion, finding that Jackson and ROSE had failed to state a claim that the Act violates due process because the Georgia Constitution does not recognize a right to work in one's chosen profession. The trial court also ruled that they had failed to state a claim that the Act violates equal protection because their complaint did not sufficiently allege that they are similarly situated to those who are able to obtain a license. Jackson and ROSE then appealed to the Georgia Supreme Court.

"We agree with Appellants that the trial court erred in both rulings," today's opinion says. "We have long interpreted the Georgia Constitution as protecting a right to work in one's chosen profession free from unreasonable government interference. And the trial court erred in concluding that Appellants (i.e. Jackson and ROSE) are not similarly situated to lactation consultants who can be licensed because, according to the allegations in the complaint, they do the same work."

As to the first claim, “the trial court erred in concluding that the complaint failed to state a claim for a violation of substantive due process on the ground that the Georgia Constitution does not protect an individual’s right to pursue the lawful occupation of her choosing free from government interference,” the opinion says. As to the second claim, “We have consistently treated individuals who perform the same work as being similarly situated for equal protection purposes.”

As alleged in the complaint, International Board Certified Lactation Consultants and Certified Lactation Counselors provide the same lactation care and services and are equally competent to do so. “In view of those allegations, which we must treat as true at the motion-to-dismiss stage, we cannot conclude that International Board Certified Lactation Consultants and lactation care providers who have obtained different credentials are not similarly situated in the relevant respects for the sole reason that the prerequisites for obtaining the various credentials differ,” the opinion says. “Accordingly, the trial court erred in dismissing Appellants’ equal protection claim on the basis that lactation care providers without an IBCLC certification are not similarly situated to IBCLCs.”

Attorneys for Appellants (Jackson and ROSE): Yasha Heidari, Renee Flaherty, Jaimie Cavanaugh

Attorneys for Appellee (State): Christopher Carr, Attorney General, Isaac Byrd, Dep. A.G., Kirsten Daughdril, Sr. Asst. A.G., Melissa Tracy, Asst. A.G., Andrew Pinson, Solicitor General, Ross Bergethon, Dep. Sol. Gen.

MATHENIA ET AL. V. BRUMBELOW (S19G0426)

Under a ruling today by the Georgia Supreme Court, a couple who has had custody of a now 3½-year-old boy since his birth may resume their attempt to adopt him.

With today’s 6-to-3 decision, written by **Chief Justice Harold D. Melton**, the high court has reversed a decision by the Georgia Court of Appeals that could have led to the biological father gaining custody of the child.

After a one time sexual encounter in late 2015 with **Joshua Brumbelow, Jeannie Mathenia** (who was separated from her then-husband) became pregnant. She told Brumbelow she was expecting a baby soon after learning herself. Throughout the pregnancy, Brumbelow denied that the child was his, although she repeatedly assured him he was the father. Early in the pregnancy, Brumbelow accompanied Mathenia to a doctor’s appointment to find out how many weeks she had been pregnant and determine whether the baby was his. Although he still professed uncertainty about his paternity, he offered to pay for her to have an abortion. She flatly declined. Throughout the pregnancy, Brumbelow never asked about her well-being or if she needed anything. Although he knew where she lived, he never visited. He also never offered Mathenia any financial support during the pregnancy to help with doctor’s appointments or maternity clothes. About two months before the baby was born, however, Mathenia sent a text message to Brumbelow’s mother.

On July 10, 2016, the baby, “E.M.,” was born, and the following day, Mathenia voluntarily relinquished her parental rights. The same day, E.M. went home from the hospital with Lance and Ashley Hall, who planned to adopt the child, and he has remained in their custody since. On Aug. 23, 2016, Brumbelow filed a petition in **Habersham County Superior Court** to legitimate his biological son.

Following a hearing, the trial court denied Brumbelow's petition to legitimate E.M. on the ground that he had abandoned his "opportunity interest" in developing a parent-child relationship with E.M. and that denying the petition for legitimation was in E.M.'s best interests. Brumbelow filed a motion for new trial and a motion to stay the adoption proceedings. The trial court denied the new trial motion but granted the motion to stay adoption proceedings. Brumbelow then appealed to the Court of Appeals, the state's intermediate court, which subsequently reversed the trial court's ruling, finding that the trial court erred in finding that Brumbelow had abandoned his "opportunity interest" to develop a relationship with the child.

