Supreme Court of Georgia
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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Monday, January 4, 2016

10:00 A.M. Session

BICKERSTAFF V. SUNTRUST BANK (S15G1295)

A woman whose son claimed his bank charged exorbitant overdraft fees in violation of the state's usury laws is appealing a court's refusal to certify his case as a class action lawsuit.

FACTS: Jeff Bickerstaff, Jr. opened a personal checking account in 2009 with SunTrust Bank, and like other bank customers, signed a Deposit Agreement in which he agreed that any dispute between the bank and the customer would be resolved by arbitration as opposed to a lawsuit. Specifically, the agreement stated that these "rules and regulations constitute a contract between you and the Bank….This agreement is for the benefit of, and may be enforced only by, you and the Bank and their respective successors and permitted transferees and assignees, and is not for the benefit of, and may not be enforced by, any third party." The arbitration provision of the agreement stated that, "neither the Depositor nor the Bank will have the right to: (1) have a court or a jury decide the claim; (2) engage in information-gathering (discovery) to the same extent as in court; (3) participate in a class action in court or in arbitration; or (4) join or consolidate a claim with claims of any other person." In June 2010, in response to unrelated federal regulation, SunTrust amended the agreement to allow customers to reject arbitration if they gave written notice by Oct. 1, 2010. "This is the sole and only method by which you can reject this arbitration agreement provision," the arbitration provision said.

According to briefs filed by Bickerstaff's attorneys, when SunTrust bank customers use their bank cards and overdraw their accounts, SunTrust automatically loans them a small amount of money to cover the overdraft and charges them $36 in overdraft fees. That charge constitutes interest, often in excess of 1,000 percent, Bickerstaff's attorneys claim. On July 12, 2010, Bickerstaff filed a lawsuit against the bank in **Fulton County** State Court, alleging that SunTrust charged its customers overdraft fees in violation of Georgia usury laws, which protect people against interest rates considered grossly unfair or unreasonable. At the time the suit was filed, SunTrust had not yet given any notice to Bickerstaff or any of its customers that it had amended the arbitration provision and they could now opt out of arbitration if they did so in writing by Oct. 1, 2010. Only after Bickerstaff filed his lawsuit did the bank include in customers' monthly August statements nonspecific language that an updated version of the rules and regulations for deposit accounts was now available at branch offices and on the bank's website. The website included the opt-out provision and the information the customer's written statement had to include. On Oct. 4, 2010, the first business day after the opt-out deadline of Oct. 1, SunTrust filed a motion to compel Bickerstaff into arbitration. Following a hearing, the judge denied the motion, finding that Bickerstaff effectively exercised his right to opt out of arbitration by filing a lawsuit, and finding that any failure on Bickerstaff's part to sufficiently comply with the opt-out provision was excused by SunTrust's own "misleading" actions regarding the opt-out provision. SunTrust appealed to the Georgia Court of Appeals, which upheld the trial court's ruling. On April 13, 2013, Bickerstaff filed a motion to certify a class of affected Georgia citizens. The trial judge also denied this motion, concluding that Bickerstaff "did not, by filing this lawsuit, effectively opt out of arbitration on behalf of the over 1,000 SunTrust account holders who would be part of this putative class." (The "putative class" is the supposed group of individuals who would make up the class.) To rule otherwise, the judge ruled, "would be contrary to the plain language of the Arbitration Agreement which does not specifically grant a customer the ability to opt out of the Arbitration Agreement on behalf of anyone other than themselves, and, rather, requires strict compliance with the opt-out provision." Bickerstaff also appealed to the Court of Appeals, which ruled against him and upheld the trial court, finding that "the Deposit Agreement contract and its arbitration clause prohibit Bickerstaff from altering others' contracts where he is neither a party nor in privity with a party." (Being in privity with a party means having a legal interest in the contract.) Bickerstaff then appealed to the state Supreme Court, which agreed to review the case to determine whether the Court of Appeals erred in upholding the trial court's denial of class certification on the ground that the contractual language prohibited Bickerstaff from opting out of the arbitration clause on behalf of the other class members. (Since this case was filed, Jeff Bickerstaff died. The Georgia Supreme Court has granted a motion to substitute his mother, Ellen Rambo Bickerstaff, the executor of his estate, as his legal representative.)

ARGUMENTS: Bickerstaff's attorneys argue the Court of Appeals "departed radically from settled principles of class action and agency law" by affirming the trial court's denial of class certification. While SunTrust no longer disputes that Bickerstaff validly exercised his contractual right to reject arbitration by filing the lawsuit, the Court of Appeals was wrong in ruling that no other depositor could ratify Bickerstaff's filing of the lawsuit to reject arbitration. Its opinion conflicts with the state Supreme Court's precedent-setting decisions in 2010, *Schorr v. Countrywide Home Loans, Inc.*, and in 2006, *Barnes v. City of Atlanta,* which establish that a

representative of the class may satisfy conditions for a lawsuit on behalf of the supposed class members and that the class members may subsequently ratify the acts of the representative as their own. The Court of Appeals opinion "reaches a contrary result by inventing two unsupported and dangerous limitations on this rule," the attorneys argue. "First, the opinion holds that to act on behalf of putative class members, Bickerstaff had to have the authority to legally bind them before certification of a class – even though Georgia Code § 9-11-23 forbids putative class representatives from binding putative class members before a class is certified and its members have the opportunity to opt out." The opinion ignores the general rule permitting Bickerstaff's representation of the class prior to certification and fails to recognize that he acts as a "putative agent" whose actions class members may subsequently ratify, making them their own, or not ratify by opting out of the class. The class members are not legally bound until they are offered the opportunity to opt out of the class after certification; only those members who do not opt out of the class are bound by the named plaintiff, and not until after they ratify the named plaintiff's actions, Bickerstaff's attorneys argue. Second, the opinion erroneously concludes that Bickerstaff could not represent the class prior to certification, and the class members could not ratify his acts, because the Deposit Agreement prohibits Bickerstaff "from altering others' contracts where he is neither a party nor in privity" with the individual class members. "As a matter of law, the opinion is wrong about what occurs in a class action, wrong about what the terms of the Deposit Agreement mean, wrong about the capacity in which Bickerstaff acted, and wrong to ignore that depositors would be rejecting arbitration themselves if they ratified the complaint by remaining in the class," the attorneys argue. Further, under long-standing class action principles, the filing of a class action complaint postpones – or "tolls" – the deadline for when potential class members must decide whether to exercise their own rights, so the members of this supposed class were not required to the meet the Oct. 1 deadline, as the bank contended. If the Court of Appeals opinion stands, the attorneys contend that Georgia class action law will become an "outlier," and it is "no exaggeration to say that the opinion threatens to end class actions in this state." That is because few "class representatives" such as Bickerstaff "will have the authority to legally bind putative class members before certification."

