Supreme Court of Georgia
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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Tuesday, January 5, 2016

10:00 A.M. Session

WALDROP V. GOLDEN COASTLINE LOGISTICS ET AL. (S16Q0022)

This case involves a lawsuit in federal court brought by a man injured in a collision with a tractor trailer. The man sued both the driver of the truck and his insurance company. The federal court is now asking the Georgia Supreme Court to answer two questions about Georgia law before resolving whether the man is entitled to the full amount awarded by the jury.

FACTS: In May 2013, Manuel Ponce was driving a tractor-trailer through **Troup County** for Goldline Coastline Logistics when he allegedly failed to yield at an intersection in LaGrange, GA, and made a left turn in the path of Jeffrey Waldrop, causing Waldrop's pickup truck to crash into the rear of Ponce's tractor trailer. As a result of the wreck, Waldrop injured his knee, which he claimed eventually ended his career as a commercial electrician. A police officer cited Ponce for failure to yield at an intersection. At the time of the collision, Ponce had an insurance policy with Carolina Casualty Insurance Company which had a liability limit of $1 million. Ponce's policy also provided "Supplementary Payments," including interest and all "costs taxed against the 'insured' in any 'suit' against the 'insured' we defend." In December 2013, Waldrop sued Ponce and his insurance company in the U.S. District Court for the Northern District of Georgia. (The suit was filed in federal court because the trucking company was engaged in interstate commerce at the time of the wreck.) Waldrop's attorneys claim they tried four times to settle with the insurance company for $1 million or less but their offers were

rejected. The case proceeded to a jury trial, and on May 20, 2015, a jury returned a $2.225 million verdict against Ponce and his insurance company. The insurance company's attorneys immediately made a motion asking the court to "write down," or reduce, the verdict to its liability limit of $1 million. Waldrop's attorneys opposed the reduction as impermissible under Georgia law and argued that supplemental provisions in the insurance policy also required Carolina Casualty to pay attorneys' fees, costs and interest on top of the stated policy limit. At issue is whether post-verdict, a court may reduce the verdict to an insurance company's policy limit under Georgia law. The federal court wrote an order stating that "because Georgia is one of a minority of states that permit the insurer of a motor carrier to be named as a defendant in a direct action suit brought by an injured party, there is a marked absence of instructive law or reasoning from other jurisdictions that might have taken up similar issues." The U.S. District Court has asked the state Supreme Court to answer two questions: Under Georgia statutes, is an insurer entitled to a write-down of an excess verdict to the liability limit of the insured person's policy? Under Georgia statutes, may an injured party recover from the other person's insurance policy supplemental benefits above the liability limit?

ARGUMENTS: Waldrop's attorneys argue the answer to the first question is no and the answer to the second question is yes. Under Georgia Code § 40-1-112 and § 40-2-140, which are called "direct action statutes," an injured party is permitted to bring a direct claim against an insurance company, in addition to bringing a direct claim against the person at fault. But these statutes do not entitle an insurance company to an automatic reduction of a jury verdict, and "Georgia courts do not have the authority to rewrite statutes," the attorneys argue in briefs. "If the Georgia legislature wanted to provide an insurer with an automatic write-down under the Direct Action statutes, it would have done so." Indeed, it has done just that in Georgia's *government* liability insurance statute, which states that, "If a verdict rendered by the jury exceeds the limits of the applicable insurance, the court shall reduce the amount of said judgment or award to a sum equal to the applicable limits stated in the insurance policy…." Georgia's direct action statutes, however, "are completely silent on the propriety of a write-down." They also provide no limit to the insurer's liability as a number of other states have done, such as Louisiana, whose direct action statute says that an injured person "shall have a right of direct action against the insurer within the terms and limits of the policy." "Because the Georgia legislature did not include any write-down provision in the direct action statutes, the first certified question should be answered that no automatic write-down of the verdict is allowed under the statute," Waldrop's attorneys contend. They also argue that the statutes allow Waldrop to recover money from the supplementary payments provision of Ponce's insurance policy. "Even if Georgia law authorized an automatic write-down of the jury verdict, the final judgment against Carolina Casualty Insurance Co. should include any benefits it agreed to pay under the Supplementary Payments provision of its insurance policy," the attorneys argue. "Moreover, while Georgia courts do not appear to have squarely addressed this issue, courts in other jurisdictions allow a plaintiff to recover amounts in a Supplementary Payments provision directly from the insurer."