The Court of Appeals held that while Brumbelow "certainly could have done more," it could not under the circumstances hold that the father had "done so little as to constitute abandonment." Noting that the trial court found that the denial of the petition was in the "child's best interests," the Court of Appeals also held that the proper standard in this case was not the child's best interests standard but rather the parental fitness standard. It therefore remanded the case for the trial court to determine whether Brumbelow was a fit parent, rather than whether denying his legitimation petition was in E.M.'s best interests.

Mathenia and the Halls then appealed to the state Supreme Court, which agreed to review the case to determine: "1) whether the Court of Appeals erred in reversing the superior court's decision that Brumbelow had abandoned his opportunity interest to pursue a relationship with his son; and 2) if not, whether the Court of Appeals properly concluded that Brumbelow's legitimation petition must be assessed on remand under the parental fitness standard rather than the best interests of the child standard."

In today's 27-page majority decision, "we conclude that, because evidence supported the superior court's finding that Brumbelow abandoned his opportunity interest, the superior court did not abuse its discretion in denying the legitimation petition. Accordingly, the Court of Appeals erred in its decision on that issue, and we must reverse that portion of the Court of Appeals' judgment."

The Georgia Supreme Court has held in other cases that "unwed fathers possess an opportunity interest to develop a relationship with their children that is protected by due process of law." In its 1987 decision in *In re: Eason*, the high court ruled that this opportunity interest "begins at conception and endures probably throughout the minority of the child. But it is not indestructible."

"Indeed, an unwed father's opportunity interest can be abandoned 'if not timely pursued,'" today's opinion says. "Factors which may support a finding of abandonment include, without limitation, a biological father's inaction during pregnancy and at birth, a delay in filing a legitimation petition, and a lack of contact with the child."

Brumbelow did not delay long in filing his legitimation petition – filing it about six weeks after E.M. was born, which led the trial court to conclude he had expressed some desire to have more than just a biological relationship with the child. "However, there are other circumstances that support the superior court's ultimate finding that Brumbelow abandoned his opportunity interest to develop a relationship with E.M.," the majority opinion states. Among them are that the only financial support he offered Mathenia while she was pregnant was to pay for an abortion, which "does not show that he wanted to pursue a relationship with his child" and which "would have ensured that no relationship could ever develop," today's majority opinion says.

“Here, Brumbelow showed no interest in ‘becoming a father in a true relational sense’ throughout Mathenia’s pregnancy, and seemingly expressed an interest only upon discovering that the child would be placed for adoption – and then only by filing a legitimation petition, not by offering financial or other support or seeking visitation with the child (except once five months after the child was born),” the opinion says. “Under all of these circumstances, we cannot say that evidence did not support the superior court’s ultimate finding that Brumbelow abandoned his opportunity interest to pursue a relationship with E.M. The Court of Appeals erred in concluding otherwise.”

The majority emphasizes in a footnote the “deference that appellate courts must give to trial courts with regard to findings of fact supported by the evidence” and reminds “appellate courts not to engage in the inappropriate practice of making independent findings.” In another footnote, the majority disagrees with the dissent, which contends that the majority has not sufficiently recognized “the ability of appellate courts to notice some undisputed facts not recognized by the trial court.” “This is untrue,” majority states. “While ‘an appellate court can properly take notice of the undisputed facts,’ appellate courts cannot use those undisputed facts to make alternative findings of fact that are contrary to those explicitly or implicitly made by the trial court where other evidence exists that supports the trial court’s findings.”

Given today’s ruling that the Court of Appeals erred in reversing the superior court’s decision on Brumbelow’s having abandoned his opportunity interest in E.M., “the Court of Appeals did not need to address the issue regarding whether the ‘best interests’ test or ‘fit parent’ test would apply on remand,” the majority opinion says. “We leave the question regarding the standard to employ in assessing legitimation where a biological father has *not* abandoned his opportunity interest to be decided in a case where it is properly presented.” Joining the majority are Presiding Justice David E. Nahmias and Justices Michael P. Boggs, Charles J. Bethel, Sarah H. Warren, and Carla Wong McMillian.