Attorneys for SunTrust argue that both the trial court and Court of Appeals correctly ruled that allowing Bickerstaff to reject arbitration on behalf of unknown class members would be contrary to the plain language of the Deposit Agreement. Under well-settled principles of Georgia contract law, an individual cannot alter the contracts of others when he is not a party to the contract, which in this case was limited to each depositor and the bank. Under the doctrine of "privity," a contract cannot impose obligations or confer rights on any person except the parties to it. The idea is that only parties to contracts should be able to sue to enforce their rights or claim damages. Here, Bickerstaff is "attempting to exercise a substantive contractual right and thereby alter putative class members' contracts," the attorneys argue. "Bickerstaff has not identified a single case that would allow him to exercise a contractual right on behalf of an entire putative class with whom he is not in privity, particularly when the contract requires individualized action," the bank's attorneys argue. The Deposit Agreement (or contract) could not be clearer that the "sole and only" way a depositor can reject arbitration is to notify SunTrust in writing. "As the Court of Appeals and the trial court correctly held, well-settled Georgia law provides that a contract cannot be modified or altered by a stranger to the contract, and any modification requires the consent of all parties to the contract." Because Bickerstaff cannot reject

arbitration on behalf of a class of people which has not yet been certified, he cannot satisfy one of the four factors Georgia law requires to obtain class certification: that the class has so many members that joining them all in a lawsuit would be impractical. Both the trial court and Court of Appeals were therefore correct in determining that class certification is inappropriate.
Attorneys for Appellant (Bickerstaff): Michael Terry, Steven Rosenwasser, Jason Carter, Joshua Thorpe, C. Ronald Ellington, J. Benjamin Finley
Attorneys for Appellee (SunTrust): William Withrow, Jr., Jaime Theriot, Lindsey Mann

STATE OF GEORGIA, COMMISSIONER OF INSURANCE ET AL. V. SUN STATES INSURANCE GROUP, INC. (S15G1293)
SUN STATES INSURANCE GROUP, INC. V. STATE OF GEORGIA, COMMISSIONER OF INSURANCE ET AL. (S15G1307)

The appeals in these two cases stem from a lawsuit filed by an insurance company against former state Insurance Commissioner John Oxendine and his deputies. The insurance company alleges the men improperly withdrew millions of dollars from an estate while serving as liquidators.

FACTS: In January 2001, then Insurance Commissioner John W. Oxendine was appointed by the **Fulton County** superior court as the liquidator of International Indemnity Co., an insolvent insurance company. Oxendine appointed Donald Roof as deputy liquidator and Harry Sivley as assistant deputy liquidator to act for him in the liquidation of the insurance company's assets. Sivley was the chief executive officer of Regulatory Technologies, Inc., a company that assisted the Department of Insurance in administering the estates of insolvent insurance companies throughout Oxendine's tenure. "Reg Tech" handled most of the administrative duties associated with the liquidation of International Indemnity. Seven years after beginning the liquidation, in 2008, the "liquidator" – i.e. Oxendine and/or his deputies – asked the superior court to approve its final accounting of the company's assets and expenses and to discharge them from further duties. Sun States, Inc. – International Indemnity's sole shareholder – objected, asserting that Sivley and Reg Tech had overcharged millions of dollars to the estate and used the money to support Reg Tech's unrelated business ventures. The superior court appointed an independent auditor to look into the assertions, and 16 months later, the auditor submitted a report identifying more than $450,000 in charges improperly charged to the estate and additional adjustments of about $2 million, including $1.1 to $1.2 million in excessive overhead charges that had been withdrawn from the estate. In March 2010, the liquidator/State filed a modified application for discharge, incorporating some, but not all, of the credits the auditor said were due to the estate. In response, the trial court ordered the liquidator to provide additional data, and the auditor to supplement his report if he deemed necessary. In November 2010, Ralph T. Hudgens was elected Georgia's Commissioner and he became party to this action. In February 2012, the State/liquidator (Hudgens et al.) again supplemented the application with additional information for the auditor, and agreed that additional credits should be made to the International Indemnity estate in the amount of $433,569.71. The State continued to refute the allegation, however, that the estate had been charged excessive administrative expenses in the form of over-allocation of contractual compensation, overhead expenses, or excessive salary and benefits to Reg Tech personnel. Sun States asked the superior court for an order of "surcharge," requiring the liquidator, both deputies and Reg Tech to reimburse the

International Indemnity's estate for the excessive and improper withdrawals identified in the audit. It also requested that the liquidator be required to cover its attorneys' fees.

In June 2013, the liquidator filed a motion asking the court to dismiss Sun States' request, calling it a "claim for money judgment" that is prohibited by the rule of sovereign immunity. At issue in this case is a provision in the state's Insurers Rehabilitation and Liquidation Act (Georgia Code § 33-37-8.1 (b)), which states: "The receiver and his or her employees shall have official immunity and shall be immune from suit and liability, both personally and in their official capacities, for any claim for damage…provided that nothing in this provision shall be construed to hold the receiver or any employee immune from suit or liability for any damage, loss, injury or liability caused by the intentional or willful and wanton misconduct of the receiver or any employee." The trial judge denied the liquidator's motion to dismiss the case, finding that based on the statute, the State/liquidator had waived its right to the protection of sovereign immunity because the law "provides no immunity 'for any damage, loss, injury or liability caused by the intentional or willful and wanton conduct of the receiver or any employee.'" The judge concluded that evidence could be introduced to show that the intentional or wanton conduct of the liquidator or his deputies permitted the payment of excessive or improper administrative expenses of the insurance company's estate. The trial court therefore ruled it would consider such evidence. The trial court also ruled that it had the authority to order a surcharge against the State. On appeal, the Georgia Court of Appeals reversed part of the ruling, affirmed part, and remanded the case. The appellate court ruled that the trial court erred in concluding that the Act waived the State's sovereign immunity because the Act failed to state the extent of any waiver. However, the Court of Appeals went on to find that § 33-37-8.1 (b) provides an exception to sovereign immunity and sets forth the extent of a waiver. It therefore affirmed the trial court's ruling that it would consider further evidence and remanded the case "for consideration of Sun States' objections related thereto." The Court of Appeals reversed the trial court's ruling on the surcharge, concluding that sovereign immunity bars Sun States' request for a surcharge. Both the State/liquidator and Sun States now appeal the rulings to the Georgia Supreme Court, which agreed to review the case to determine the answer to two questions: Did the Court of Appeals err in ruling that Sun States' claim for a surcharge was barred by sovereign immunity? If the Court of Appeals correctly determined that the Insurance Commissioner had not waived sovereign immunity, did it err in holding that § 33-37-8.1 (b) provides an exception to that immunity?