The attorneys for Ponce and the insurance company contend that the answer to the federal court's first question is yes and the answer to the second question is no. "Carolina Casualty is entitled to have any judgment against it limited to the amount of the liability limits in the insured's policy," they write in briefs." That is because the insurance company's obligations

arise out of a contractual relationship with the motor carrier for whom Ponce was driving, and not because of the wrongdoing that underlies the lawsuit. The attorneys first make the point that the statutes at issue "are contrary to both common law and common practice" by granting a person "the extraordinary right to sue the insurance company directly." That said, however, "those rights are not unlimited," they argue. "And over the course of the past 80 years, those limitations have been well defined by the courts in this state." "Carolina Casualty's role in the litigation is that of a surety, and not a true party, and therefore its liability is limited by the insurance contract." The Georgia Supreme Court "has squarely held that in a suit under the direct action statutes, a plaintiff's recovery against the insurance company is limited to the insurance policy's liability limits," the insurance company's attorneys argue. "The purpose of the direct action statutes is clear, and plainly supported by decades of precedent. That purpose is to allow a plaintiff to directly recover from a truck driver's liability policy up to the amount of the liability limits. That's it; nothing more and nothing less. Accordingly, whether the Court chooses to call it a write down or simply a limitation of liability, the result is the same." Furthermore, "Waldrop may not stand in the place of Ponce to recover supplemental benefits from Carolina Casualty." Waldrop "may seek to recover only under those portions of the policy to which he is a third party beneficiary. That recovery is not extended to other portions of the policy, such as the supplemental benefits, which exist only for the benefit of the insured, Manuel Ponce." As the state Supreme Court said in 2012 in *Archer W. Contractors, Ltd. V. Estate of Pitts*: "A third party should not be permitted to enforce covenants made not for his benefit, but rather for others. He is not a contracting party…." If this Court rules that an insurance company's liability is not limited to what its policy states, insurance companies "will have no way to determine the amount of risk they face by doing business in Georgia," the attorneys argue. "If this Court does not restrict an insurance company's exposure to that set forth in its contract, what is to stop that number from being three or four times the amount of the policy limits?" The result would be higher premiums and fewer insurance companies doing business in Georgia.

Attorneys for Appellant (Waldrop): Peter Law, E. Michael Moran, Edward Piasta
Attorneys for Appellee (Carolina Casualty): Leah Ward Sears, John Amabile, Nicholas McDaniel

PEARCE ET AL. V. TUCKER (S15G1310)

The appeal in this case stems from a lawsuit filed by a woman against a **Glynn County** police officer after her husband was arrested and committed suicide in a holding cell. While the trial court denied the officer's motion asking for a judgment in his favor and ruled that the case could proceed to a jury trial, the Georgia Court of Appeals reversed the trial court, ruling that the case could not proceed against the officer.

FACTS: Christopher Pearce, 38, was married and had five children. According to his wife, Tammy, he was the choir leader and taught Sunday school at their church, People's Liberty Baptist Church, where the pastor was Rev. Hugh Harrison. According to the evidence, Pearce suffered from major depressive disorder. On Oct. 26, 2008, Harrison noticed something seemed to be bothering Pearce during church. As Pearce left that day, he told the pastor, "You have been a good friend," which Harrison said struck him as odd. Later that night, Pearce rang the doorbell at Harrison's home. Harrison saw Pearce was holding a gun and had his wife call 911 while he retrieved and loaded his own gun. Harrison's wife told the 911 dispatcher that Pearce had a gun

