



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Tuesday, January 19, 2016

10:00 A.M. Session

CARTER v. THE STATE (S15G1047)

In this **Fulton County** case, a man is appealing his voluntary manslaughter and aggravated assault convictions for his role in a gun fight that resulted in the death of an innocent bystander.

FACTS: On March 19, 2002, Lynette Reese was at home at her apartment in the Villa Monte Apartment complex when gunfire from an argument over drugs broke out in the courtyard of the complex. A stray bullet entered her apartment through a wall and wounded her while she was in her bedroom. Reese was taken to Grady Hospital, but died a month later of complications from the gunshot wound. Chernard Carter had been involved in the gun fight that night with two other men. Carter was charged with several offenses, including malice murder, felony murder, and aggravated assault. At trial, the jury found Carter not guilty of malice murder or felony murder, but instead convicted him of voluntary manslaughter as a “lesser-included,” or less serious, offense to felony murder, which carries a shorter maximum prison sentence. Carter was also convicted of aggravated assault. However, the jury found Carter not guilty of voluntary manslaughter as a lesser-included offense to malice murder. Carter appealed his conviction to the Court of Appeals, saying that the verdict was “repugnant” because he was found “both not guilty and guilty” of voluntary manslaughter. The Court of Appeals affirmed the trial court’s

convictions and Carter filed a “petition for writ of certiorari” (an application to appeal a ruling by the Court of Appeals to the state Supreme Court). This Court has granted his petition.

ARGUMENTS: Carter argues that the verdicts returned in his case are “repugnant,” which occurs “when an accused is found both guilty and not guilty in the same verdict or verdicts of the same crime committed against the same victim at the same time involving the same allegations in the indictment and the same facts to prove.” Carter argues “there is no legal difference in the crime of voluntary manslaughter as a lesser included offense of malice murder and a lesser included offense of felony murder...” He asks the Supreme Court to reverse the Court of Appeals decision upholding the trial court and throw out his convictions. In the alternative, the high court should order he be granted a new trial.

The State argues that the Court of Appeals’ and trial court’s rulings were correct. The jury’s voluntary manslaughter verdicts were not repugnant. Under its 2013 decision in *Wallace v. State*, the Georgia Supreme Court ruled that any “type of murder – malice or felony murder – may be reduced to voluntary manslaughter in light of mitigating evidence.” Malice murder and felony murder are not the same, as malice murder requires the intent to kill and the absence of provocation, but those two requirements are irrelevant to felony murder, the Court of Appeals pointed out in its ruling. In light of the distinction between malice and felony murder, “the crime of voluntary manslaughter under malice murder or felony murder are not the same” and “the jury did not have to make two irreconcilable factual determinations about Carter’s intent to reach the verdict it did.” The Court of Appeals correctly reasoned that the jury could have found “that Carter was not guilty of malice murder because he did not intend to kill the victim and was not guilty of voluntary manslaughter as a lesser-included offense of malice murder because the victim did not provoke him.” At the same time, the jury could have determined that Carter fired at the co-defendants because he was provoked, “thus mitigating his offense and rendering him guilty of voluntary manslaughter as a lesser-included offense of felony murder.”

Attorney for Appellant (Carter): Charles Frier

Attorneys for Appellees (The State): Paul Howard, Paige Whitaker, David Getachew-Smith

MARY WYCHE ET AL. V. GEORGIA DEPARTMENT OF TRANSPORTATION (S15G1621)

A mother is appealing the dismissal of her lawsuit against the Georgia Department of Transportation for negligence regarding the death of her son, who was killed while working on a road construction site in Macon.