ARGUMENTS: The state Attorney General's office, representing the Commissioner/litigator argues the Court of Appeals erred in ruling that § 33-37-8.1 (b) may provide an exception to sovereign immunity. Under the Georgia Constitution, "sovereign immunity extends to the state and all of its departments and agencies…[and] can only be waived by an Act of the General Assembly…." The test for whether sovereign immunity has been waived is not met by § 33-37-8.1 (b), the attorneys for the State argue. Furthermore, the Court of Appeals has confused *official* immunity, which is designed to protect state employees from personal liability, with *sovereign* immunity, which protects the State itself, including its agencies, from liability. "Rather than treating official and sovereign immunity as two separate and distinct doctrines of immunity, the Court of Appeals combines them and holds that an exception to official immunity in § 33-37-8.1 (b) constitutes an exception to sovereign immunity," the State attorneys argue in briefs. "In other words, Section 8.1 (b) does not strip the

state of sovereign immunity in the event that the receiver or employee engages in intentional or willful and wanton misconduct." The Court of Appeals erred in "judicially creating" an exception to sovereign immunity. The law does not provide an exception to sovereign immunity and the case should not be remanded to consider Sun States' claims. However, the Court of Appeals correctly determined that the State had not waived sovereign immunity with respect to Sun States' claim for a surcharge.

Attorneys for Sun States argue the Court of Appeals erred in ruling that sovereign immunity bars Sun States' request for a surcharge. It was wrong to view the request as a claim for money damages. Sun States did not sue for money damages; it was merely asking for the court to order the liquidator to perform his statutorily-mandated functions, just as a petition for a writ of mandamus would. And the Georgia Supreme Court has long held that mandamus "is not within the rule that a State cannot be sued without its consent." The superior court has inherent authority to order a surcharge. As it is charged with appointing and supervising the liquidator, the superior court certainly has the authority to order the liquidator to restore any funds misappropriated from the estate. Sovereign immunity does not apply to the Commissioner when he acts as a liquidator, which is equivalent to a receiver of a private company in liquidation who is charged with administering the company's affairs. Sun States' attorneys agree that sovereign and official immunity are "distinct and independent concepts." But the immunity provision of the Act waives both official and sovereign immunity for "intentional or willful and wanton misconduct," the attorneys argue. Even if the Court of Appeals correctly decided that sovereign immunity applies in this case, it properly remanded the case to the trial court to decide whether the liquidator or his deputies were guilty of such conduct.

Attorneys for Appellants (State): Samuel Olens, Attorney General, Isaac Byrd, Dep. A.G., Daniel Walsh Sr. Asst. A.G., Jeffrey Stump, Sr. Asst. A.G.

Attorneys for Appellee (Sun States): Thomas Gallo, Brian Casey, L. Rachel Lerman

SCAPA DRYER FABRICS, INC. V. KNIGHT ET AL. (S15G1278)

A textile company is appealing a Georgia Court of Appeals decision upholding a **Ware County** court's award of $4.1 million to a man who argued his cancer was caused by his exposure to asbestos at the company's mill.

FACTS: In 2009, Roy Knight was diagnosed with malignant mesothelioma, a cancer of the pleural lining of the lungs that is most commonly caused by inhaling airborne asbestos fibers. Knight and his wife sued Scapa Dryer Fabrics, Inc. Knight had worked at its Waycross, GA mill on multiple occasions as an independent contractor doing sheet metal work from 1967 to 1973. Scapa made dryer felts for the paper-making industry, and most of the felts were made from yarn that contained asbestos. Knight also helped maintain the plant's pipe and boiler insulation which contained asbestos fibers as well. The Knights also sued Union Carbide Corporation, claiming that Knight's mesothelioma was caused by his exposure to asbestos which Union Carbide had sold to Georgia Pacific, LLC (not a party to the lawsuit). The Knights alleged that Georgia Pacific had used the asbestos to manufacture a joint compound and that Knight was exposed to the asbestos during drywall installation at his house between 1973 and 1975.

Before trial, Scapa filed a motion to exclude the testimony of the Knights' expert witness, Dr. Jerrold Abraham, under what is now Georgia Code § 24-7-702, the statute that restricts expert testimony. The trial judge denied the motion and the case went to trial. During the trial,

the jury considered evidence that Knight was also exposed during his life to many other products containing asbestos and considered whether 29 additional entities (also not parties) associated with these products were at fault for Knight's development of cancer. The jury concluded that Knight's mesothelioma was caused in large part by the negligence of defendants Scapa and Union Carbide, and in part by the negligence of Georgia Pacific. Under Georgia Code 51-12-33, which allows for the apportionment of damages according to the percentage of fault, the jury returned a verdict of $10.5 million in compensatory damages to the Knights, apportioning 20 percent of the fault to Georgia Pacific, which had settled with the Knights before trial, 40 percent to Union Carbide, which also settled with the Knights, and 40 percent to Scapa. The judgment against Scapa amounted to $4,187,068.95. Scapa appealed to the Georgia Court of Appeals, challenging the sufficiency of the evidence and alleging numerous trial court errors, including the admission of Abraham's testimony. A divided Court of Appeals upheld the lower court's ruling, finding that the trial court did not err when it concluded that Abraham's testimony was admissible under the expert testimony statute (then Georgia Code § 24-9-67.1). Specifically, the majority rejected Scapa's argument that the testimony was based on junk science and therefore inadmissible under the law. The two dissenting judges argued that Abraham's testimony that Knight's exposure to asbestos at the Scapa plant was a contributing cause to his mesothelioma was not "the product of reliable principles and methods" as required under the statute, and that the trial court erred by admitting unreliable expert testimony on the issue of specific causation. Scapa now appeals to the Georgia Supreme Court, which has agreed to review the case to determine whether the Court of Appeals erred when it concluded that the trial court was authorized to admit the testimony of the Knights' expert witness.

