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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Under a ruling today by the Supreme Court of Georgia, the Metro Atlanta Task Force for the Homeless, Inc. has won the right to have a jury decide whether the foreclosure sale of its homeless shelter in downtown Atlanta was illegal.

A number of people and organizations have tried to get the Task Force evicted from the building at the corner of Pine and Peachtree streets on the grounds that the Task Force has failed to make payments on the property and is merely "warehousing" homeless people. Among numerous claims brought by the Task Force against numerous defendants, the claim of wrongful foreclosure is one of several that are key to the Task Force's case.

In today's unanimous decision, written by **Justice Robert Benham**, while the Task Force has won some of its claims, it has lost others in a complex and contentious case that has been tied up in litigation for years.

At issue in this appeal are two earlier orders by the **Fulton County** Superior Court: one that lifted a stay and allowed eviction proceedings against the Task Force to begin, and the other which stated that the majority of the remaining issues raised by the Task Force should be decided by a jury, including whether the foreclosure sale was unlawful and whether the evidence shows a conspiracy against the Task Force and improper interference in its relationships with various public and private funding sources.

Since the time this appeal was filed in the state Supreme Court, attorneys for the Task Force have won a "plea in abatement" – essentially another stay – that prohibits any attempt to evict the Task Force from the property until the litigation is complete. The Georgia Court of Appeals recently upheld that ruling.

In today's opinion, the high court therefore dismisses as "moot" the appeal of the trial court's order allowing eviction proceedings to begin. As to the other order, "we affirm in part and reverse in part," the opinion says.

According to the facts of the case, the Metro Atlanta Task Force for the Homeless owned the property in downtown Atlanta free of debt from 1997 until 2001, when it took out $900,000 in loans with two original lenders – the Institute for Community Economics ("ICE) and the McAuley Institute, which later transferred its promissory note and security deed to Mercy Housing, Inc. As of January 2010, the Task Force was in default with its lenders, so Ichthus Community Trust purchased the outstanding notes from the lenders for $781,112.84. Ichthus borrowed money from Premium Funding Solutions, LLC, to buy the notes. In May 2010, Ichthus foreclosed on the property and sold it on the courthouse steps. As the sole bidder, Ichthus then purchased the property, with the record showing it paid what it had paid for the notes and possibly as high as $900,000. The same month, Ichthus sued the Task Force in superior court, seeking a temporary and permanent injunction, essentially to gain access to the Peachtree-Pine property. Ichthus alleged the Task Force was denying it access, and it needed to conduct an inspection. At the same time, Ichthus filed a "dispossessory" action in magistrate court, which is what a landlord does to request that the court return possession of the property to the landlord and award any unpaid rent that is still owed.

In response, the Task Force countersued Ichthus, claiming wrongful foreclosure and seeking title to the Peachtree-Pine property. In addition, the Task Force countersued Ichthus for violations of Georgia's racketeering statute (RICO); interference with business and contractual relations; libel, slander and defamation; bad faith; and punitive damages. In June 2010, the Task Force filed a separate lawsuit against Central Atlanta Progress, Atlanta Downtown Improvement District, Benevolent Community Investing Co., LLC, Premium Funding Solutions, LLC, and Emanual Fialkow, making the same claims it had made against Ichthus. (Fialkow had offered to buy the property in 2009 for $2.1 million, after the Task Force placed a listing.) The Task Force alleged that these defendants were in a conspiracy to prevent the Task Force from paying on the notes by interfering in its relationship with public and private funding sources. On June 17, 2010, the trial court entered a consent order approved by the parties which permitted the Task Force to continue its occupancy of the property, tabled the issue of possible rent payments, and stayed the dispossessory action previously filed by Ichthus. In 2011, while the various legal actions were pending, Ichthus defaulted on its loan obligation with Premium Funding Solutions and in February 2011, Ichthus executed a warranty deed and transferred the property to Premium

Funding Solutions. Premium Funding Solutions subsequently asked the court's permission to file a dispossessory action to evict the Task Force.

The defendants filed motions asking the trial court to grant them "summary judgment," which a judge does upon deciding that a jury trial is unnecessary because the facts are undisputed and the law falls squarely on one side or the other. The trial court appointed a "special master" to hear that set of arguments. (A "special master" is a disinterested person – usually a lawyer – appointed to a case to assist the judge in a case by holding hearings and making recommendations.) In January 2014, following a hearing, the special master concluded that the Task Force had some viable claims that a jury should decide, including its claims for wrongful foreclosure, quiet title, intentional interference, bad faith and punitive damages. The defendants filed their objections to the special master's order, the trial judge conducted another hearing, and on Aug. 8, 2014, the judge adopted the special master's order, paving the way for a jury trial. In addition, the judge lifted the stay and granted Premium Funding Solutions' request to begin eviction proceedings against the Task Force.