and was possibly on medication. Glynn County Police Officer Henry Tucker and another officer arrived at the Harrison's home as Pearce was walking down Harrison's driveway with his gun tucked in the back of his waistband. The officers drew their weapons and on their orders, Pearce put up his hands and got down on his knees, and the officers took his gun. After handcuffing Pearce and putting him in the patrol car, Pearce said little and had a blank look on his face. His silence and "weird look" struck Officer Tucker as odd. Before leaving the Harrisons' home, the other officer retrieved Pearce's driver's license, which was wrapped in two notes that said: "Tammy and Kids, No [sic] your fault. I love you and always will," and "To [sic] much PAIN. To [sic] much RIDICULE. NO UNDERSTANDING. NO MORE PAIN. Forgive me! Chris." The other officer saw the notes, but it is unclear whether Tucker did, and the other officer later testified he did not perceive them as suicide notes. Once at police headquarters, Tucker placed Pearce in a temporary holding cell that was monitored by a video camera. Tucker later admitted that although he completed a required property receipt for Pearce's personal property, he forgot to fill out a medical assessment form attached to it that requires the booking officer to "fill out the screening form noting and inquiring as to:" the detainee's health, medication that he's taking, and his behavior, including his "mental status." Tucker later testified, however, that he did not believe Pearce was in any danger of hurting himself. About 21 minutes after leaving Pearce in the holding cell, the other officer found Pearce slumped in the corner of his cell and blue in the face. Tucker performed CPR until emergency medical personnel arrived, but he was later pronounced dead at the hospital. Surveillance footage of the holding cell showed that Pearce had committed suicide by tying his socks together and hanging himself from a door hinge.

Pearce's widow filed a wrongful death lawsuit against Tucker, alleging that Tucker had been negligent for not removing her husband's socks. He filed a motion asking the court for "summary judgment" in his favor on the ground that official immunity protects him from being sued. (A judge grants summary judgment after determining a jury trial is not necessary because the facts are undisputed and the law falls squarely on the side of one of the parties.) Tucker argued that official immunity applies because deciding whether to remove Pearce's socks was a "discretionary" act, requiring judgment and personal deliberation, as opposed to a "ministerial" act, requiring merely the execution of a simple, specific duty. Under the doctrine of official immunity, public officials are afforded greater immunity from liability when they are faced with a situation that requires them to make a judgment call and less protection when they are performing simple, automatic tasks governed by clear rules. In response, Pearce's widow agreed that removing her husband's socks was a discretionary act, but that summary judgment was still inappropriate because the requirement to perform a medical screening was a ministerial function. The trial court agreed and denied Tucker's motion, finding that there was evidence the lack of a medical screening was the cause of Pearce's suicide, and that a jury should decide whether a properly conducted health assessment would have revealed Pearce's intent to kill himself. On appeal, the Court of Appeals reversed the decision, quoting the standard from its 2001 decision in *Dry Storage Corp. v. Piscopo,* which states: "Generally, suicide is an unforeseeable intervening cause of death which absolves the [wrongdoer] of liability." However, there is an exception to the general rule if the so-called wrongdoer's act causes the party to "kill himself during a rage or frenzy." The Court of Appeals ruled that there was no evidence Pearce was in a rage or frenzy, so the general rule, not the exception, applies and there is no evidence Pearce would have been unable to commit suicide if Tucker had medically screened him before placing

him in the cell. His widow's argument that the screening would have revealed Pearce was a suicide risk was "purely speculative," the appellate court ruled. Tammy Pearce now appeals to the state Supreme Court, which has asked the parties to answer two questions: Did the Court of Appeals err in applying the "general rule" that suicide is an unforeseeable intervening cause of death, even though there is a special relationship between an officer and his prisoner? Did it err in reversing the trial court's denial of summary judgment to Tucker? The issue here is whether Tucker's failure to medically screen Pearce was the direct cause of his suicide or whether the suicide was an unforeseeable act not caused by Tucker's failure to act.