In a concurrence, **Justice Charles J. Bethel** agrees with the majority opinion but writes separately “to emphasize my understanding of the scope and nature of appellate review in relation to determinations of an abandonment of an opportunity interest in parenting a child. Having made a finding of the salient facts, the trial court determined that Brumbelow abandoned his opportunity interest in being a parent of E.M. There was clearly evidence in the record to support this determination and limited evidence to the contrary. The Court of Appeals was wrong to attempt to reweigh the evidence because the proper standard of review asks whether the trial court, which carries the burden and responsibility of making these decisions across Georgia in the first instance, abused its discretion. In this case, it did not.”

In the dissent, **Justice Nels S.D. Peterson** writes that he is “far less certain than the majority that the Court of Appeals got it wrong. The majority overstates the responsibility of appellate courts to ignore undisputed facts that a trial court has not rejected. And the only question the majority actually answers today is essentially one of the sufficiency of the evidence; our rules make clear that is not a matter for our certiorari review. I would dismiss this case as improvidently granted, and so I respectfully dissent.” Here, “It was undisputed that the father doubted he was the father,” the dissent says. “It was undisputed that the mother did not want the biological father to contact her for at least some portion of her pregnancy. And it was undisputed that the biological father filed his legitimation petition mere weeks after the child was born, and before he received results of a paternity test; not the years later many Georgia cases point to as

coming too late.” “I agree that an appellate court cannot make factual findings contrary to factual findings made by the trial court so long as those latter findings are supported by some evidence. But the undisputed facts that I note do not actually conflict with any factual findings of the trial court; rather, those undisputed facts are merely contrary to the trial court’s ultimate conclusion that the father abandoned his opportunity interest.” “Because I do not believe the only question the majority answers today is worthy of our review on certiorari, and it is not clear to me that the Court of Appeals erred, I would dismiss this case as improvidently granted,” concludes the dissent, which is joined by Justices Keith R. Blackwell and John J. Ellington.

Attorneys for Appellants (Mathenia): James Outman, Justin Hester

Attorney for Appellee (Brumbelow): Timothy Healy

NEW CINGULAR WIRELESS PCS V. DEPARTMENT OF REVENUE ET AL.
(S19G0802)

The Supreme Court of Georgia for a second time has ruled in favor of four cellular and wireless data providers who are seeking millions in tax refunds from the Georgia **Department of Revenue** on behalf of their customers.

In today’s unanimous opinion, written by **Justice Michael P. Boggs**, the high court has for a second time reversed part of a Georgia Court of Appeals decision that upheld a **DeKalb County** court’s dismissal of a lawsuit brought by **New Cingular Wireless PCS** and three other AT&T Mobility subsidiaries – together “AT&T.”

AT&T alleged that from 2005 to 2010, the subsidiaries sold wireless Internet access services, which were exempt from state sales tax under Georgia Code § 48-8-2. The statute says that for purposes of state sales and use tax, “telecommunications service” shall not include “Internet access service.” In November 2010, AT&T requested a refund from the Department of Revenue for sales tax AT&T claimed had been erroneously charged to its Georgia customers on the purchase of wireless Internet access service. More than four years later, in March 2015, the Department denied the request to refund almost \$6 million for Georgia customers.

In April 2015, AT&T sued the Department of Revenue and its commissioner in her official capacity. In response, the Department filed a motion to dismiss the suit. It argued the complaint should be dismissed because: 1) AT&T did not reimburse the alleged illegally collected sales tax to customers before seeking a refund from the Department; 2) AT&T lacked standing to file sales-tax-refund claims on behalf of customers for periods prior to May 5, 2009 – the effective date of the General Assembly’s amendment to the refund statutes allowing dealers such as AT&T to seek refunds on behalf of their customers; and 3) AT&T’s claims amounted to a class action barred by the refund statutes. The trial court granted the Department’s motion on all three grounds, and AT&T then appealed to the Court of Appeals, the state’s intermediate appellate court.

In 2017, the Court of Appeals upheld the trial court’s dismissal on the first ground, finding that AT&T had not proven it had reimbursed the customers for the taxes before requesting the refund. AT&T appealed to the state Supreme Court, and in April 2018, the high court reversed the Court of Appeals decision, holding that “with regard to the period beginning on May 5, 2009 and ending on Sept. 7, 2010, the Court of Appeals erred by affirming the dismissal of AT&T’s case on the basis that AT&T was required to prepay any claimed refund amount to its customers prior to receiving a determination from the Department as to whether

any refund will be approved.” The state Supreme Court also remanded the case to the Court of Appeals with direction to consider the second and third grounds for the trial court’s dismissal.