ARGUMENTS: Attorneys for Scapa argue that proof of specific causation requires a showing that the plaintiff was exposed to a sufficient dose of toxin to cause the disease at issue. Here, the "Knights' attempt to establish that Roy Knight breathed a disease-causing dose of asbestos while working at the Scapa facility fell woefully short," the attorneys argue in briefs. "No expert testified about the dose of asbestos fibers necessary to cause mesothelioma or that Knight inhaled that, or any other dose while working at the Scapa plant. The only specific-causation 'evidence' that the Knights presented was Dr. Abraham's widely-discredited 'cumulative exposure' theory," in which dosage need not be shown because every assumed exposure to asbestos above the amount that naturally occurs is considered a contributing cause of mesothelioma. And because it is undisputed that the naturally occurring "ambient" dose of asbestos is not sufficient to cause the disease, there is no scientific reason to think that a low occupational exposure would cause it either, the attorneys contend. Because the Knights could not prove that the dosage of asbestos to which Knight was exposed at the Scapa plant caused his cancer, they procured an expert who testified that every occupational exposure, regardless of the dosage, was cumulatively at cause. But in its 2011 decision in *Butler v. Union Carbide Corp.*, the Court of Appeals rejected the "cumulative exposure" theory as "not the product of reliable principles and methods." Over the course of his life, Knight was exposed to asbestos fibers from a host of different products that he did not encounter at Scapa's textile factory and that his own expert said would have contributed to cause his disease. He often used or was exposed to asbestos-containing products during work he performed with sheet metal, plumbing, drywall, automobiles and roofing. "Jurisdictions throughout the nation rightly have excluded the cumulative exposure theory from their courtrooms, and this Court too should ban that theory

from Georgia courtrooms by reversing the Court of Appeals' erroneous judgment," Scapa's attorneys argue.

Attorneys for the Knights argue that their expert, who is a professor at the State University of New York Medical School and an expert in asbestos exposure levels, relied on evidence of Knight's repeated asbestos exposures at the Scapa mill, and "based on relevant peer-reviewed, published literature, concluded that these exposures contributed to Mr. Knight's asbestos cancer." Scapa's argument that the trial court abused its discretion in admitting his opinion because it was based upon a "discredited" cumulative exposure theory, "is without merit," the attorneys argue in briefs. "First, the 'cumulative exposure' principle is an accepted scientific method to measure risk for disease," they contend. Scapa confuses the cumulative exposure principle with the discredited "each and every exposure" theory or "any fiber" theory. The cumulative exposure principle compares the cumulative exposure of an exposed group to that of an unexposed group and measures the comparative risk of disease between each group. The "each and every exposure" theory ascribes causation to every exposure **without reference to the plaintiff's actual exposure,** the attorneys point out. Abraham did not rely on the "any exposure" theory, but instead referenced Knight's exposure to asbestos at the Scapa plant and concluded it was a significant cause of his mesothelioma. Although Abraham did not calculate the dose of asbestos that Knight inhaled, Georgia law does not require such evidence. Abraham relied on evidence that workers in the vicinity of the looms at the Scapa plant, such as Knight, were exposed to asbestos levels at or exceeding 2 fibers per cubic centimeter. Studies show that cumulative exposure to as little as .5 fibers per cubic centimeter is enough to cause mesothelioma. Furthermore, Abraham did not ascribe causation to trivial exposures. He specifically ruled out several exposures as not being contributing factors to Knight's disease. Scapa also misrepresents the evidence presented at trial, the attorneys argue. Knight's work at the Scapa plant was not minimal; he worked there frequently and more than at any other location over the course of more than five years. Abraham did not rely on junk science, and the trial court did not abuse its "wide latitude" in admitting his testimony, the Knights' attorneys argue.
Attorneys for Appellant (Scapa): William Barwick, J.D. Smith, H. Lane Young, M. Elizabeth O'Neill
Attorneys for Appellees (Knights): Robert Buck, Denyse Clancy

FULTON COUNTY BOARD OF EDUCATION ET AL. V. THOMAS (S15G1205)

The **Fulton County** Board of Education is appealing a Georgia Court of Appeals ruling requiring it to pay workers' compensation benefits to an injured bus driver that are calculated based on her earnings not only from the County, but also from a second summer job.

FACTS: Since 2008, Merita Thomas has worked as a school bus driver for the Fulton County Board of Education. Thomas only drove the bus the nine months of the school year, but her salary was spread over 12 months, although she was paid less during the summer months. Beginning in 2010, Thomas supplemented her income by working summers for a private company, Quality Drive Away, driving newly manufactured school buses from the Atlanta area to other parts of the country. In 2011, her last day of work for Quality Drive Away, was July 30, 2011, after which she returned to working for the County. On Oct. 19, 2011, Thomas was injured while on the job for the County. She subsequently applied for workers' compensation benefits.

The County did not dispute that she was eligible for benefits, but it did dispute the amount she claimed she was due.