ARGUMENTS: Tammy Pearce's attorneys argue that had Tucker followed required procedure and conducted the medical screening, he would have had to specifically ask Pearce about his mental state and learned about the medications he had been taking for years for major depression. Furthermore, given that Pearce had already turned over two suicide notes to the officers, the inference is he would have told them of his suicidal intent. As the other officer testified, suicidal inmates usually admit they are suicidal. The Court of Appeals erred in applying the "general rule" that suicide is an unforeseeable intervening cause of death because that rule does not apply when a special relationship exists, such as between an officer and his prisoner, that creates a duty to *prevent* the suicide, the attorneys argue. "There are two types of wrongful death suicide cases: *direct cause* and *failure to prevent*, which are judged under different standards that have been accepted by Georgia Courts," the attorneys argue in briefs. "Without a doubt, this is a *failure to prevent* case." Here, there is no allegation that Tucker took any action that caused Pearce to actually become suicidal. In fact, Pearce was already in a suicidal state when he was arrested. Therefore it makes no sense to analyze the case to see if Tucker caused Pearce to go into a suicidal "rage or frenzy." Rather, it should be analyzed on a *failure to prevent* standard because that is the alleged wrongdoing and a special relationship existed between Tucker and Pearce. The Court of Appeals muddled the distinction between the two types of cases by incorrectly applying the *direct cause* "general rule" as opposed to the *failure to prevent* standard. "The Court here has an opportunity to clarify this rather murky area of law simply by stating the correct rule of law in this case" and rejecting *failure to prevent* cases that misapplied the ruling in *Dry Storage Corp*. In its 1988 decision in *Brandvain v. Ridgeview Institute, Inc.*, the Court of Appeals addressed whether suicide, as an intentional self-destructive act, breaks the causal chain against an accused wrongdoer as a matter of law. "In holding that suicide is ***not*** an intervening act as a matter of law, the court reasoned that a [wrongdoer] with a duty to prevent a suicide could be liable if the suicide was reasonably foreseeable," the attorneys argue. "Accordingly, suicide is not an unforeseeable intervening act as a matter of law in failure to prevent cases." The Court of Appeals was wrong to reverse the trial court's denial of Tucker's motion for summary judgment because jury questions remain when analyzing this case under the *failure to prevent* standard. Furthermore, the court was wrong to say that Tammy Pearce's claims were speculative. Pearce's suicide was a foreseeable harm that Tucker had a duty to prevent. A jury should decide whether Pearce's suicide would have been prevented if Tucker had conducted the screening.

Tucker's attorneys point out there is another exception to the general rule that a suicide is an "intervening act" which breaks the line of causation from the defendant's wrongful action, such as the officer's failure to do the medical screening, to a person's death. That exception is where the defendant and the decedent had a special relationship that placed a duty on the

defendant to use reasonable care and where the suicide is reasonably foreseeable to the defendant. The Court of Appeals correctly reversed the denial of summary judgment because there is no evidence that Tucker's failure to perform a medical screening caused the suicide. As the appellate court correctly noted, "The plaintiff's argument that during such a screening Pearce would have offered information or acted in a manner indicating that he was a suicide risk…is purely speculative." Also, even if Tucker had performed a screening and determined that Pearce was suicidal, Pearce's widow assumes that something more would have been done after the screening that would have prevented her husband's suicide, such as taking him to the hospital. But there is no evidence that Pearce could have been transported to a hospital sooner than it took him to commit suicide. Mrs. Pearce is also incorrect in stating that causation in this case should turn entirely on whether the suicide was generally foreseeable because, "if causation hinged only on the general foreseeability of a suicide, then an officer like Tucker would be strictly liable for any detainee's suicide so long as there was any reason to believe that the detainee was suicidal," the attorneys argue. "Here there is no evidence that Pearce's suicide was a foreseeable result of the specific alleged negligence – i.e., the failure to perform a medical screening." Much of Mrs. Pearce's argument about foreseeability rests on the content of the "suicide notes." "But there is no evidence that Officer Tucker ever read those notes." Finally, although the Court of Appeals did not consider whether official immunity applies because it based its ruling on the lack of causation, summary judgment in favor of Tucker is appropriate because he is protected by official immunity. Official immunity hinges on whether performing a medical screening was a "discretionary" or "ministerial" act. "By its inherent nature, a medical screening is a discretionary function," Tucker's attorneys argue. "After all, screening an inmate for medical and mental health problems requires a police officer to 'examine the facts, reach reasoned conclusions, and act on them in a way not specifically directed.'" Therefore, Mrs. Pearce is suing Tucker for his allegedly negligent failure to perform a discretionary act. "As a result, Officer Tucker is entitled to official immunity."
Attorneys for Appellant (Pearce): Paul Painter, III, W. Richard Deckle
Attorneys for Appellee (Tucker): Richard Strickland, Steven Blackerby, Aaron Mumford