On appeal, the Task Force argued that the trial court erred in determining Premium Funding Solutions could file a dispossessory action while the main case was still pending and that the trial court was wrong to terminate the stay. But in today's opinion, "we conclude that the instant allegation of error is moot inasmuch as the Task Force has successfully obtained a remedy at law for the dispossessory action filed by Premium Funding Solutions." The remainder of the 40-page opinion is devoted to addressing one by one the Task Force's other claims.

Among them, the Task Force alleged a conspiracy in which the defendants worked toward a common goal of permanently depriving the Task Force of the downtown property. In briefs, the Task Force's attorneys argued that "since late 2006, a group of powerful business entities have conspired to drive the Task Force from the property by systematically destroying its donor and lender relationships, using its weakened position to acquire notes secured by the property, wrongfully foreclosing and evicting the Task Force." In the briefs, the attorneys referred to different people as "conspirators" or in the case of the then-president of Emory Healthcare, "a member of the conspiracy." The defendants, particularly Fialkow, argued there was no such conspiracy or wrongdoing against the Task Force.

In today's opinion, the high court has concluded that there "is evidence, however, that Fialkow may have been part of a concerted action with a common design insofar as his role in acquiring the notes on the property through defendant Ichthus." Because disputed issues remain, "and because civil conspiracy claims may be properly resolved by a jury, the special master and trial court did not err in denying summary judgment to Fialkow and the other defendants on the civil conspiracy claim."

The Task Force also alleged that Dan Cathy, President of Chick-fil-A, Inc., quit giving charitable contributions to the shelter due to the defendants' interference in the Task Force's relationships with donors. The trial court ruled the claim needed to go to a jury, and not be decided by summary judgment. In today's opinion, however, the high court disagrees, finding that a charitable donation to the Task Force "is more akin to a gift than it is akin to a traditional business relationship."

"Unlike a traditional business relationship where the parties have some agreement or contract that is mutually beneficial and where there is some consequence for non-compliance with said agreement or contract, a charitable donor has no obligation to bestow a gift…," the

opinion says. The trial court therefore was wrong in denying summary judgment in favor of the defendants on this claim, the opinion says, and the high court has reversed the lower court's ruling.

The trial court also was wrong to deny summary judgment in favor of defendants on the issue of title to the property. The Task Force lost all title in 2010 when Ichthus foreclosed on the property, and therefore it has no standing to sue for title.

However, the high court has upheld the trial court's decision denying summary judgment on the Task Force's claim that the defendants interfered in its business relationships with the original lenders, Mercy Housing and ICE. The evidence suggests, the opinion says, "that defendants may have been improperly interfering with the relationships between the Task Force and the lenders by making misleading statements about the Task Force in order to persuade the lenders to sever their relationship with the Task Force, either through foreclosure or sale of the notes." As a result, "We find no reason to upset the decision to deny summary judgment regarding this claim." And it has ruled that a jury must also decide whether the defendants interfered with the Task Force's ability to obtain public funding from the Georgia Department of Community Affairs. The Task Force alleges the defendants made misrepresentations about the Task Force to the Atlanta Mayor's staff, who in turn wrote letters to the state department recommending the Task Force not be funded. The record shows that at least one of the letters echoed sentiments attributed to the defendants that the Task Force was merely "warehousing" the homeless and not providing them with any services.

Finally, the high court has ruled in favor of the Task Force on its claim of wrongful foreclosure. A year before Ichthus paid possibly up to $900,000 for the property, Fialkow had offered to buy it for $2.1 million, and he admitted it was worth at least three times what Ichthus had paid at the foreclosure sale. A real estate broker stated in deposition that the property was worth $8.3 million at the time of foreclosure.

This evidence goes "to the heart of whether a breach of duty occurred and whether there was harm to the Task Force," today's opinion says. "These disputes of material fact must be considered and weighed by a jury to determine whether a wrongful foreclosure occurred."
Attorneys for Appellant (Task Force): Steven Hall, Robert Brazier
Attorneys for Appellees (Premium): David Maher (a number of other attorneys represent the additional organizations that are suing or being sued)

IN THE INTEREST OF M.F., A CHILD (S15A0840)

The Supreme Court of Georgia has ruled in favor of a man who claims he is no longer addicted to drugs and therefore should be allowed to regain custody of his 7-year-old daughter.

Under today's unanimous ruling, **Justice Keith Blackwell** writes that a **Douglas County** juvenile judge erred in dismissing Steven Frank's petition to regain custody of his child from a couple the court had appointed as permanent guardians who have now cared for her since she was 19 months old.