The key issue in this case is how her "average weekly wage" at the time of her injury should be calculated. Georgia's Workers' Compensation Act (Georgia Code § 34-9-260) states: "If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of 13 weeks immediately preceding the injury, his average weekly wage shall be one-thirteenth of the total amount of wages earned in such employment during the 13 weeks." Thomas contended that 1/13th of the total wages she earned working for both Fulton County and Quality Drive Away during the 13-week period immediately preceding the injury was $593.32. The County disagreed that Thomas' earnings from the private company should be included in the calculation. Given that her last day with that company had been July 30, 2011, she was not employed by it for "substantially the whole of 13 weeks immediately preceding the injury." Thomas' average weekly wage, the County argued, should be calculated based on another provision of the statute, using her "full-time weekly wage," but only from the County. Following a hearing before the State Board of Workers' Compensation, an Administrative Law Judge ruled in favor of Thomas. The judge held that Thomas' employment with Quality Drive Away was "concurrent similar employment" to her employment with the County and it therefore should be included, making her average weekly wage $593.32. On appeal, however, the Board's Appellate Division reversed the Administrative Law Judge's decision, finding that while Thomas' employment with Quality Drive Away was "similar" to her work with the County, it was not "concurrent" because she "was not employed concurrently with another employer at the time of her injury." The Board determined Thomas' correct average weekly wage was $337.62. Thomas appealed to the Fulton County Superior Court, which upheld the Board's decision. She then appealed to the Court of Appeals, which reversed the decision, disagreeing with the Board's conclusion that Thomas' employment with Quality Drive Away was not "concurrent" with her County employment. The Court of Appeals ruled that Thomas "was working as a bus driver for substantially the whole of the 13 weeks immediately preceding her injury on Oct. 19, 2011, because she worked as a bus driver for both Quality Drive Away and Fulton County during the whole time." The Workers' Compensation Act "explicitly contemplates work *'for the same or another employer,'"* the Court of Appeals stated, and therefore her average weekly wage should be computed on her work during the 13 weeks preceding her injury – about 11.5 weeks with Fulton County and 1.5 weeks with Quality Drive Away. The Court of Appeals remanded the case for a recalculation of Thomas' average weekly wage, using her earnings from both the County and Quality Drive Away. The County now appeals to the Georgia Supreme Court.

ARGUMENTS: Attorneys for the County argue the Court of Appeals erred in ruling that Thomas' average weekly wage should be calculated based on her "concurrent" employment as a bus driver for two employers when she did not work for both for "substantially the whole" of the 13 weeks preceding her injury. The appellate court was wrong to conclude that her employment with Quality Drive Away should be included under the "concurrent similar employment doctrine." In adopting the doctrine in 1953, the Court of Appeals held in *St. Paul-Mercury Indemnity Co. v. Idov* that the doctrine applies only where an employee's "concurrent work" is "similar in character to the work in the course of which the accident was sustained," the County's attorneys argue. Therefore, the phrase in the Worker's Compensation Act, "whether for

the same or another employer," is applied only where the work for the two employers is "concurrent." Contrary to the Court of Appeals' decision, work is not "concurrent" simply because the employee performed similar work for another employer sometime during the preceding 13-week period, the attorneys contend. Thomas' work with Quality Drive Away was not concurrent because Thomas stopped working for the company prior to the beginning of the school year. The Court of Appeals also erred by finding facts that were never established by the evidence. It essentially found that Thomas' employment with Quality Drive Away was ongoing by assuming she would return to working for the company the following summer, when there was no evidence to support such a plan. Even if the "concurrent similar employment doctrine" does not apply, the Court of Appeals erred in failing to use the average weekly wage, which the State Board of Worker's Compensation said was the correct one to use. Under the "any evidence" standard, the Board's finding cannot be disturbed as long as there is "any evidence" to support it. The appellate court erred in remanding the case back to the State Board "to again make a determination of these wages as there is sufficient evidence in the record to support the average weekly wage of $337.62," the County's attorneys argue.

Thomas' attorneys argue the Court of Appeals correctly ruled that Thomas' average weekly wage should be calculated based on her "concurrent" employment as a bus driver for two different employers during the 13 weeks immediately preceding her injury. Georgia courts have adopted the doctrine of "concurrent similar employment" in applying the Workers' Compensation statute. Under this doctrine, when an injured worker had multiple employers during the 13 weeks preceding her injury, the wages earned from all the employers are to be used in calculating the average weekly wage as long as the work performed was "similar in character." The doctrine does not require that the worker be *simultaneously* employed by multiple employers during the 13-week period, only that the injured worker performed a similar type of work during "substantially the whole" of those 13 weeks. Therefore the appellate court correctly determined that the average weekly wage should be based on Thomas' earnings from both the County and Quality Drive Away. If the "concurrent similar employment doctrine" does not apply, her average weekly wage should be calculated based on the other method laid out in the statute, which is the full-time weekly wage of the injured employee. Ultimately, Thomas' attorneys urge the Supreme Court to affirm the Court of Appeals opinion and rule that her average weekly wage should be calculated based on the wages earned from her concurrent similar employment with Fulton County and Quality Drive Away.

Attorneys for Appellant (County): Todd Brooks, Mark Irby
Attorneys for Appellee (Thomas): Kenneth Smith, Joseph Brown, II

2:00 P.M. Session

WASHINGTON, WARDEN, V. HOPSON (S16A0148)

The state Attorney General is appealing a judge's ruling that threw out a man's rape conviction due to improper actions by the **Fulton County** prosecutor. After successfully prosecuting the man, the Assistant District Attorney went into private practice and sought to represent the man, telling the man's parents he believed the victim was "lying" at trial.

FACTS: According to the facts at trial, in June 2004, Jason Hopson met a young woman and her friend at a party at Zoo Atlanta that was sponsored by a local radio station. Both women had been drinking and proceeded to drink more with Hopson and his friends. Eventually, the victim's friend got sick, and while the victim was waiting for her outside the restroom, Hopson approached and tried to kiss her, but she resisted. When the victim's friend returned from the restroom, Hopson offered her a glass of what appeared to be water. The friend took a sip before giving it to the victim, who then drank "quite a bit" of it. Within minutes, the victim felt dizzy and light-headed, and was unable to move. Her friend, who was also disoriented and vomiting, was unaware that Hopson dragged the semiconscious victim to a secluded and restricted area of the zoo, where he raped her. A Zoo Atlanta maintenance worker later found the victim unconscious in the restricted area, with her pants down and her shirt lifted. He saw Hopson nearby pulling up his pants. The worker called for security, and police later found Hopson in another area of the party.

