



## Supreme Court of Georgia

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## CASES DUE FOR ORAL ARGUMENT Summaries of Facts and Issues

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**Thursday, May 21, 2020**

### **10:00 A.M. Session**

#### **GEER V. PHOEBE PUTNEY HEALTH SYSTEM, INC. (S19G1265)**

A man is appealing rulings by the Georgia Court of Appeals and **Dougherty County** Superior Court denying his motion to strike a hospital authority's claim that it is entitled to get back its legal expenses in an open records lawsuit he filed against the hospital authority.

**FACTS:** **Claude Wilson Geer, IV**, is a certified public accountant who alleges in an affidavit that the costs of healthcare in the Albany market are consistently higher than other cities in Georgia. He claims that for years he has expressed "concerns about the quality of healthcare at **Phoebe Putney**" Memorial Hospital. He cited a study in his affidavit which ranks Phoebe Putney as one of the "25 worst hospitals in the United States." Geer has complained that the salaries and benefits provided to hospital administrators are extravagant and that tax forms from 2016 show that the Chief Executive Officer received more than \$2 million in salary and "additional compensation" in a county with a per capita income of only \$19,210. Geer alleges

that the Phoebe Putney Health System has transferred “hundreds of millions of dollars” to Phoebe Putney Memorial Hospital without any accounting to the public.

In February 2018, Geer sued Phoebe Putney under Georgia’s Open Records Act (Georgia Code § 50-18-70 et seq., i.e. and the sections that follow) to compel Phoebe Putney to release all the minutes from Phoebe Putney’s board meetings from January 2008 through December 2017. Phoebe Putney answered the complaint, asserting multiple defenses. It also included a counterclaim for attorneys’ fees under Georgia Code § 50-18-73 (b), which allows for an award of attorneys’ fees in any lawsuit brought under the Georgia Open Records Act “in which the court determines that either party acted without substantial justification either in not complying with this chapter or in instituting the litigation.” Geer then filed a motion to strike Phoebe Putney’s counterclaim as a violation of Georgia’s anti-SLAPP statute, Georgia Code § 9-11-11.1. (SLAPP stands for “Strategic Lawsuit Against Public Participation.”) Geer alleged that Phoebe Putney’s counterclaim against him was an effort to chill his right to petition the government and his right of free speech. Following a hearing, the trial court denied Geer’s motion to strike the counterclaim after concluding that Geer did not make the case that the anti-SLAPP statute applied to the counterclaim. Geer appealed to the Court of Appeals, the state’s intermediate appellate court. But that court upheld the trial court’s decision, ruling that the anti-SLAPP statute did not apply to Phoebe Putney’s counterclaim. In a pre-trial appeal, Geer now appeals to the Georgia Supreme Court.

**ARGUMENTS:** Geer’s attorney argues that “the ‘order on motion to strike counterclaim’ must be reversed, with instructions to enter an order striking Phoebe Putney Health System’s counterclaim and awarding Mr. Geer ‘attorneys’ fees and expenses of litigation related to this action,’ including costs and attorneys’ fees incurred on appeal.” Both the trial court and the Court of Appeals “clearly misapplied Georgia Code § 9-11-11.1 in concluding ‘the anti-SLAPP statute does not apply to Phoebe Putney’s counterclaim.’” The statute specifically says: “The General assembly of Georgia finds and declares that it is in the public interest to encourage participation by the citizens of Georgia in matters of public significance and public interest through the exercise of their constitutional rights of petition and freedom of speech,” and that the exercise of those rights “should not be chilled through abuse of the judicial process.” The trial court erred in concluding that Geer had failed to make a showing that the anti-SLAPP statute applies to the counterclaim for attorneys’ fees, “as Mr. Geer’s Open Records request is clearly within the category of claims to which the anti-SLAPP statute applies,” the attorney argues in briefs. “Phoebe Putney Health System’s counterclaim is a classic case of a well-financed entity attempting to deter someone from exercising a right specifically granted to the citizens of this state. PPHS, in asserting a counterclaim which has no merit, seeks to evade the law’s express requirements and to delay and, if possible, avoid its obligations to comply with the Open Records Act. PPHS further seeks to intimidate Mr. Geer by invoking a claim for ‘reasonable attorneys’ fees and other litigation costs reasonably incurred,’ even though there is no scenario whereby a court could conclude this action was initiated ‘without substantial justification’ in view of PPHS’s intimate relationship with Phoebe Putney,” Geer’s attorney argues.

