Supreme Court of Georgia
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SUMMARIES OF OPINIONS

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BURTON ET AL. V. GLYNN COUNTY, GEORGIA ET AL. (S15A0082)
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BURTON ET AL. V. GLYNN COUNTY, GEORGIA ET AL. (S15X0627)

The Supreme Court of Georgia has ruled against a man and woman who have been renting out their St. Simon's oceanfront home for weddings and social events.

With today's unanimous opinion, written by **Justice Carol Hunstein**, the high court has upheld a **Glynn County** court ruling that the use of their home as a commercial event venue is in violation of the county's zoning ordinance.

According to briefs filed in the case, in 1999, Lee R. and Thomas "Jeff" Burton purchased a home in the upscale East Beach neighborhood of St. Simon's Island. The Burtons, who lived in Atlanta, used the home as a vacation home once or twice a year, renting it out the rest of the year. In 2006, the Burtons demolished the house and built a new larger one on their two and a half lot parcel. The current house, known as "Villa de Sueños," has eight bedrooms and eight bathrooms in two buildings, plus a pool, spa, large patio and carport. In the summer of 2008, after the couple had divorced, Lee moved into the house full-time. However, financial troubles made it impossible for her to remain there and eventually, she moved out and offered the property as a vacation rental. At the rental company's suggestion, she and her ex-husband instituted a $2,000 "event fee" for any renters planning to hold a wedding or other large party at Villa de Sueños during their stay. In 2010, the first full year the property was rented, at least 21 weddings or large events were held there. By 2013, there had been at least 79 events since the Burtons had started offering the property for short-term rentals.

In 2010, neighbors began complaining of loud music, heavy traffic congestion, and inebriated party guests. In February 2013, the Glynn County attorney mailed a cease and desist letter to the Burtons, demanding they immediately cease the "unauthorized and impermissible use" of their property. Under section 701.2 of the county zoning ordinance, the permitted uses of property in their zoning district include a "one-family dwelling," and "accessory uses," which are "clearly incidental and subordinate to the principal use or structure." In April 2013, the Burtons sued the County, asking the court to declare their use of the property in compliance with the zoning ordinance. In response, the County countersued, asking the court for a "declaratory judgment" and "injunctive relief," asking the court to declare the use of the Burtons' property in violation of Section 701.2 and to order them to stop using their property as a commercial event venue.

In December 2013, the trial court ruled that a property owner in the zoning district where the Burtons' property was had the "right to host parties and weddings attended by large numbers of family and friends…even though doing so may – and often does – involve noise and traffic disruptions to neighbors." The court went on to say, however, that there can be "too much of a good thing" and that the Burtons' "permissible accessory use of their property to host a wedding or social event has become the primary use of their property, and the magnitude, frequency, and cumulative impact thereof has moved beyond that expected of or customary for a one family dwelling." Therefore, the trial court ruled, the Burtons' use of their property violated the zoning ordinance. The Burtons appealed to the state Supreme Court, and in a "cross-appeal," the County asked the court to clarify what kind of relief it was granting. While the appeal and cross-appeal were pending, the County filed a motion for contempt, arguing that despite the trial court's order, the Burtons were continuing the improper use of their property. The trial court denied the County's motion for contempt. The County then appealed that ruling to the Supreme Court, and the Burtons cross-appealed.

In today's opinion, "we conclude, as the trial court did, that the Burtons' use of their property violated the Glynn County Zoning Ordinance. The frequency of the events and the apparently systematic manner in which the property has been marketed and utilized for large-scale gatherings support the conclusion that the property's use as an event venue has, as the trial court found, 'moved beyond that expected or customary for a one-family dwelling.'"

"In sum, the evidence amply supports the conclusion that the hosting of the events at Villa de Suenos, which is undeniably permissible on an occasional basis as an incidental, accessory use of a one-family dwelling, has become 'sufficiently voluminous and mechanized,' so as to fall outside the scope of permissible uses under Section 701.2 of the Glynn County Zoning Ordinance," the opinion says.