IN THE INTEREST OF B.R.F., A CHILD (S15G1301)

A mother is appealing a Georgia Court of Appeals decision upholding the termination of her parental rights. The legal issue in this case is the appellate court's decision that it had the authority to review her case even though her application to appeal was filed months after the deadline.

FACTS: B.R.F was born in June 2011 to a 17-year-old girl, who lived in **Pike County** with her father. The Department of Family and Children's Services was alerted that the baby was not being properly cared for and initially became involved with the family in an effort to keep the baby with her mother and the family intact. For the next year, the child welfare agency worked with the mother, trying to get services for her at home so she could learn how to parent her child, but the father interfered and impeded the agency's attempts to help his daughter and grandchild. In August 2011, a Pike County juvenile judge ordered the mother and baby be placed in a shelter for teenage mothers where she could learn parenting skills, and they were placed together in a "Second Chance Home." But the mother did not want to be in the group home, and her father continued to interfere in her care of her baby. In September 2011, the judge

determined the child was deprived and awarded custody to the State. The baby, who was not quite 3 months old, was placed in foster care. Shortly after, the court released the mother from the group home and she returned to live with her father. The child welfare agency continued to work with the mother, and she received services from a therapist and a parent aide, and continued to visit her baby. Meanwhile, her father filed a petition in superior court to adopt B.R.F. after the baby's father surrendered his parental rights.

In July 2012, the baby's mother went to her father's attorney and signed documents surrendering her parental rights to her father. At that point, the Department of Family and Children's Services cancelled the mother's visitations with her child. In September 2012, the department filed a petition for the termination of the mother's parental rights. At the hearing, the social services administrator testified that from the beginning, the mother's father had not wanted the child welfare agency involved and would not allow his daughter to cooperate with them. The administrator testified that the mother had not shown proof she was taking medication for her mental health diagnosis and that while she had completed parenting classes, she was unable to do what she had been taught. She had no source of income and had not completed high school or a GED program, as the safety plan she had signed stipulated. At the hearing, the mother testified she had executed the documents surrendering her parental rights in favor of her father so that her baby could "stay…with the family," and said she would be an "assistant person" to her father, or a "big sister," to the child, but not the child's primary caregiver. In an earlier hearing, the mother had acknowledged she was not able to care for her child by herself. The child welfare agency presented expert testimony showing that the baby had bonded with her foster parents, who want to adopt her, although the same expert caseworker also testified that the baby had bonded to her mother as well. The State also presented testimony regarding the effect of a lack of permanency on a child. The child welfare agency conducted a home placement evaluation of the grandfather's home, but rejected it as a suitable placement for B.R.F. Following the termination hearing where the mother was represented by an indigent defense attorney, in January 2013, the juvenile court entered an order terminating the mother's parental rights, finding that that the mother had surrendered her rights to her father only to avoid completing her court-ordered reunification goals and as a subterfuge to avoid the involuntary termination of her parental rights.

At issue legally in this case is what happened next. The mother wanted to appeal the decision, but her court-appointed attorney wrote her a letter stating it was his understanding "that you are not entitled to indigent defense for a discretionary appeal of a civil case (termination of parental rights)." (Under Georgia Code § 15-11-262, an indigent parent has the right to appointed counsel in all dependency and termination of parental rights cases, including at all stages.) So the teenage mother, described by the juvenile court as "mentally 'slow,'" then tried to represent herself, but she filed the wrong form in court – a notice of appeal, which is what is required in a "direct" appeal, or an appeal that the appellate court automatically grants. But the appeal of a termination of parental rights is now by law a "discretionary" appeal, meaning the appellate court may decide whether or not to hear the appeal. Because she filed a direct appeal, her case was dismissed for failure to follow the discretionary appeal procedure. She then appealed to the Georgia Court of Appeals, which in a split 4-to-3 decision, granted her application for discretionary appeal, even though it was filed months past the 30-day deadline to do so, in violation of court procedure. The Court of Appeals ruled that in refusing to assist the mother with applying for a discretionary appeal and actively telling her the *wrong* way to appeal on her