According to the facts of the case, in February 2010, at the recommendation of the Department of Family and Children Services, the Douglas County juvenile court ruled that M.F. was a deprived child. The juvenile court placed the toddler with Candace and Gerald Rausch, who were not related to M.F. but had raised her mother following the divorce of the girl's parents. M.F.'s mother and father, Steven Frank, were not married. According to the Rausches'

attorney, after M.F.'s natural parents failed to overcome their substance abuse and failed to comply with the reunification case plan, the child welfare agency filed a Petition for Permanent Guardianship, asking that the Rausches be appointed M.F.'s "permanent guardians," which the juvenile judge did in January 2012. The judge found that it was not in M.F.'s best interest to terminate the parents' rights and recommended visitation rights for Frank "to support the child's strong bond to him." The judge pointed out in the guardianship order that M.F.'s mother and father "are young, intelligent and able to stabilize their lives provided they engage in long-term substance abuse treatment and recovery." Frank was awarded visitation rights with his mother serving as supervisor. Frank did not appeal the guardianship order.

In June 2013, the Rausches filed a Motion for Contempt against Frank, alleging the father had not been compliant with the court's order mandating that his visitation with M.F. be supervised. The judge subsequently held Frank in contempt and rejected Frank's counterclaim asking the court to modify the guardianship order. The court found that he had illegally exercised unsupervised visitation with the child and exceeded his authority to care for her. The judge also found he'd created an emotionally abusive situation during his visitation exchanges and the judge voiced concern about his continued reliance on the drug Suboxone, which is prescribed to help people recover from addiction to opiates, such as heroin. Frank did not appeal the contempt order or seek to have it set aside, according to briefs filed in the case.

In 2014, Frank filed a Complaint for Custody in **Gwinnett County** Superior Court, which was in the county where the Rausches lived, alleging that the conditions leading to the guardianship had been resolved. Frank argued the evidence showed he had remained drug-free for three years and it was in M.F.'s best interest to be with her natural father. In response, the Rausches filed a motion to dismiss the complaint for custody and a motion to transfer the case. They argued that under Georgia Code § 15-11-244, the permanent guardianship statute, the juvenile court in Douglas County where the guardianship was established retained authority over any change. In April 2014, the Gwinnett County court transferred the case to Douglas County. Following a hearing, in August 2014, the same Douglas juvenile judge dismissed the case. The judge, who also charged Frank $5,000 in attorney's fees, stated that the standard for modifying the arrangement as established in the Georgia Code "is clear and convincing evidence that there has been a material change of circumstances of the child or the guardian and that such modification, vacation or revocation of the order is in the best interests of the child. In reading the petition and subsequent amendments, the court finds the complaint for custody and subsequent amendments do not allege any legal basis outlined by statute for modification, vacation or revocation of the order." Frank then appealed to the Georgia Supreme Court.

In today's opinion, the high court first addresses Frank's claim that the transfer of his petition from Gwinnett County to Douglas County was error. "We disagree," the opinion says.

The permanent guardianship statute clearly states that when a juvenile court enters an order of permanent guardianship, that court "shall retain jurisdiction over a guardianship action…for the sole purpose of entering an order following the filing of a petition to modify, vacate, or revoke the guardianship and appoint a new guardian."

"Accordingly, a superior court has no authority to award permanent custody of a child under a permanent guardianship to anyone other than a guardian, and to secure the permanent custody of such a child, anyone other than a guardian generally must first petition the juvenile

court to modify, vacate, or revoke the guardianship," the opinion says. "For this reason, the transfer of the petition to Douglas County was no error."

However, the juvenile judge's dismissal of Frank's petition on the ground that he failed to state a claim upon which relief could be granted was wrong. The grounds for changing a permanent guardianship order are defined in the statute, which states: "The guardianship shall be modified, vacated, or revoked based upon a finding, by clear and convincing evidence, that there has been a material change in the circumstances of the child …or the guardian and that such modification, vacation, or revocation of the guardianship order and the appointment of a new guardian is in the best interests of the child."

"Although a permanent guardianship indisputably works a limitation of the parental power of a legal parent by vesting that parental power in the guardian, it does not forever terminate the parental rights of a parent," the opinion says. The fact that the statute contemplates modifying a permanent guardianship "signals quite clearly that the statutes do not mean for a permanent guardianship to work a termination of parental rights."

"As we have explained, 'parents have a fundamental liberty interest in the care, custody, and management of their children,' and there can scarcely be 'a more fundamental and fiercely guarded right than the right of a natural parent to [his] offspring,'" today's opinion says. "'The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost [at least] temporary custody of their child to the State.'"

"Given the general presumption of parental custody, one can hardly imagine a change in circumstances more material for such a child than the subsequent reappearance of a parent fit to be charged with her care and custody, thereby rendering the child no longer a 'deprived' or 'dependent' child."

A footnote in the opinion offers hypothetical examples of children placed with permanent guardians after their only parent is rendered comatose from a traumatic accident, or goes missing in action while serving her country. "Now suppose, however, that the comatose parent awakens against all odds, or the missing parent returns unexpectedly," the opinion says. "It would be extraordinary, we think, to conclude that the law denies such a parent any opportunity whatsoever to regain custody of her child."