In November 2004, Hopson was indicted for rape, kidnapping, aggravated assault, aggravated sexual battery and aggravated sodomy. In December of that year, a jury convicted him of rape and acquitted him of the remaining charges, other than aggravated assault, which it entered as "nolle prosequi," which means the prosecution decided not to pursue the charge. Hopson was sentenced to 15 years to serve in prison. Hopson appealed, but the Georgia Court of Appeals upheld the conviction. In January 2007, Hopson's attorney filed an "extraordinary motion" for new trial, claiming prosecutorial misconduct, which was new evidence that had only come to light after his trial. Specifically, Hopson claimed that Ash Joshi, the assistant district attorney who had prosecuted him, believed the victim had been lying during the trial and "had an ethical obligation" to inform the court and stop the trial. But Joshi did not disclose this until after the trial. The trial court held a hearing on the extraordinary motion and in January 2009 denied the motion, finding the evidence was not "new evidence" as required to order a new trial, because it was no more than the prosecutor's opinion of the credibility of a witness. The judge noted the victim had never recanted her statement, and the facts upon which Joshi's opinion were based had been presented at trial and were known to the defense attorney. Hopson appealed that decision, and again the Court of Appeals upheld the trial court's ruling, finding that Hopson had not satisfied the six-pronged test for granting an extraordinary motion for a new trial. Hopson also filed in another court a petition for a "Writ of Habeas Corpus." Habeas corpus is a civil proceeding that allows already convicted prisoners to challenge their conviction on constitutional grounds in the county where they're incarcerated. They generally file the action against the prison warden, who in this case was Anthony Washington. On June 30, 2015, the Chattooga County Superior Court granted Hopson habeas relief and threw out his conviction, finding that Hopson's constitutional right to due process had been violated by Joshi who first prosecuted Hopson for rape, then left for private practice and solicited $15,000 from Hopson's family to secure Hopson's release based on his knowledge that the victim and her friend had lied at trial. "Due process, at its most basic level, should prevent a convicted felon from being propositioned for money from his former prosecutor," the habeas judge said. The warden, representing the State, now appeals to the Georgia Supreme Court. (In 2009, the Georgia Supreme Court disciplined Joshi and ordered a public reprimand for his conduct related to this case.)

ARGUMENTS: Representing the State, the Attorney General's office argues the habeas court erred in granting habeas relief and setting aside Hopson's conviction based on a purported

due process violation due to Joshi's prosecutorial misconduct. The issue is barred by the doctrine of "res judicata," a Latin term meaning the issue has already been litigated and decided and is therefore barred from being re-litigated. The facts underlying the prosecutorial misconduct claim were decided against Hopson by both the trial court and the Court of Appeals when the trial court denied Hopson's extraordinary motion for a new trial and the Court of Appeals upheld the decision. "Issues previously decided by a court of competent jurisdiction are conclusive and constitute a procedural bar to re-litigation," the State argues, quoting the Georgia Supreme Court's 1999 decision in *Walker v. Penn.* Hopson's attorney even told the habeas court that "we are essentially using the same facts that were developed in the extraordinary motion for new trial," the State points out. "He then proceeded to argue that the 'rule has been clear for decades [that] a criminal defendant is denied due process of law when a prosecutor either knowingly presents false evidence or fails to correct the record to reflect the true facts when unsolicited false evidence is introduced at trial." The record is clear that Hopson sought a new trial due to "prosecutorial conduct." While he did not use the term "due process" in his extraordinary motion, he relied upon virtually the same arguments when he alleged Joshi violated three of the Georgia Rules of Professional Conduct, which govern the state's attorneys. Furthermore, it is inappropriate for a habeas court to substitute its own analysis on the same facts already decided by an appellate court. Also, even if the Supreme Court finds that the due process claim was not barred from the habeas court's review due to res judicata, the habeas court erred in setting aside Hopson's rape conviction due to a supposed due process violation. Neither the state Supreme Court nor the U.S. Supreme Court has ever ruled that a purported due process violation, based on prosecutorial misconduct, rises to the level of a "structural error," requiring automatic reversal. "Structural errors" are rare and extreme, and include such things as a complete denial of counsel, the denial of a public trial, or a biased trial judge. The habeas court's fact findings are all "clearly erroneous because they are not supported by any evidence in the record," the State argues. Joshi stated under oath at the hearing on Hopson's extraordinary motion that his statement to Hopson's parents that he "knew" the victims were lying was "inartfully worded." He believed only that the victim and her friend were lying about whether the victim had gone willingly with Hopson or had been dragged to the location where she was raped, not whether she was raped. "The habeas court's finding that Joshi knowingly presented perjured testimony at trial is clearly erroneous as a matter of fact and error as a matter of law," the State argues.

Hopson's attorney argues that habeas relief is not barred by the doctrine of res judicata. The trial court that considered the extraordinary motion for new trial did not have the authority to consider the constitutionality of Hopson's conviction. "Only a habeas court could do that," the attorney argues, as "the purpose of state habeas corpus is to determine whether an inmate is being held in violation of his constitutional rights." Likewise, the habeas court could not consider whether Joshi's belief in the untruthfulness of the testimony of the victim and her friend was newly discovered evidence. "Only a trial court on an extraordinary motion for new trial could do that." "Res judicata applies only as between the same parties and upon the same cause of action which were actually in issue or which under the rules of law could have been put in issue," the attorney argues. "The issues before the habeas court are not the same cause of action and do not involve the same rules of law as the issues in the extraordinary motion for new trial." The habeas court found that when a prosecutor sends a man to prison, then requests thousands of dollars from that man in an offer to undo the conviction, there is a "structural error" and a due process

violation. "The habeas court was not barred from considering the claim under the doctrine of res judicata." Under the U.S. Supreme Court's 1985 ruling in *United States v. Bagley,* "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury," Hopson's attorney argues. "The habeas court properly found that Mr. Hopson was entitled to release from prison due to structural error."
Attorneys for Appellant (State/Warden): Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Vicki Bass, Asst. A.G.
Attorney for Appellee (Hopson): J. Scott Key

ALLABEN V. THE STATE (S16A0166)

For the second time, a man is appealing the murder conviction and life prison sentence he received in **DeKalb County** for the strangulation death of his wife. He argues the evidence does not prove he intended to kill her.

FACTS: Dennis Ronald Allaben has twice been convicted by a jury of murdering his wife, Maureen Allaben, in 2010. In his first trial in 2011, a jury found Allaben guilty of malice murder, felony murder, aggravated assault with intent to murder, battery, simple battery, and reckless conduct. But in 2013, the Georgia Supreme Court unanimously reversed his conviction for malice murder, set aside the other verdicts and sent the case back to the trial court for further proceedings, finding that the jury's guilty verdict of reckless conduct was "mutually exclusive" of the other verdicts. While reckless conduct requires the jury to find that a defendant acted with criminal negligence and did not intend to injure or kill the victim, the other charges require the jury to find that he did intend to kill or injure the victim.