On remand, the Court of Appeals ruled that the third ground lacked merit, but it upheld the trial court’s ruling that AT&T lacked standing to seek refunds for periods prior to the effective date of the 2009 amendments to the refund statutes that allowed dealers to seek refunds on behalf of their customers. Again, AT&T appealed to the state Supreme Court, which agreed to review the case to determine whether the Court of Appeals erred in holding that AT&T lacked standing to file refund claims for periods prior to May 5, 2009.

In today’s opinion, the high court has concluded that “the Court of Appeals did err. We therefore reverse in part and we again remand this case to the Court of Appeals.”

Georgia Code § 48-2-35 (a), as amended in 2009, states: “A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from such taxpayer under the laws of this state....” Under the same Code section, “the term “taxpayer” “shall mean a dealer...that collected and remitted erroneous or illegal sales and use taxes to the commissioner.”

The Court of Appeals correctly recognized that “legislation which involves mere procedural or evidentiary changes may operative retrospectively; however legislation which affects substantive rights may only operate prospectively,” and that “a substantive law creates rights, duties, and obligations while a procedural law prescribes the methods of enforcing those rights, duties, and obligations,” today’s opinion says. “However, in applying these principles to the facts here, the Court of Appeals reasoned that, because standing is the question of ‘whether the litigant is *entitled* to have the court decide the merits of the dispute or of particular issues,’ standing therefore is ‘an entitlement, or a substantive right,’ and that the 2009 amendments to the refund statutes thus created a substantive right and may not be applied retrospectively. This ultimate conclusion was erroneous.”

“It is true that in order to maintain an action, a party ‘must establish standing to sue on the ground asserted, which requires showing an injury in fact that was caused by the breach of a duty owed by the defendants to the plaintiffs and that will be redressed by a favorable decision from the court,’” the opinion says. “But it does not follow that standing to sue is necessarily a substantive right. For example, standing may be granted at common law or by statute for the special purpose of representing others in the assertion of their claims. This is generally termed ‘representational standing.’”

In this case, “contrary to the Court of Appeals’ assertion,” the “dealer” (here AT&T) acquires no substantive “right” to a refund under Georgia Code § 48-2-35.1. As this Court previously explained in its first decision in this case, “the statutory and regulatory scheme itself demonstrates that the dealer as representative acquires no right to a tax refund.” Therefore, “the dealer makes no claim for itself but only on behalf of the real party in interest, just as a guardian ad litem or next friend acquires no ‘right’ in the underlying claim of the minor or incapacitated person.”

In conclusion, “the representational standing granted to AT&T by the amended statute is not a substantive change in the law,” today’s opinion says. The revised statute is procedural, not substantive. “Because the statute is procedural and does not alter or create any rights or obligations, the amendment properly may be applied retrospectively.”

“Thus, AT&T has statutorily granted representational standing to recover wrongfully paid sums on behalf of and for the benefit of its customers. To the extent, therefore, that the Court of Appeals held that AT&T lacked standing to file a claim on behalf of its customers for any taxes for periods before May 5, 2009, the Court of Appeals judgment is erroneous and must be reversed.”

Attorneys for Appellant (New Cingular): Bryan Vroom, Margaret Wilson

Attorneys Appellee (Dept. of Revenue): Christopher Carr, Attorney General, William Banks, Dep. A.G., Alex Sponseller, Sr. Asst. A.G., John Forbes, Asst. A.G.

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

- * James Angelo Hampton (Chatham Co.) **HAMPTON V. THE STATE (S20A0482)**
- * Antione Hood (DeKalb Co.) **HOOD V. THE STATE (S20A0343)**
- * Monique E. Sullivan (Richmond Co.) **SULLIVAN V. THE STATE (S20A0309)**
- * Vashon Londell Walker (Muscogee Co.) **WALKER V. THE STATE (S20A0170)**

IN LAWYER DISCIPLINARY MATTERS, the Georgia Supreme Court has accepted a petition for voluntary discipline and ordered the **6-month suspension** of attorney:

- * Howard L. Sosnik **IN THE MATTER OF: HOWARD L. SOSNIK (S20Y1078)**