In this case, Frank's petition alleges that his "material change in circumstances" requires the modification or revocation of the permanent guardianship of M.F. under the law.

"Accordingly, his petition states a claim under OCGA § 15-11-244 upon which relief might properly be granted, so long as the father proves that material change in circumstances clearly and convincingly, and so long as he proves as well that his custody of M.F. is now in her best interest. Whether the father can prove those things is a question for the juvenile court. But the juvenile court erred when it dismissed the petition, and we reverse the judgment of dismissal."

Attorney for Appellant (Frank): Tom Pye
Attorney for Appellees (Rausches): Douglas Fox

ANDERSON ET AL. V. SOUTHERN HOME CARE SERVICES, INC. ET AL.
(S15Q1127)

In an opinion today, the Georgia Supreme Court has ruled that employees of personal care companies who take care of elderly and disabled people in their homes are entitled to Georgia's minimum wage.

According to the facts of the case, Southern Home Care Services, Inc. is a multi-state home health care company and a subsidiary of Res-Care, Inc., that employed Margaret Anderson and a number of others to provide in-home non-medical services to elderly and disabled persons. The services varied according to the individual but included such things as assisting people with bathing, toileting, dressing, walking, and cleaning up after them. Because the employees worked in people's homes, they had to travel during the work day between job sites. They claimed they did not get paid for the hours they were on the road and therefore, earned less than minimum wage. In February 2013, Anderson and the others sued Southern Home Care and Res-Care in **DeKalb County** Superior Court to recover unpaid overtime and minimum wages. The DeKalb court subsequently granted the companies' motion to transfer the case to the U.S. District Court for the Northern District of Georgia.

The dispute in this case is over the interpretation of the state Georgia Minimum Wage Law. The federal Fair Labor Standards Act states that federal minimum wage and overtime provisions do not apply to "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves…." Anderson and the plaintiffs who filed the lawsuit claim that because they fall under this exemption, and the law's general minimum wage requirements do not apply to them, they are not "covered" by the federal law. The Georgia law states that its provisions do not apply "to any employer who is subject to the minimum wage provisions of any act of Congress as to employees *covered* thereby if such act of Congress provides for a minimum wage which is greater than the minimum wage which is provided for in this Code section." The plaintiffs claim that because they are not "covered" by the federal law, they are covered by the Georgia law, which states that "every employer…shall pay to all covered employees a minimum wage which shall be not less than $5.15 per hour for each hour worked in the employment of such employer." The employers contend the employees are covered by the federal law. Also, they argue that because the employees are "domestic employees," they are exempted under another provision of the Georgia law. The employees counter that while the Georgia law exempts from its minimum wage protections any "employer of domestic employees," they are not "domestic employees."

Before issuing a final decision in the case, the federal U.S. District Court has asked the state Georgia Supreme Court to answer two questions:

1. If an employee falls under an exemption of the federal Fair Labor Standards Act, is he or she still "covered" by that act and thereby prohibited from receiving minimum wage compensation under the Georgia Minimum Wage Law?
2. Is an employee who provides in-home personal support services prohibited from receiving minimum wage compensation under the Georgia law due to the "domestic employees" exception stated in that law?

In today's unanimous opinion, "we answer both of these questions no," **Justice David Nahmias** writes for the Court.

"It is undisputed that the Employers, as companies with employees and clients in multiple states, are enterprises engaged in commerce, and thus they are 'subject to' the Fair Labor Standards Act's minimum wage provisions," the opinion says. "That is not, however, all that is required for the Georgia Minimum Wage Law exception to apply."

At least until Jan. 1, 2015, the employees fell under the "companionship services" exemption of the federal law, which excludes from federal minimum wage protections, "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves." Federal regulations define "companionship services" as "meal preparation, bed making, washing of clothes, and other similar services." And the regulations apply the companionship services exemption to workers employed by third-party agencies like the employers in this case. Therefore, "the Employees concededly were not entitled to the minimum wage set by the [federal law] during their time working for the Employers," the opinion says.

The Georgia law, meanwhile, excludes from its minimum wage protection employees "who are 'covered' by the *minimum wage provisions* of a federal statute like the Fair Labor Standards Act if such act provides for a minimum wage greater than the Georgia Minimum Wage Law's minimum wage," the opinion emphasizes. That exemption, it says, is "squarely focused on employees who are exempted from the [federal law's] minimum wage provisions, like the Employees in this case, and who thus could benefit from a state minimum wage, albeit one lower than the federal one." (The federal minimum wage is $7.25 an hour.)

"For these reasons, we answer the first certified question no," today's opinion says.