own, the indigent defense attorney had violated her constitutional rights to due process. After accepting her appeal and considering her case, however, the Court of Appeals upheld the termination of the mother's parental rights, finding it was "in the best interest of the child, considering the child's physical, mental, emotional, and moral condition and need for a secure and stable home." Represented by the State's former Child Advocate, the mother now appeals to the Georgia Supreme Court, which has agreed to review the case to determine whether the Court of Appeals was wrong to conclude that it had the authority to excuse the late filing of a discretionary application in a parental termination case.

ARGUMENTS: The attorney for B.R.F.'s mother argues that appellate courts are authorized to grant applications for late appeals from a juvenile court's termination of parental rights rulings to guarantee a parent's statutory and constitutional rights under the Georgia and federal constitutions. "This case involves a very important issue of child welfare law with the potential to impact the public's confidence in our state judiciary, our indigent defense system, and our child welfare system," the attorney argues in briefs. "When the court-appointed attorney for a 'slow' teenaged mother whose parental rights are terminated following a contested juvenile court trial, refuses her request to seek appellate review of the matter and instead gives her incorrect legal advice regarding appellate procedure, causing her to lose her opportunity to seek appellate review, can our courts provide her with any relief?" In this case, the State of Georgia persuaded the juvenile court to terminate an indigent mother's rights to her infant child. Under a Georgia statute, the mother was entitled to appointed counsel on appeal. But she also had a constitutional right to court-appointed counsel, the attorney contends. While the State argues that under the U.S. Supreme Court's 1981 decision in *Lassiter v. Dept. of Social Services of Durham City,* indigent parents have no federal constitutional right to an attorney in parental rights termination cases, the "State is incorrect," the attorney argues. "The *Lassiter* Court found that where the case is complex, the parent's capacity to defend himself or herself low, and the risk of error high, due process may require the appointment of counsel for indigent parents in termination proceedings." Because the mother had a right to representation at all states of the proceedings, she also had the right to <u>effective</u> representation when she asked her court-appointed attorney to help her seek an appeal of the juvenile court's ruling. "Even in the absence of a recognized *constitutional* right to counsel in termination cases, this Court has recognized that indigent parents are entitled to <u>effective</u> assistance of counsel and are allowed to raise such claims." The appropriate response is a motion for new trial alleging ineffective assistance. "That additional step undoubtedly delays permanency for the child, but no one seems ever to have suggested that such a procedure is incorrect or unfair to the child for whom adoption is sought." "It is beyond doubt that efforts by a State government to terminate a parent's rights impact rights that the U.S. Supreme Court has determined are 'of basic importance in our society' and that are 'sheltered by the fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect,'" the attorney argues. "To protect those rights, as well as those guaranteed by the Georgia Constitution, our appellate courts must have the opportunity to ensure that trial courts in contested termination cases have applied 'the most stringent procedural safeguards' to guarantee due process for parents in termination cases."

The Attorney General, representing the State, argues the Court of Appeals erred in ruling it had the authority to grant a late application for a discretionary appeal in a civil parental rights termination case where ineffective assistance of counsel is alleged. That decision, the State