However, the high court has vacated the trial court's denial of the motion for contempt. Under the laws governing court procedure, because the trial court's December 2013 order was a declaratory judgment, as opposed to an injunction, once a notice of appeal was filed, the trial court lacked authority to enforce its ruling while the appeal was pending. As a result, "the trial court lacked jurisdiction to entertain the motion for contempt during the pendency of the appeal," the opinion says. Therefore, "we vacate the August 12, 2014 order to the extent it denied the motion for contempt rather than dismissing the motion for lack of jurisdiction or holding it in abeyance pending disposition of the appeal."

In its cross-appeal, the County argued the trial court erred in only granting declaratory relief – by merely stating the rights of the parties under the law – as opposed to granting injunctive relief – by ordering the Burtons to do something or refrain from doing something. However, "we now also affirm the trial court's exercise of discretion not to award an injunction," the opinion says. "A trial court's decision to grant or deny a request for an injunction must be affirmed absent an abuse of discretion. We find no abuse of discretion here."
Attorneys for the Burtons: Jason Tate, James Roberts, IV, Lacey Houghton
Attorneys for the County: G. Todd Carter, Bradley Watkins, Emily Hancock

WELDON V. THE STATE (S14G1721)

The Supreme Court of Georgia has upheld a Georgia Court of Appeals decision rejecting a man's claim that he was denied a fair trial in **Gwinnett County** because the judge made him wear an electronic shock device to prevent him from escaping.

According to the evidence at trial, between March 5 and March 26, 2007, Brian Eugene Weldon held up five Chinese restaurants and one store, where he robbed at gunpoint a number of Chinese employees. In all the robberies, Weldon was accompanied by at least one other man, and in the first robbery, by two others. The victims of each robbery identified Weldon either in photographic lineups or at trial as one of their assailants. At trial, the State introduced "similar transaction evidence" of three other armed robberies during the same month of Chinese restaurants in **DeKalb County** involving co-defendants, one of whom pleaded guilty and testified he had robbed one of the restaurants with Weldon.

On the first day of Weldon's trial, prior to the jury coming in, the judge addressed Weldon, telling him, "not only at previous hearings but also today, I see you looking around a lot." The judge said he'd observed Weldon looking at the door and noted that Weldon faced a significant risk of a life prison sentence for any one of the 12 counts of armed robbery against him, plus a possible 40-year sentence from DeKalb County. As a result, the judge said, "the court finds that it is necessary in order to conduct a safe and orderly trial in this matter without you making a go for the door, which it appears to me that you may be considering based on your looking to the door more than you look up here, that I am going to have you with an electronic belt on…." The judge told Weldon the device would not be visible to jurors and he could move around the courtroom without activating it. Initially Weldon refused to wear the device, but when the judge told him he would proceed with the trial without Weldon being present, Weldon agreed. Prior to placing the BAND-IT brand shock sleeve on his arm, a courtroom deputy read Weldon a notification form that explained the system contained 50,000 volts of electricity, and if activated, the device would immobilize him, cause him to fall to the ground and could cause him to defecate or urinate on himself. The form clearly stated: "This apparatus will NOT be activated for simply consulting with legal counsel." The deputy also told him that once the deputy pressed the button on the transmitter, the device would emit a one-second high-pitched beep before the shock, which could be prevented by releasing the button if the wearer complied with the deputy's demands.

At the conclusion of his trial, Weldon was convicted of 12 counts of armed robbery, aggravated assault and giving a false name to a law enforcement officer. He appealed to the Georgia Court of Appeals, arguing that the trial court violated his constitutional right to a fair trial by ordering him to wear the electronic shock device. But the appellate court upheld the trial

court's ruling. Weldon then appealed to the state Supreme Court, which agreed to review the case.