Regarding the second question, the employers argue that the employees are also exempt from the Georgia Minimum Wage Law because it states it "shall not apply with respect to…[a]ny employer of domestic employees." The employees argue, however, that they were never "domestic employees" as that term is used in the statute because they were employed by third-party agencies and did not work in the homes of their employers.

In today's opinion, the high court agrees. "Sources providing everyday definitions of domestic employees and employment – including the Wikipedia definition cited to us by the Employers – limit such employment to work done in the home of the employer," the opinion says. Under Georgia Department of Labor regulations, domestic services "must be performed by an individual in or about the private home…of the person employing the individual." "Under this definition, the Employees were not providing 'domestic services,'" the opinion says, because they "instead worked in the homes of their Employers' clients."

For these reasons, the high court also answers no to the second certified question.

Attorneys for Appellants (Anderson): Geoffrey Pope, J. Marcus Howard
Attorneys for Appellees (Southern): Ronald Polly, Jr., Matthew Boyd

GARY ROLLINS ET AL. V. GLEN ROLLINS ET AL. (S15G0567)

In a highly contentious dispute involving the family of O. Wayne Rollins, one of the founders of Rollins, Inc., Georgia Supreme Court is throwing out for the second time a decision by the Georgia Court of Appeals involving a **Fulton County** lawsuit. The suit was filed by four siblings, who are grandchildren of O. Wayne Rollins, against their father and uncle who managed trusts their grandfather had set up for them before he died.

In today's unanimous decision, written by **Justice Robert Benham**, the high court is sending the case back to the Court of Appeals for additional action.

Over its 60-year history, Rollins, Inc., whose companies include Orkin Pest Control, has grown into one of North America's largest pest-control conglomerates yielding assets worth several billion dollars. The elder Rollins, who with his brother built the pest-control empire, named his two sons, Gary Rollins and Randall Rollins, as trustees of his estate and as officers and directors of the family-held corporations. He also named a close family friend, Henry B. Tippie, as a trustee. Before his death, O. Wayne Rollins set up the "Rollins Children's Trust" and nine Subchapter S-Trusts, each for the benefit of the nine children of Gary and Randall. These trusts hold interests in a complex web of corporate family entities and holding companies which were created primarily to reduce tax liability to the elder Rollins' heirs, according to briefs filed in the case. Under the terms of the Children's Trust, which was established in 1968, the beneficiaries were to receive "statements disclosing the condition of the trust estate" not more than every six months. Also under its terms, a portion of the trust principal was distributed to the nine grandchildren on their 25th and 30th birthdays, so that the first half of the principal has by now been distributed and accepted by the nine grandchildren. In 1986, O. Wayne Rollins as the "settlor" established the Subchapter S-Trusts, and to date more than $74 million in income has been distributed to the beneficiaries, according to the briefs.

After O. Wayne Rollins' death in 1991, Gary's four children – Glen Rollins, Ruth Ellen Rollins, Nancy Louise Rollins, and O. Wayne Rollins II – sued their father, uncle and Tippie in Fulton County Superior Court for breach of trust and breach of fiduciary duties. (Randall's five children did not sue.) They alleged that after their grandfather died, the trustees made various changes to the structure, leadership, holdings, and distribution methods used within the various family entities that are held within the Children's Trust and the S-Trusts. They claimed their father and uncle shifted power to themselves and violated the trust documents and their grandfather's intent to evenly distribute the trusts' assets to the nine grandchildren. They claimed that after they sued, Gary and Randall excluded them from a distribution of some $9 million that instead went to their cousins – Randall's five children – who did not sue. They also claimed that Gary and Randall had Gary's son, Glen Rollins, fired from his position at the family company where he had worked his entire career.

The Fulton judge ruled in favor of Gary and Randall, finding that "Defendants' conduct with respect to the management of the trust assets was permissible under the trust agreements and consistent with the intent of the settlor, O. Wayne Rollins." The trial court refused to order an accounting of the corporate entities which hold the trust assets, holding that they had effectively obtained such an accounting in the course of the litigation. The grandchildren appealed, and the Court of Appeals reversed the lower court's decision and ruled in their favor, finding that the Fulton court erred by failing to order an accounting of the Rollins corporate family entities. The appellate court relied on Official Code of Georgia § 53-12-243, which mandates that upon request by any beneficiary, a trustee "shall provide" a report of information about the trust and "shall account at least annually" to each beneficiary. The Court of Appeals also ruled that the trial court erred in finding that Gary Rollins, Randall Rollins and Henry Tippie had not breached their fiduciary duties, finding that the actions they took regarding the corporate entities were subject to the heightened trustee-level fiduciary duties they had as trustees.