Attorneys for Phoebe Putney argue that the Court of Appeals “correctly decided that the anti-SLAPP statute does not prohibit Appellee (i.e. Phoebe Putney) from invoking the provisions by counterclaim of § 50-18-73 (b) such that fees and expenses can be awarded if the trial court

finds upon review of the entire record that Appellant (i.e. Geer) acted without substantial justification in bringing his petition to compel compliance with the Georgia Open Records Act.” “Despite the Georgia Legislature expressly having provided a **statutory framework for either party** to obtain attorneys’ fees in a Georgia Open Records Act enforcement action, Appellant contends that any such claim violates the anti-SLAPP statute,” the attorneys argue in briefs. “The anti-SLAPP statute unequivocally states that it is not intended to ‘affect’ or ‘preclude’ other statutory rights of recovery.” “Having vested the trial court with the authority to view the entire record and determine the propriety for awarding fees for one side or the other, the Georgia Legislature quite clearly did not deem such a claim for attorneys’ fees against a petitioner to be antithetical to the anti-SLAPP statute.” As the Court of Appeals said in its opinion, “the anti-SLAPP statute was not intended to immunize parties from the consequences of abusive litigation...and it plainly does not extend to protecting those who abuse the judicial process.” The Supreme Court should uphold the Court of Appeals ruling, Phoebe Putney’s attorneys argue.

**Attorney for Appellant (Geer):** Kermit Dorough, Jr.  
**Attorneys for Appellee (Phoebe Putney):** Charles Wainright, II, F. Faison Middleton, IV, Louis Hatcher, Maggie McMichael

#### **NORMAN ET AL. V. XYTEX CORPORATION ET AL. (S19G1486)**

A couple is appealing a Georgia Court of Appeals ruling that upheld a **Fulton County** judge’s dismissal of all but one of 13 causes of action they asserted in their lawsuit against a sperm bank. At issue in this case is whether Georgia recognizes fraud, negligence, and other damages claims against a sperm bank for misrepresentations about a donor when the child born with the donor’s sperm inherits his serious medical and psychological problems.

**FACTS: Wendy Norman** was artificially inseminated with sperm she and her partner, **Janet Norman**, purchased from **Xytex Corporation**. In 2002, Wendy gave birth to a son, “A.A.” As A.A. grew up (he is now 17 years old), the Normans discovered he had an inherited blood disorder and a number of emotional and mental health disorders, including suicidal and homicidal ideations that have required multiple periods of extended hospitalizations. A.A. regularly sees a therapist for his anger and depression, and takes ADHD, anti-depressant, and anti-psychotic medications. In November 2017, the Normans sued Xytex Corporation, Xytex Cryo International, Dr. J. Todd Spradlin, medical director at the Atlanta location, and Mary Hartley, an employee, alleging they had misrepresented Xytex’s process for reviewing and screening donors, and falsely represented the medical and educational history of their donor. They sought damages for fraud, negligent misrepresentation, battery, negligence, unfair business practices, false advertising, unjust enrichment, and other wrongdoing. They also sought “specific performance” to require Xytex to release information about the donor.

In their complaint, the Normans alleged that Xytex had procured the sperm with which Wendy was inseminated from Donor # 9623, whom Xytex represented as having a clean mental health history, no criminal background, an IQ of 160, and multiple college degrees. In fact, contrary to Xytex’s representations, Donor # 9623 had been diagnosed with schizophrenia, narcissistic personality disorder, a drug-induced psychotic disorder, and significant grandiose delusions. The donor had been repeatedly hospitalized for mental health problems, arrested for burglary and other crimes, and spent eight months in custody for a residential burglary. He had no college degree at the time Xytex sold his sperm to the Normans.