"As this Court has stated," **Presiding Justice P. Harris Hines** writes in today's opinion, "'Although it is well settled that a defendant is entitled to a trial free of partiality which the presence of excessive security measures may create, it is also as well established that the use of extraordinary security measures to prevent dangerous or disruptive behavior which threatens the conduct of a fair and safe trial is within the discretion of the trial court. We have previously held that utilization of a remedial electronic security measure shielded from the jury's view is permissible where the defendant fails to show that he was harmed by its use.'"

In Weldon's case, "there is no evidence that the shock sleeve was apparent to the jury, and Weldon fails to show that he suffered any harm arising from adverse jury partiality created by the shock sleeve, or that the court abused its discretion in finding a necessity for it to be worn."

Although at a hearing on his request for a new trial, Weldon's attorney argued that his fear of being accidentally shocked interfered with his ability to focus on the trial, "at no time during the course of the trial did Weldon claim the shock sleeve was causing him any such inability," the opinion says. Under court rules, Weldon may not raise the issue for the first time on appeal and he therefore "waives appellate review of any alleged impropriety."

In a concurrence, **Justice David Nahmias** agrees with the opinion but writes to emphasize that, "Before a trial court requires a criminal defendant to wear an electronic shock device as a security measure in the courtroom, the court must: (1) explain why such an extraordinary security measure is needed to protect the safety and decorum of the proceeding and those participating in it; (2) consider alternative ways to address that need; (3) ensure that the defendant is aware of the operation of the device and, in particular, what conduct by him may lead to a shock; and (4) provide an opportunity for the defendant to address these matters and present any other concerns about use of the shock device." Here, "the trial court sufficiently addressed these matters and articulated reasons supporting its ultimate exercise of discretion to require Weldon to wear a concealed shock device during his trial."

In addition, Justice Nahmias writes that while some of this Court's previous decisions might be read to suggest that a trial judge can defer to the sheriff in security matters, "the court may properly take into account, but may not defer entirely to, the views of the law enforcement personnel who are responsible for securing the courtroom but are not responsible for securing the defendant's constitutional rights." "Second, in considering alternative measures, the court and the parties should recognize that certain security measures may have different potential effects on different rights of the defendant." For instance, "the use of a concealed shock device poses less risk that the jury will prejudicially perceive the defendant as dangerous, when compared to the use of more visible security measures like guards or shackles – but the shock device may pose a greater risk to the defendant's ability to consult with counsel and to focus on the proceeding." Finally, the concurrence says, "the test this Court once applied to a claim regarding use of shock device – whether it was 'so inherently prejudicial as to pose an unacceptable threat to [the defendant's] right to a fair trial,' is properly applied only to determine whether *conspicuous* security measures, like an allegedly excessive number of guards, affected the defendant's Sixth Amendment right to a fair trial….Use of a properly concealed shock device will never meet that test – but the analysis should not end there if the defendant claims that the

shock device also violated his Sixth Amendment right to counsel or his due-process-based right to be present at trial."
Attorney for Appellant (Weldon): G. Richard Stepp
Attorneys for Appellee (State): Daniel Porter, District Attorney, Christopher Quinn, Asst. D.A., Tom Williams, Asst. D.A

DUBOIS ET AL. V. BRANTLEY ET AL. (S14G1192)

The Supreme Court of Georgia has unanimously reversed a Georgia Court of Appeals ruling in a **Glynn County** medical malpractice lawsuit brought by a man whose pancreas was pierced during a simple hernia repair.

In today's ruling, written by **Justice Keith Blackwell**, the high court has agreed with a Glynn County State Court judge that the man's medical expert witness is legally qualified to offer his opinion that the man's surgeon was negligent when the case goes to trial.

At issue in this case is what type of experience is required of a practicing surgeon who is offered as an expert witness in a medical malpractice case.