The Rollins brothers and Tippie appealed to the state Supreme Court, which in March 2014 unanimously reversed the Court of Appeals and ruled in their favor. The high court held that the Court of Appeals erred in ruling that the trial court should have ordered an accounting of the family entities held within the trusts. Although that decision may ultimately prove to be correct, the opinion said, "we find it to be erroneous at this juncture because the Court of Appeals failed to give due deference to the discretion of the trial court in this matter. Accordingly, we find it necessary to vacate and remand this issue to the Court of Appeals to enable the appellate court to reweigh the accounting issue by placing the sound discretion of the trial court on the scales."

Another issue in Gary and Randall Rollins' first appeal to the state Supreme Court was whether the Court of Appeals applied the proper fiduciary standard to the conduct of the trustees in ruling that their actions as managers of the corporate family entities must be scrutinized according to heightened trustee-level fiduciary standards instead of the more deferential standards that apply to the conduct of corporate entity managers.

In 2014, the high court also reversed the Court of Appeals' decision on this issue, ruling that "where, under the terms of a trust, the trustee is put in control of a corporate entity in which the trust owns a minority interest, the trustee should be held to a corporate level fiduciary standard when it comes to his or her corporate duties and actions." On remand, the high court instructed the appellate court to apply such a standard. The Supreme Court stated that "the cardinal rule in trust law is that the intention of the settlor is to be followed," and it was clear that O. Wayne Rollins took great pains to set up the estate planning scheme in such a way that he did not intend the trustees to be held to trustee-level fiduciary standards when performing their corporate duties.

Upon remand, however, the Court of Appeals again concluded that an analysis of which fiduciary standard applies to each alleged wrongful act depends on what a jury determines was the role Gary and Randall Rollins were assuming with respect to each act. For this reason, the Court of Appeals also remanded to the trial court the issue of the accounting sought by the beneficiaries. Again, Gary and Randall Rollins appealed to the state Supreme Court, which again agreed to review the case to determine whether the Court of Appeals was wrong in determining that a jury must decide which fiduciary standard applies to the various decisions and transactions made by the defendants.

In today's 28-page opinion, the high court has again concluded that the Court of Appeals was wrong, and it is again vacating that court's decision and remanding the case with direction.

"The Court of Appeals concluded it could not comply with this Court's direction to apply the more deferential corporate-level fiduciary standard with respect to the defendants' management of the family entities without a jury's first determining the role in which the defendants were acting at the time of the complained-of conduct," today's opinion says. "Contrary to the conclusion of the Court of Appeals, the trier of fact is not required first to determine which fiduciary duty applies to each defendant's decision to execute the partnership amendment before it can reach a finding about whether the duty was breached."

In the state Supreme Court's previous decision, "this Court expressly held that where, as here, 'under the terms of a trust, the trustee is put in control of a corporate entity in which the trust owns a minority interest, the trustee should be held to a corporate level fiduciary standard when it comes to his or her corporate duties and actions,'" today's opinion says. "Further, we

directed the Court of Appeals 'to apply a corporate fiduciary standard when considering the [defendants'] conduct with regard to their management of the corporate family entities held within the trusts.' The record evidence demonstrates that the corporate decisions complained of by the plaintiffs could only have been made by Gary and Randall in their capacity as managers of the family entities and are precisely the type of conduct we directed the Court of Appeals to review in accordance with a corporate fiduciary standard. It is not necessary for a jury to determine the role Gary and Randall were playing at the time these corporate decisions were made. On remand, as before, the Court of Appeals is directed to apply a corporate fiduciary standard to these decisions."

However, the opinion says, this "does not preclude the Court of Appeals…from applying a trustee-level fiduciary standard to decisions the defendants made as trustees of the trusts."

As the Supreme Court noted in its earlier decision, "the cardinal rule in trust law is that the intention of the settlor is to be followed," the opinion says. "On remand, the Court of Appeals is directed to apply to these trust decisions a trustee-level fiduciary standard consistent with the authority granted by the trust instrument when determining whether the trial court erred in granting summary judgment to Gary on these claims."

Attorneys for Appellants (Gary): John Dalton, James Lamberth, Alan Bakowski
Attorneys for Appellees (Glen): H. Lamar Mixson, Timothy Rigsbee, Lisa Strauss

HARPER V. THE STATE (S15A1248)

In this high-profile **Gwinnett County** case, the Georgia Supreme Court has upheld the convictions and life prison sentence given to a man for his role in the murder and armed robbery of an Indian immigrant who managed a convenience store in Stone Mountain.

Mark Anthony Harper, who was having an affair with the victim's wife, claimed the evidence against him was insufficient to prove his guilt. But in today's unanimous opinion, **Presiding Justice P. Harris Hines** writes for the Court that "the evidence authorized the jury to find Harper guilty beyond a reasonable doubt of the crime of felony murder while in the commission of armed robbery."