contends, "is foreclosed by this Court's precedents, barred by the Court of Appeals' own case law, and, if allowed to stand, would introduce uncertainty into both the child adoptive process and the state appellate process." As the Georgia Supreme Court ruled in 2011 in *Gable v. State,* "Georgia courts may excuse compliance with a statutory requirement for appeal only where necessary to avoid or remedy a constitutional violation concerning the appeal." "There is no such constitutional right available here; although Georgia law grants a *statutory* right to counsel in termination proceedings, neither the federal nor the state Constitution guarantees that right," the State argues. The decision by the appellate court is all the more surprising because it decided the same question in the opposite way in its 2012 decision in *In the Interest of S.M.B.*, finding it lacked jurisdiction to consider an appeal "where no constitutional right of appeal or of counsel is implicated." "In short, the court's conclusion that it has the authority to excuse the untimely filing of a discretionary application in a civil parental rights termination case is plainly contrary to this Court's instruction in *Gable* that only a *constitutional* violation is sufficient to excuse compliance with statutory requirements." Here the mother failed to file an application for discretionary review for nine months after the juvenile court issued its decision, rather than within the 30 days required by state law. "Because, as the Court of Appeals itself concluded, there was no constitutional right to counsel at stake, the courts are without authority to excuse the late filing." As long as there is a possibility for the filing of an application for a discretionary appeal long after its deadline, "there will be no certainty for any deprived child that his or her stable, permanent home placement will be maintained," the State argues. "The decision by the Court of Appeals was in clear error, and presents a threat to the finality of future (and past) termination proceedings."

Attorney for Appellant (Mother): Thomas Rawlings
Attorneys for Appellee (State): Samuel Olens, Attorney General, Britt Grant, Solicitor General, Dennis Dunn, Dep. A.G., Shalen Nelson, Sr. Asst. A.G., Penny Hannah, Sr. Asst. A.G.

OLGA ZARATE-MARTINEZ v. ECHEMENDIA et al. (S15G1446)

In this **DeKalb County** medical malpractice case, a woman whose bowel was perforated during a tubal ligation is appealing a Georgia Court of Appeals ruling affirming the trial court's dismissal of her case.

FACTS: Two months after the birth of her third child, Olga Zarate-Martinez told her doctor, Michael Echemendia, she wanted to have her tubes tied to prevent firther pregnancies. Echemendia had been her physician for several years and on April 24, 2006, he performed an out-patient open laparoscopic tubal ligation procedure on Zarate-Martinez. Soon after the surgery, Zarate-Martinez developed complications including peritonitis (abdominal infection), sepsis (complications from infection), and abdominal abscesses. During the next few days, she developed increasing pain, nausea, and fever. On April 28, 2006, she went to the emergency room, was admitted to the hospital, and underwent an exploratory laparotomy, which disclosed that her small intestine had been perforated during the tubal ligation. In March 2008, two years after the surgery, Zarate-Martinez filed a medical malpractice claim against Dr. Echemendia and other health care entities in DeKalb County Superior Court for damages which resulted from her tubal ligation. She contended that the post-operative medical complications were a result of negligence.

Zarate-Martinez attached to her complaint an affidavit from Dr. Errol Jacobi, whom she identified as a medical expert who would testify in her case. She later identified Dr. Charles Ward as an additional expert. Georgia Code § 24-7-702 (c) outlines the qualifications medical experts must meet to participate in civil actions, which include "experience in the area of practice or specialty in which the opinion is to be given" and "active practice of such area of specialty of his or her profession for at least three of the last five years." Echemendia filed a motion to strike the testimony of both doctors, claiming they did not meet the qualifications of an expert under the code section. In response, Zarate-Martinez challenged the constitutionality of § 24-7-702 (c). The trial court ruled against her, finding that neither Jacobi nor Ward qualified as a medical expert under the statute. However, the judge granted Zarate-Martinez 45 days to file another affidavit from a qualified expert. Zarate-Martinez then filed an affidavit from Dr. Nancy Hendrix, which Echemendia also challenged on the ground that it too failed to demonstrate that the physician met the statute's requirements. Although Zarate-Martinez filed a supplemental affidavit from Dr. Hendrix to show her qualifications, the trial court granted Echemendia's motion to strike both of Dr. Hendrix's affidavits, which affectively dismissed Zarate-Martinez's complaint for failure to meet the expert affidavit requirement. The parties dispute whether the trial court actually ruled on Zarate-Martinez's constitutional claims in its order, or if it simply struck the expert affidavits and dismissed the case.