According to the facts, in January 2012, David Dubois and his wife sued Damon Brantley, M.D., a general surgeon, and Glynn-Brunswick Memorial Hospital for medical malpractice. In their complaint, they alleged that on March 31, 2011, Brantley negligently injured Dubois' pancreas while performing a laparoscopic umbilical hernia repair. (Laparoscopic surgery is less invasive than general surgery.) They claimed the surgeon punctured Dubois' pancreas when he inserted a sharp tube-like instrument called a "trocar" that is used to facilitate the procedure. The injury was undetected until the next day when Dubois started running a fever and went to the emergency room. He was eventually transferred to the Southeast Health System in Brunswick, where he was diagnosed with pancreatitis, complicated by respiratory failure, acute renal failure and sepsis. He subsequently spent several days in a coma and was hospitalized in intensive care for almost a month. Dubois claimed he underwent 11 surgical procedures, was in an out of hospitals, was out of work for six months, and incurred more than $480,000 in medical bills. Attached to Dubois' complaint was an affidavit by Dr. Steven E. Swartz, a general surgeon in Richmond, VA who uses trocars to perform a variety of abdominal laparoscopic procedures. Swartz stated in the affidavit that Brantley had deviated from the applicable standard of care by negligently puncturing Dubois' pancreas, resulting in pancreatitis and other illnesses.

Georgia Code § 24-7-702 (c) (2) (A) states that in a medical malpractice case, the opinion of an expert is admissible only if the expert "had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in: (A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure…which is alleged to have been performed or rendered negligently."

During deposition, Swartz testified that he had performed "maybe one" laparoscopic umbilical hernia repair in the five-year period before Dubois' procedure, and possibly none. However, he also testified that he does "lots and lots of laparoscopy for other things and I do umbilical hernia repairs and I'm intimately familiar with the techniques for laparoscopic umbilical hernia repair." Based on his testimony, Brantley and Southeast Health System filed a motion asking the court to dismiss the lawsuit, or at the very least, issue a "summary" judgment

in their favor. (A judge issues a summary judgment upon deciding a jury trial is unnecessary because the facts of the case are not disputed and the law falls squarely on the side of one of the parties.) The trial court denied the motion, but on appeal, the Court of Appeals reversed the decision, ruling in Brantley's favor. The appellate court ruled that Swartz was not qualified to testify as an expert under Rule 702 (c) (2) (A) of the Georgia statute, because he had not performed more than one laparoscopic procedure to repair an umbilical hernia in the last five years, even though he had performed many other abdominal laparoscopic procedures during that time. In this pre-trial appeal, Dubois then appealed to the state Supreme Court, which agreed to review the case to determine whether the Court of Appeals understood Rule 702 (c) (2) (A) correctly.

In today's 27-page opinion, "we now conclude that it did not."

According to Brantley and Southeast Georgia Health, the provisions of Rule 702 (c) (2) (A) and (B) require that an expert testifying on the standard of medical care regarding a particular surgical procedure must have actually performed or taught the same surgical procedure in three of the past five years. But a careful reading of the statute shows it does "not require that an expert actually have performed or taught the very procedure at issue," the opinion says. Rather, "the pertinent question is whether an expert has 'an appropriate level of knowledge…in performing the procedure…[or] teaching others how to perform the procedure,' not whether the expert himself has actually performed or taught it. If the General Assembly had meant to require absolutely that the expert actually have performed or taught the procedure in question, it presumably would have said so."

"Considering the 'appropriate level of knowledge' requirement in context, it must mean, we conclude, knowledge suitable or fitting for the rendering of the particular opinions to which the expert proposes to testify."

In his complaint, Dubois contended that Brantley was negligent with regard to the insertion of the primary trocar. While Swartz has given up performing umbilical hernia repairs laparoscopically, "the record shows that he still regularly performs numerous other laparoscopic procedures in the abdominal cavity, and as a part of these other procedures, Dr. Swartz regularly inserts primary trocars like the one used by Dr. Brantley in this case."

Therefore, "it cannot be said that the trial court abused its discretion when it found that Dr. Swartz had an 'appropriate level of knowledge…in performing the procedure' to offer his opinion that Brantley was negligent when he inserted the primary trocar," the opinion says. "The Court of Appeals erred when it concluded otherwise, and we reverse its judgment."

Attorney for Appellants (Dubois): Brent Savage, Kathryn Pinckney
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