According to the facts of the case, Allaben admitted he killed his wife but said he didn't mean to. He merely wanted "to put her to sleep, tie her up, and then confront her about what he believed was her adulteration of his food." On Jan. 3, 2010, she died after he put her in a chokehold. He then rolled her up in blankets bound with duct tape and put her body in the bed of his Ford pick-up truck, according to briefs filed in the case. With his 7 and 8-year-old children, he then drove to his brother's house in Chesterfield, VA, telling them on the way that he had killed their mother. Arriving unannounced, he told his sister-in-law that his wife had videotaped him performing sex acts and had given the video to a party of 30 or so gay men. The sister-in-law testified he told her that while they watched the video, his wife collected the semen and then used it to poison his food and milk. Allaben told his sister-in-law that he had put a cloth with ether over his wife's mouth, hoping she would go to sleep so he could tie her up, then force her to tell him the truth about what she was doing. But he said the cloth went too far down her throat and she choked to death. After leaving his children in Virginia, Allaben returned the next morning to Georgia. He went to the home of a friend in Clayton County and told him his wife's body was in the back of his truck. That man also testified that Allaben told him a "crazy story" about his wife "collecting human semen," putting it in his food, and running around on him. The man called his neighbor, who was a police officer and Allaben turned himself in and was arrested. Officers subsequently found his wife's frozen body in the back of his truck. The medical examiner who performed the autopsy found signs of asphyxia due to strangulation, including petechial hemorrhages on the face and eyes, and bruises on the neck and jawbone. He concluded that Maureen Allaben had been strangled by someone who approached her from

behind, wrapped an arm around her neck and applied pressure by squeezing her neck with the other hand. He said the crook of the assailant's arm at the elbow would have been over her Adam's apple and the other hand would have applied the pressure, causing the petechial hemorrhages and bruises. The medical examiner testified that Mrs. Allaben was choked long enough to get the hemorrhages in her face and eyes, to get the bruise on her face, to get the thick bruising of her Adam's apple, and to eventually die.

Following a second trial in August 2014, a jury convicted Allaben of the malice murder and felony murder of his wife. Allaben again appeals to the Georgia Supreme Court.

ARGUMENTS: Allaben's attorney argues his convictions should be reversed because the State failed to prove that his actions were likely to cause injury or death or that he intended to kill his wife. As the medical examiner stated, a "carotid sleeper hold," which was used in this case, is "not likely to cause injury or death." "In fact, this hold was so ***not likely*** to cause serious injury that in the past it was routinely used by the police – until a statistically small but sufficient number of deaths occurred, ending the practice," the attorney argues in briefs. The medical examiner also conceded that the evidence was consistent with Allaben's statement "that he just wanted to put Ms. Allaben to sleep with a rag with ether." Some ether was found in her system. And there was no evidence Allaben had an intent to kill. "The evidence was instead perfectly consistent with an unexpected and unintentional death," the attorney argues. The trial court erred by refusing to instruct jurors that they could consider Allaben guilty of the two misdemeanors of simple battery and reckless conduct as lesser included offenses of the more serious malice murder and felony murder charges. Those less serious charges were "not merely justified by the evidence, but in fact fit the evidence better than the charged offenses," Allaben's attorney argues. In the first trial, the judge did charge the jury on simple battery and reckless conduct as lesser included offenses of aggravated assault, and the jury convicted Allaben of the less serious charges. "There being overwhelming doubt regarding the element of malice, it was error to refuse Mr. Allaben's requested lesser included offense of simple battery," his attorney argues. The trial judge was also wrong to refuse to allow the jury to consider whether the killing of his wife was involuntary manslaughter instead of murder. Allaben argues the trial judge was also wrong to refuse to define for jurors the term, "abandoned and malignant heart" when instructing them on how to determine whether malice existed. The jury asked for clarification of the words, but the judge responded they should "apply their common and every day usage." "A trial court has a duty to recharge the jury on issues for which the jury requests a recharge, and the trial court commits reversible error if it fails to do so," the attorney argues. Among other errors, the trial judge also erred by admitting an extremely damaging post-autopsy photograph after the medical examiner made it clear that it was unnecessary. The medical examiner said only one of two photographs was necessary to make his points to the jury, but the judge admitted both.

The District Attorney and Attorney General argue for the state that there was sufficient evidence that Allaben's actions were likely to result in serious bodily injury and that the result was an intentional death. "It was up to the jury to determine if Appellant's [Allaben's] actions, as described by the medical examiner and as shown by the exhibits admitted at trial, supported the State's charges on both malice murder and felony murder," the state's lawyers argue in briefs. "Obviously, the jury did not believe Appellant's actions supported a finding of unexpected and unintentional death as asserted by Appellant." Also, there was no evidence to support jury instructions on the less serious crimes of simple battery, reckless conduct or involuntary

manslaughter. "The evidence showed Appellant intentionally placed ether on Ms Allaben's mouth, placed a choke hold around her neck for a sufficient time to create petechial hemorrhages and severe bruising, and caused her death by asphyxiation," the State argues. "Intentionally choking someone and preventing them from breathing, coupled with incapacitating the victim constitutes extreme recklessness and malice." The trial court did not err in refusing to define "abandoned and malignant heart" because the words were not technical but had an ordinary meaning and were self-explanatory, the State argues. And the trial judge properly admitted the autopsy photo. "Photographs which are relevant to any issue in the case are admissible even if they may have an effect upon the jury which a defendant feels is damaging to him," the State argues.

Attorney for Appellant (Allaben): Gerard Kleinrock

Attorneys for Appellee (State): Robert James, District Attorney, Eric Dunaway, Dep. Chief Asst. D.A., Antonio Veal, Asst. D.A., Deborah Wellborn, Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Michael Oldham, Asst. A.G.

BROWN V. THE STATE (S16A0179)

In this **Cobb County** case, a man is appealing his murder conviction and sentence to life in prison for killing a man by hitting him in the head with a hammer.