Zarate-Martinez appealed the trial court's ruling to the Court of Appeals, which upheld the lower court's ruling. Zarate-Martinez then filed a "petition for a writ of certiorari," which is an application to appeal a ruling by the Court of Appeals to the state Supreme Court. This Court granted the application in order to answer the following questions:

1) Did the Court of Appeals err in ruling that Zarate-Martinez's constitutional challenges to § 24-7-702 (c) had not been distinctly ruled on by the trial court and therefore could not be brought up on appeal?
2) If the Court of Appeals did err, do any of Zarate-Martinez's constitutional claims mean this case should have gone directly to the state Supreme Court, which has exclusive jurisdiction over "all cases in which the constitutionality of a law... has been drawn into question?"
3) If this case is within the Supreme Court's exclusive jurisdiction and the Court of Appeals opinion must therefore be vacated, how should this Court decide Zarate-Martinez's appeal?

ARGUMENTS: In order for an issue to be challenged on appellate review, it must have been raised in, and acted on, by the lower court. Zarate-Martinez argues that he phrase in the trial court's order which stated, "[t]he constitutionality of a statute is presumed, and ... [the court] decline[d] to hold that [the statute] violates due process requirements or is otherwise unconstitutional," is sufficient enough to constitute a ruling meriting appellate review. Zarate-Martinez's attorney also references a 1999 decision by this Court, *Rouse v. Dept. of Natural Resources*, which says that even where there was no ruling on constitutional issues raised before the trial court, the lack of an order from the trial court was "effectively a distinct ruling on the constitutional issues and [was] a sufficient ruling to permit Rouse to raise his constitutional challenges on appeal." Additionally, Zarate-Martinez argues that not only does her constitutional challenge still stand, but it also falls under the Supreme Court's specific appellate jurisdiction and should not have been ruled on by the Court of Appeals, citing Art. IV of the Georgia

Constitution of 1983, which states that the Supreme Court has jurisdiction in "all cases in which the constitutionality of a law, ordinance, or constitution provision has been drawn into question." Zarate-Martinez's attorney contends that the code section used to justify the disqualification of her medical experts is unconstitutional because it denied her right to a jury trial, denied her equal protection of the laws, violated the separation of powers, and was a "special law" not of a general nature, and that her affidavits should have been allowed. She also states that even aside from the constitutional challenges, "[t]his is one of those extremely rare cases that should be allowed to go to the jury even in the absence of admissible expert medical testimony on the applicable standard of care." Therefore, the lower court's ruling should be reversed and her medical malpractice claim should be given the opportunity to be heard by a jury, her attorney contends.

Attorneys for Echemendia argue that Zarate-Martinez "has been given multiple chances to find a qualified expert in this case, but has failed. In an attempt to salvage her case from dismissal in the trial court, the Appellant [i.e. Zarate-Martinez] raised various constitutional challenges to § 24-7-702 (c). The trial court, however, never distinctly ruled on any of the Appellant's constitutional challenges." The trial court specifically said it "decline[d] to hold that Section 702 violates due process requirements or is otherwise constitutional." Echemendia's attorneys argue that this general statement is not sufficient to preserve the constitutional questions for appellate review. Echemendia also argues that this Court has already rejected similar constitutional challenges to the statute in its 2008 decision in *Mason v. Home Depot, U.S.A.* Furthermore, Echemendia claims that Zarate-Martinez has abandoned her due process claims on appeal, as she did not list them in her petition to this Court. In conclusion, Enchemedia argues that the Court of Appeals did not err in holding that the trial court did not distinctly rule on Zarate-Martinez's constitutional challenges, and they cannot, therefore, be addressed on appeal. His attorneys request that the Supreme Court allow the Court of Appeals' decision to stand. In the alternative, they urge this Court to rule that the statute is constitutional, and to affirm the trial court's decision excluding Zarate-Martinez's experts and dismissing her case.
Attorney for Appellant (Zarate-Martinez): Beverly Bates
Attorneys for Appellees (Echemendia): Daniel Huff, R. Page Powell, Jr., Taylor Tribble.