FACTS: In May 2005, a road reconstruction and widening project was underway at the intersection of Eisenhower Parkway and Log Cabin Drive in **Bibb County**. Mary Wyche’s son, Larry Bowen, Jr., worked for Reeves Construction Company, which had been contracted by DOT for some of the repaving work. Bowen’s tasks included monitoring the traffic signals at the intersection and directing equipment across the intersection. At about 11:20 p.m. on May 5, 2005, Bowen was stuck by a car proceeding through the intersection and was knocked to the ground, where a second car proceeded to run over him. Bowen died on the scene. Two years later, Wyche filed suit in Bibb County against the transportation department, alleging that it was negligent in failing to provide appropriate signage and lighting at the intersection where Bowen was killed; in failing to inspect for such safety procedures; and in failing to ensure that a proper traffic control plan had been approved and enforced based on agreements made with

subcontractors. The two drivers had indicated in depositions that the intersection was dark, and they had not seen any signage indicating construction work. The DOT filed a motion to dismiss the action, arguing that it was protected by sovereign immunity, a legal doctrine under which the state is protected from civil or criminal prosecution. But the trial court denied its motion. The DOT then appealed to the Court of Appeals, which reversed the trial court's decision, saying that the DOT was protected by sovereign immunity because Wyche's claims relate to actions of independent contractors to which the Department delegated its responsibility for traffic control and inspections for contract compliance. Also, the appellate court ruled the DOT did not waive its right to sovereign immunity under the Georgia Tort Claims Act, which states: "The state shall have no liability for losses resulting from... (8) Inspection powers or functions, including failure to make an inspection or making an inadequate or negligent inspection of any property other than property owned by the state... (9) Licensing powers or functions, including... the failure or refusal to issue, deny, suspend or revoke any permit, license... or similar authorization." Wyche now appeals to the state Supreme Court.

ARGUMENTS: Attorneys for Wyche argue that the Court of Appeals misinterpreted the licensing and inspection exceptions of the Georgia Tort Claims Act's waiver of sovereign immunity too broadly. They assert that according to the contract and federal regulations, the Department's engineers are responsible for the effective administration of safety and traffic controls. They also argue that the Code section relied upon by the DOT attorneys clearly states that it applies to "property other than property owned by that state...." Wyche asserts that it is undisputed that the property where the accident occurred was State owned.

The Attorney General's office, representing the state Department of Transportation, argues that the Court of Appeals correctly ruled that the Department is protected by sovereign immunity based on the inspection and licensing exceptions in the Georgia Tort Claims Act. Wyche's claims are also barred by sovereign immunity because they are based on the actions of one or more independent contractors. This Court should uphold the Court of Appeals ruling, the attorneys argue.

Attorney for Appellant (Wyche): Russell Boston, Wendy Boston

Attorneys for Appellees (DOT): Samuel Olens, Attorney General, Kathleen Pacious, Dep. A.G., Loretta Pinkston, Sr. Asst. A.G., C. McLaurin Sitton, Sr. Asst. A.G.

BARKING HOUND VILLAGE, LLC ET AL. V. MONYAK (S15G1184)

In this **Fulton County** case, a couple is suing a kennel for the death of their dog. The couple claims that Barking Hound Village staff administered the wrong medicine to the dog while she was boarding with them, which resulted in acute kidney failure and ultimately death.

FACTS: Barking Hound Village is a kennel company that provides "luxury dog boarding" at multiple locations. In May 2012, Robert and Elizabeth Monyak boarded their two dogs, Lola, a dachshund mix, and Callie, a labrador retriever. Callie had been prescribed Rimadyl, an anti-inflammatory drug for arthritis. Lola was on no medication other than a preventative heartworm which she received only once a month. According to the Monyaks, after they picked up their dogs, Lola quickly exhibited symptoms of being ill, and they took her to the veterinarian, Dr. Lance Hirsh. Barking Hound Village maintains that Lola appeared normal when she was checked out of their facility. Dr. Hirsh later diagnosed Lola with acute kidney failure caused by Rimadyl. A kennel employee later testified that it appeared someone had peeled off

the medication instruction sticker on Callie's information card, and possibly Lola's, and that the medication sign-off sheets were missing. Barking Hound Village claims Lola had a pre-existing kidney disease, which the Monyaks' deny. Lola was later transferred for kidney dialysis, which had varying results. Ultimately, Lola relapsed in 2013 and died.