FACTS: The case stems from a confrontation between Roger Shannon Brown and Roger Emory in the parking lot of a liquor store. According to the facts of the case, Emory operated a firewood business. In addition to Emory's daughters and his sons-in-law, Dennis Freeman also worked for the family business, called Roger's Firewood, which was located in a wood lot next to Good Times Package Store near the intersection of Canton and Blackwell roads. The liquor store also had a check cashing business. A dumpster sat to the side of the package store adjacent to Emory's business.

The evening of Jan. 18, 2008, following a day doing roofing work in Alpharetta, Brown and his crew from Get-R-Done Roofing went to the Good Times Package Store to cash the check they had received from the homeowner for whom they had worked that day. While the others went inside to cash the check, Brown and one of his co-workers walked back to the dumpster to urinate. Emory later testified he was standing near the wood lot with his family and employees when he noticed the men urinating by the dumpster and told them to stop because they were in plain site of his wife and family. The other man apologized and went into the store, but Brown angrily refused and he and Emory began arguing. According to witnesses, Brown went to his work truck and retrieved a hammer and crow bar. As he approached Emory, he began beating the hammer and crow bar together, screaming, "What are you going to do now?" Brown threatened to kill both Emory and his wife, then swung the hammer over the head of Emory's son-in-law. The son-in-law jumped out of the way, and Brown then turned his attention to Freeman, who was leaning against a pickup truck with his legs crossed. Freeman said nothing, was unarmed, and avoided eye contact with Brown. Brown said to Freeman, "I'll just kill you," swung the hammer and hit Freeman in his head. Freeman lost all expression in his face and fell to the ground. Brown then headed for Emory, who reached into the floorboard of his truck, grabbed an axe handle and held it like a baseball bat to defend himself. Brown took several steps back before seeing Freeman on the ground. He then ran away, throwing the hammer into the woodpile and the crow bar into a pile of cardboard boxes. According to state prosecutors, Brown went into the package

store and told his boss to give him his money because, "I got to go. I just killed this man." Police eventually found Brown hiding in a culvert nearby. Meanwhile, paramedics transported Freeman to Kennestone Hospital, where he was pronounced dead. According to the medical examiner who performed the autopsy, Freeman died as a result of a sharp-force injury to his head, which was consistent with having been caused by a claw hammer.

Prior to trial, Brown's attorney filed a motion to suppress certain incriminating statements Brown made the night of the crime, arguing that police had violated his constitutional right to have an attorney present. The trial court granted his motion and the State appealed. In a split 4-to-3 decision, the state Supreme Court reversed the trial court's ruling, finding that Brown had made the statements voluntarily. Brown was subsequently tried, and in February 2011, he was convicted of murder and the aggravated assault of Emory and sentenced to life plus 20 years in prison. Brown now appeals to the state Supreme Court.

ARGUMENTS: Brown's attorneys argue his convictions should be reversed because his trial attorney was ineffective in violation of his constitutional rights. The attorney pursued an "unreasonable and legally unsupported theory of defense," Brown's attorneys for his appeal argue. The defense strategy the attorney used was that (1) Brown was justified in defending himself, but he did so in an "unlawful" manner; or as an alternative, that (2) Brown committed the less serious crime of involuntary manslaughter when he negligently swung the hammer at Emory which inadvertently led to Freeman's death. But as the Georgia Supreme Court stated in *Demery v. State* (2010), if a person is justified in killing someone under the state's self-defense statute, "he is guilty of no crime at all," and "one's conduct when acting in self-defense cannot be unlawful," his attorneys argue. Similarly, the trial attorney's alternative argument that Brown was only guilty of involuntary manslaughter "finds no support in Georgia law," because by Brown's own account, his conduct was intentional. "Rather than providing a roadmap that would show the jury how the evidence called for acquittal, counsel instead presented a patchwork of legally incompatible concepts that provided no actual avenue for the jury to acquit Brown, under any interpretation of the evidence," the attorneys argue. The trial court erred as well by permitting the State to present graphic autopsy photos of the victim that served no purpose but to inflame the jury against Brown. In a 1983 decision, the Georgia Supreme Court noted "increasing concern" about the admission of gruesome photographs of victims at trial, announcing a rule regarding such photos, which stated: "A photograph which depicts the victim after autopsy incisions are made or after the state of the body is changed by authorities or the pathologist will not be admissible unless necessary to show some material fact which becomes apparent only because of the autopsy." Here, the photos "clearly depicted the victim after the body had been changed by authorities – the skin had been cut and pulled down over the front of the skull," the attorneys argue. And the photos were not necessary to prove any fact. Finally, the trial judge erred by giving an erroneous jury instruction that completely failed to inform the jury that Brown would be justified in using lethal force in response to "threats and menaces." "Instead, the jury was left with the instruction that threats and menaces would justify an *assault,* and by implication the jury could only have concluded that threats and menaces *would not* justify more significant uses of force in response."

The District Attorney and Attorney General argue for the State that Brown's trial attorney provided "effective assistance of counsel." Maddox Kilgore, who represented Brown at trial, is an experienced criminal defense attorney who has handled about 70 felony jury trials, including

murder cases, and who also worked as a prosecutor for six years, also handling murder cases. The attorney "made a reasonable strategic decision" to pursue involuntary manslaughter as a less serious offense than murder, the State argues. "Mr. Kilgore worked diligently to develop a defense strategy for Brown that was reasonably consistent with the facts that he expected to confront at trial." Because Freeman had done nothing that could be construed as a threat to Brown, the attorney recognized he could not argue that Brown's actions toward him were in self-defense. Kilgore therefore crafted a defense that acknowledged innocent behavior on Freeman's part but still asserted self-defense and justification by arguing that in self-defense against Emory, Brown had unintentionally struck Freeman. Under that defense theory, the jury could have convicted him of involuntary manslaughter. The State also argues that the trial court did not err in admitting the post-autopsy photos. The photos "illustrated material facts that were only apparent because of the autopsy," the State's attorneys argue. Finally, the trial court properly instructed the jury on the legal principles of justification and self-defense, and "Brown has no basis for asserting that error seriously affected the fairness, integrity, or public reputation of his judicial proceeding," the State contends.

Attorneys for Appellant (Brown): Lawrence Zimmerman, Christopher Geel

Attorneys for Appellee (State): D. Victor Reynolds, District Attorney, John Edwards, Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Scott Teague, Asst. A.G.