According to the facts of the case, Rajib Sarkar, 38, immigrated to the United States from an impoverished area of India when he was a young man. He met his wife, Stephanie, when they worked together at a gas station in Carrolton, GA. Sarkar's goal was to save enough money that he could purchase his own convenience store, and in 2011, the couple moved to Gwinnett County so Sarkar could pursue his dream, according to briefs filed in the case. They lived in an apartment at the Paces Crossing complex off Jimmy Carter Boulevard, and he worked as manager of a Chevron gas station and convenience store on Memorial Drive, sometimes working up to 16 hours a day. She also worked at the store, usually in the mornings. Harper worked at the car wash next to the store, and he and Stephanie developed a romantic relationship. Harper had noticed that Sarkar always took the store proceeds home with him at night in a single-strapped Georgia Lottery bag. He and his wife would count the money, and Sarkar would deposit it in the bank the next day. Sometimes, Stephanie told Harper how much money had been in the bag, and she shared with her paramour that Saturdays were the most lucrative. Harper also knew where the Sarkars lived as he'd been to their apartment to have sex with Stephanie while her husband worked.

Harper came up with the idea to rob Sarkar, and he approached James Clark, his co-worker at the car wash, with the idea. Harper told Clark that he should commit the robbery because Sarkar would recognize Harper, and that the robbery should take place in the parking lot of Sarkar's apartment complex. The night of Oct. 1, 2011, which was a Saturday, Clark took a taxi to the complex. To establish an alibi, Harper traveled to Rochester, NY to visit family while staying in constant contact with Clark.

Clark later testified that murder was never part of the plan, but that he felt safer taking a gun to the robbery. He said Harper had told him that Sarkar was a small man and he would not have to do much to Sarkar, "just pistol-whip him maybe, and he'll give it up easy like that." After midnight, while Harper was on the phone with Stephanie, her husband called to tell her he was on his way home from work, which she relayed to Harper. Harper, who was also on the phone with Clark, and passed that information to him, telling him to be prepared. Sarkar arrived at the apartment complex, and as he left his car, Clark confronted him with a .40 Smith and Wesson gun and yelled at him to put the bag down. Sarkar screamed and tried to run away. As he was fleeing, Clark shot Sarkar three times in the back. While Sarkar lay on the ground, trying to crawl to his apartment, Clark took the bag of money, ran from the scene, and called the same taxi driver to pick him up and take him back to his home in DeKalb County. Sarkar called his wife at 1:14 a.m. and told her he had been shot. She ran out of the apartment, found him and called 911. Responding officers found Sarkar lying on his right side in the breezeway in front of his apartment. He was alive but in a lot of pain. Sarkar subsequently died of cardiac arrest while en route to the hospital.

Once Clark arrived home, he counted the proceeds from the robbery and determined there was up to $6,000 in the bag. Harper and Clark had agreed beforehand to split the money. At Harper's direction, Clark delivered Harper's share to an unknown female in a white car at a set time and place. Once Harper got his money, he informed Clark that Sarkar had died and that Clark should no longer call him.

Through Stephanie's cell phone records, investigators with the Gwinnett County Police Department were able to trace numerous calls the night of the murder among Harper, Stephanie and Clark. In interviews, Harper admitted that he'd been having an affair with the victim's wife, that he had been to the couple's apartment, and that he knew about Sarkar carrying money home from work in a bag. After he was arrested, Harper told two inmates in the Gwinnett County jail about his role in the crimes, and they subsequently testified against him. He told one he'd gotten "some young boy" to do the crimes. At the time, Clark was 21; Harper was 44.

Clark ultimately pleaded guilty to all the charges in the indictment. In March 2014, a jury found Harper guilty as a party to the crimes of felony murder and armed robbery, and he was sentenced to life in prison. Harper appealed to the Georgia Supreme Court, arguing that the evidence against him was circumstantial and failed to exclude every other reasonable hypothesis except that of his guilt.

"But Clark's testimony regarding Harper's recruitment of him to be the active perpetrator of the armed robbery, and of Harper's efforts to facilitate Clark's role in the robbery, as well as the testimony regarding Harper's admissions to his fellow inmates, are examples of direct, not circumstantial, evidence of Harper's guilt," today's opinion says. "Although Harper contends that the testimony of Clark and the two inmates was not reliable, direct evidence is not converted into circumstantial evidence by a witness's credibility or lack thereof, and the weight and

reliability of such evidence is for the jury's resolution."

"Judgment affirmed. All the Justices concur."

Attorney for Appellant (Harper): Sharon Lee Hopkins
Attorneys for Appellee (State): Daniel Porter, District

TOLBERT V. THE STATE (S15A1073)

The Supreme Court of Georgia has upheld the conviction and life prison sentence a young man received in **Richmond County** 18 years ago for his role in a man's murder.

Under today's unanimous decision, written by **Justice Keith Blackwell**, the high court has concluded that Terry Tolbert's constitutional right to effective legal representation was not violated even though his attorney also represented his co-defendant who was tried with him.