The Monyaks sued Barking Hound Village for a variety of claims, including negligence, fraud, and deceit, claiming that there had been an error in medication administration and that the kennel had attempted to cover it up. They sought to recover damages, which included more than \$67,000 in veterinary and emotion-based damages for the death of Lola. Barking Hound Village filed a motion for "summary judgment" in its favor, claiming that the measure of damages should be capped at Lola's "market value" and there was no evidence of Lola's market value. (A court grants summary judgment when it determines there is no need for a jury trial because the facts are undisputed and the law falls squarely on the side of one of the parties.) The trial judge granted the kennel's motion for summary judgment regarding the Monyaks' claim of fraud, but otherwise denied the motion, holding that a market value cap did not apply. The trial court also held that when the case goes to trial, the Monyaks could present evidence regarding both the actual value of their pet, as well as her intrinsic, or inherent emotional, value. On appeal, the Court of Appeals reversed the trial court's ruling allowing the admissibility of non-economic evidence to prove Lola's value. But it upheld the trial court's ruling granting summary judgment to Barking Hound Village regarding the claim of fraud. Barking Hound Village filed a "petition for certiorari" in this Court, requesting it be permitted to appeal to the Court of Appeals' pre-trial ruling to the state Supreme Court. This Court has granted the kennel's petition. At issue in this case is how to measure damages for the death of a family pet.

ARGUMENTS: Attorneys for Barking Hound Village argue there is a cap to the recoverable damages for a dog, which are "limited to the dog's pre-injury fair market value." Although the Court of Appeals found that the intrinsic value of the dog can't be factored in, it did not go far enough to ensure that a "fair market value cap" for damages would be applied. Barking Hound Village states that the "market value ceiling" applies here, and is a precedent that has been upheld by the Georgia Supreme Court for more than 135 years. They also contend that this market value would be "non-existent or nominal" in the case of Lola, a mixed-breed rescue dog who was 8 ½ years old when she died.

The Monyaks contend that mere market value is not an acceptable remedy for the loss of their dog. They explain that, "a family pet is not standard fungible property for which market value can provide fair and just compensation. A family pet is in fact one of the *best* possible examples of property whose true personal value to its owner is not reflected by 'resale value,' and for which a recovery capped by nominal or non-existent 'market value' would obviously be unjust." The Monyaks argue that their compensation for damages should be based on "actual value" rather than market value, pointing to a 1941 Georgia Court of Appeals decision in *Cherry v. McCutchen*, which deals with the loss of a family oil painting and states that "[t]he just rule of damages is the actual value to him who owns it...."

Attorney for Appellant (Barking Hound Village): Joel McKie and Andrew Hazen

Attorneys for Appellees (Monyak): Robert Monyak and Jonathan Peters

THE STATE V. ASHLEY (S15G1207)

In this **Douglas County** case, the State is appealing a Court of Appeals' ruling that reversed a man's convictions for kidnapping a 7-year old girl and attempting to kidnap her 2-year old sister.

FACTS: On Sunday, Sept. 4, 2011, Lucero Lorenzo was preparing to take her four daughters and one nephew to church. As she locked her trailer in the Douglas Estates Trailer Park where they lived, she had her oldest daughter, 7-year-old, K.L., put the other children in the van. K.L. got the others settled in the van, but left the sliding door open on the driver's side. Thad Ashley, a stranger to Lorenzo, approached the van and grabbed K.L. out of the van by her wrist. The child broke away and ran toward Lorenzo, who was on the front porch of the trailer. Lorenzo said she saw Ashley place his right foot on the van, reach in, and try to pull 2-year-old B.L. out, but the child moved out of his reach. Lorenzo also said she saw Ashley "touching himself" in an inappropriate manner while trying to pull B.L. out of the van. Lorenzo screamed and told Ashley she was calling police. He then walked away, returning to his father's trailer in the same neighborhood. Eyewitnesses later told police where Ashley lived, and police arrested him. At trial, the jury was presented with evidence that Ashley had received a warning two months earlier for criminal trespassing at the same trailer park involving various incidents at the neighborhood pool and one involving Ashley's niece. Ashley was convicted by a jury of kidnapping, criminal attempt to commit kidnapping, and criminal trespass. On appeal, the Court of Appeals concluded that the character evidence regarding the incidents surrounding Ashley's warning for criminal trespassing prior to this incident was improper, and reversed his convictions. The State then filed a petition for certiorari, asking to appeal the Court of Appeals ruling to the state Supreme Court. This Court granted the State's petition and it now appeals.