In response to the Normans's lawsuit, Xytex filed a motion to dismiss the suit, arguing that it alleged claims for "wrongful birth," which is not a legally recognized claim in Georgia. The trial court granted Xytex's motion to dismiss all counts in the Normans' complaint except for the "specific performance" count, finding that the complaint amounted to an impermissible claim for wrongful birth. The Normans appealed to the Court of Appeals, the state's intermediate appellate court, but that court upheld the trial court's decision, ruling that the Normans were asserting claims for wrongful birth, which are not recognized under the Georgia Supreme Court's 1990 decision in *Atlanta Obstetrics & Gynecology Group v. Abelson*. The Court of Appeals quoted *Abelson* in its decision, stating that an "action for 'wrongful birth is brought by the parents of an impaired child and alleges basically that, but for the treatment or advice provided by the defendant, the parents would have aborted the fetus, thereby preventing the birth of the child.'" The Court of Appeals explained that the principle that wrongful birth claims are impermissible applies even when the plaintiff attempts to characterize such a claim as some other action. "All of the Appellants' (i.e. Normans') claims directly relate to the fact that, had they known the health, educational, and criminal history of Donor # 9623, they would not have purchased his sperm from the Appellees (i.e. Xytex). And, as the Supreme Court stated in *Abelson*, "we are unwilling to say that life, even life with severe impairments, may ever amount to a legal injury," the Court of Appeals concluded. "This is a task best addressed by the Georgia General Assembly." The Normans now appeal to the Georgia Supreme Court.

**ARGUMENTS:** Attorneys for the Normans argue that the Court of Appeals erred in applying *Abelson* to all the causes of action in their complaint. They contend the Court of Appeals misconstrued their complaint because they are not asserting a claim for wrongful birth. Instead, their claim is for *pre-conception* conduct and is a proper claim under the Georgia Supreme Court's 1984 decision in *Fulton-DeKalb Hospital Authority v. Graves*. The Normans' attorneys argue that *Abelson* and the cases that followed it are based on a doctor's failure to diagnose a pre-existing disease or medical condition during pregnancy but they do not involve pre-conception conduct. Attorneys for the Normans argue the Supreme Court should clarify whether Georgia law should recognize that sperm banks, which are in the business of recruiting and screening donors and promoting and selling semen, have a pre-conception duty of care to avoid injury to the prospective parents and unconceived child. The Normans' attorneys also argue that the issue with damages in *Abelson* – that it is impossible to balance the value of a life with an incurable impairment against value of nonexistence – is not present here because the alternative for the Normans was to conceive a child with sperm from a healthy donor and that other courts have recognized this distinction. Finally, the Normans argue that the Court of Appeals has created such broad immunity for sperm banks that any harm Xytex may have caused is not subject to a lawsuit. Courts should not usurp the legislature's power to establish immunity, the attorneys argue.

A group of more than 30 law professors filed an amicus brief in which they argue that this case does not have the causation and damages issues that led the Supreme Court to reject wrongful birth claims in its *Abelson* decision. They also contend that rejection of the Normans' claims unfairly immunizes Xytex from legal responsibility for causing harm through its false representations. The law professors argue that exposing sperm banks to liability is the most effective way to reduce the risk of harms that result from inaccurate information about donor sperm and thus will benefit patients. They contend that although many questions about the

regulation of reproductive technologies await legislative action, the wrongs alleged here demand a judicial remedy and are the type of wrongs that are neither so complex nor so political that their resolution would be better suited to the legislative branch.

Attorneys for Xytex argue that the Court of Appeals correctly determined that the Normans' claims are impermissible wrongful birth claims under *Abelson* because their complaint alleged that if they had known the true facts, they would not have purchased Donor # 9623's sperm and would have avoided the birth of their child. The appellate court's decision is consistent with other courts that have dismissed identical claims against it. "The Normans mischaracterize the allegations in the complaint in hopes that alternate nomenclature will obscure the true nature of their claims: wrongful birth," the attorneys argue in briefs. The Normans' attempt to distinguish pre-conception cases is flawed because avoiding exposure to the sperm of Donor # 9623 would not mean that A.A. would be healthier; it means he would not exist. Here, the Normans are asking this Court to overturn long-standing authority and usurp the legislature's role. This Court held in *Abelson* that wrongful life claims implicitly and wrongful birth claims explicitly "shall not be recognized in Georgia absent a clear mandate for such recognition by the legislature." Affirming the Court of Appeals does not create any immunity for an industry already regulated by the state and federal governments Zytex's attorneys argue. This Court should affirm the Court of Appeals decision "because it correctly applied *Abelson* to the Normans' claims."

**Attorneys for Appellants (Normans):** James McDonough, III, Nancy Hersh, Kate Hersh-Boyle, David Newdorf

**Attorneys for Appellees (Xytex):** Thomas Lavender, III, Alison Currie, Andrew King