According to the facts of the case, in January 1996, Dewey Sims shot Shelley Griffin, Jr., who was 22 years old. Leroy Sims, Dewey's brother, and the Sims brothers' nephew, 19-year-old Terry Tolbert, were present. The evidence at trial showed that earlier that day, the Richmond County Narcotics Office had executed a warrant on Griffin's home in Augusta. Griffin confronted Leroy Sims on a street corner and threatened him, loudly accusing him and his brother Dewey of being snitches who had called police to his home. Griffin, who was upset and angry, said he was going to "get" Leroy and threatened he was going home to get his gun. Griffin left and returned with a gun, standing on the street and still complaining about the police search. Tolbert and his uncle, Dewey Sims, who were both armed, arrived on the scene and were then joined by Leroy Sims. The three quickly walked up to Griffin. As they approached, Griffin handed his gun to a friend and urged the others not to use guns but to "fight like men." An eyewitness testified that Tolbert told Griffin, "don't move, don't move, or I'm going to bust you." But then Tolbert said, "OK, you know. We ain't going to do nothing like that." According to the witness, Leroy then urged his brother Dewey to "do it," and after about 45 seconds, Dewey shot Griffin in the head, killing him. Dewey, Leroy and Tolbert then fled together.

All three men were indicted for Griffin's murder. In November 1996, a Richmond County jury convicted Tolbert of murder and possession of a firearm during the commission of a crime. He was sentenced to life plus five years in prison. The Sims brothers were also convicted of murder, and in 1997 and 2007, the Georgia Supreme Court upheld their convictions. This appeal to the state Supreme Court now involves Tolbert.

At issue is Tolbert's claim that he received ineffective assistance of counsel because his trial attorney represented not only him, but also his co-defendant, Leroy Sims. Tolbert claimed this was a clear conflict of interest that adversely affected his lawyer's representation of him.

Today's opinion quotes the U.S. Supreme Court's 1987 decision in *Burger v. Kemp*, which stated, "it is settled that requiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not *per se* violative of constitutional guarantees of effective assistance of counsel."

To prevail on a claim of ineffective assistance based on a conflict of interest, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." An "actual conflict of interest" means "a conflict *that affected counsel's performance* – as opposed to a mere theoretical division of loyalties," the opinion says. "We have expressed the test as 'whether the representation deprived either

defendant of the undivided loyalty of counsel, i.e., did counsel slight one defendant to favor the other?'"

Tolbert's lawyer died before the hearing on Tolbert's motion requesting a new trial, and the lawyer never testified about his performance at the trial. But that "did not relieve Tolbert of his burden of proving ineffective assistance," today's opinion says. In doing so, "the critical question is whether the conflict significantly affected the *representation*, not whether it affected the outcome of the underlying *proceedings.*"

In this case, the trial judge made written findings that the lawyer for both Tolbert and Leroy Sims "vigorously represented the interests of both clients during the trial. Neither client was alleged to be the shooter. Vigorously defending one client did not have an adverse impact on the other….There is no evidence of anything that trial counsel could have done in defense of [Tolbert] that was not pursued out of a divided loyalty to [Leroy]." Based on these findings, the judge concluded that Tolbert's trial attorney "was not laboring under a conflict of interest that adversely affected his representation."

One of Tolbert's arguments was that Tolbert was less culpable than Leroy Sims in Griffin's murder, and his attorney failed to make that distinction. In fact, evidence was presented to the jury that Leroy Sims may have been more culpable than Tolbert. The evidence showed that there had been prior difficulties between Leroy and Griffin and that Leroy had allegedly urged Dewey to shoot Griffin by telling him to "do it, do it." "The evidence also showed, however, that it was Dewey who shot Griffin, that neither Tolbert nor Leroy ever fired a shot or pointed a gun at Griffin or anyone else, and that all three confronted Griffin, fled together, and later went to the emergency room in an attempt to confirm that Griffin was dead."

"Here, the defenses of Tolbert and Leroy were compatible, as they both were based on the theory that Dewey had acted in self-defense (which was also the same defense that Dewey presented) and that, even if the evidence of self-defense failed, Tolbert and Leroy were not parties to the crime of murder," the opinion says. "The unified defense strategy was to show that both Tolbert and Leroy were innocent; neither of them testified, much less did one point the finger at the other."

"Tolbert's contention that the lawyer's failure to de-emphasize Tolbert's culpability as compared to Leroy's is most probably explained by a conflict of interest is, at best, poorly supported," today's opinion concludes. "The trial court was authorized to conclude that Tolbert failed to demonstrate that his lawyer's theoretical division of loyalties ripened into an actual conflict of interest that significantly and adversely affected the adequacy of the lawyer's representation of him at trial."

Attorney for Appellant (Tolbert): Tanya Jeffords

Attorneys for Appellee (State): Rebecca Wright, District Attorney, Kimberly Easterling, Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G.