ARGUMENTS: Attorneys for the State argue that, "the Court of Appeals incorrectly concluded that Respondent's repeated, inappropriate conduct with young children in the Douglas Estates trailer park was somehow irrelevant to his intentional crimes against two young girls in the same trailer park weeks later." They assert in their brief that the Court of Appeals applied an incorrect analysis in determining the evidence was inadmissible, as this case was tried under the old evidence code, which had different standards than the current evidence code. "Under the law that was applicable at the time of respondent's trial, evidence of independent offenses or acts was admissible against a defendant if the State made three affirmative showings: (1) the independent act was introduced for some proper purpose, (2) there was sufficient evidence to establish that the defendant committed the independent act, and (3) there was sufficient similarity between the independent act and the crime charged such that proof of the former tended to prove the latter." Therefore, the State argues that Ashley's convictions were proper under the evidence code which was applicable at the time of his trial, and the Court of Appeals' decision should be reversed in order to uphold his original convictions.

Ashley's attorney argues that Ashley mistakenly thought the van was his father's and that Ashley tried to communicate with Lorenzo on the day of the incident, but she only spoke Spanish. The trial court abused its discretion, the attorney argues, by improperly allowing the State to present evidence of the prior incidents to the jury. "The jury heard irrelevant and prejudicial evidence under the guise of similar transaction as the basis for the criminal trespass warning th[at] was given on July 3, 2011 by Officer Christian and rescinded by the property manager Mark Cool several days after July 3, 2011." Ashley's attorney argues that the Court of

Appeals properly evaluated the standard for admission of this evidence, even under the former evidence code, and properly determined that the evidence should not have been presented. Ashley's attorneys are asking this Court to uphold the Court of Appeals decision to reverse his convictions.

Attorney for Appellant (State): Emily Richardson and Brian Fortner

Attorneys for Appellees (Ashley): Cynthia Harrison

2:00 P.M. Session

LEJEUNE V. MCLAUGHLIN, WARDEN (S16A0072)

A man is appealing his sentence of life in prison with no chance of parole, arguing that his guilty plea to murder was not done "knowingly" or "voluntarily."

FACTS: On Dec. 27, 1997, Michael Lejeune shot Ronnie Davis one time in the head, then dismembered and burned his remains. Davis's head has never been found. Following Lejeune's indictment in **Fulton County**, the State announced it would seek the death penalty. Lejeune's first trial ended in a mistrial due to the Brian Nichols Fulton County courthouse shooting, which occurred in a different courtroom but at the same time as Lejeune's trial. Midway through the second trial, Lejeune entered a negotiated plea arrangement in which he agreed to plead guilty to one count of malice murder in exchange for a sentence of life without parole, instead of death. In September 2009, Lejeune filed 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 Gregory McLaughlin.) In his habeas petition, Lejeune argued that he was not properly advised of his constitutional rights before pleading guilty. The habeas court denied him relief, and he now appeals to the Georgia Supreme Court, which has agreed to review his case to determine whether Lejeune "knowingly and voluntarily" entered his guilty plea. The high court has also asked the parties to address whether the high court should reconsider its recent precedents which say that the failure to advise a defendant of all three of his constitutional rights before pleading guilty can never be deemed "harmless error."

ARGUMENTS: Lejeune's attorney argues that the habeas court was incorrect in finding that Lejeune's guilty plea was knowingly, intelligently, and voluntarily entered. Under the U.S. Supreme Court's 1969 decision in *Boykin v. Alabama*, a criminal defendant must fully understand that by pleading guilty, he is waiving his constitutional right to a trial by a jury, his right to confront his accusers at trial, and his right against compulsory self-incrimination, meaning the State cannot compel him at trial to take the stand. "The record is clear that Mr. Lejeune was not informed of or validly waived his Fifth Amendment right against self-incrimination at the time of his guilty plea," his attorney argues in briefs. The state Supreme Court should not reconsider its current precedent regarding whether the failure to advise a defendant of his constitutional rights during a guilty plea can be considered harmless error. Since the *Boykin* case was decided, "this Court has repeatedly held that a failure to inform a person of one of the three so called *Boykin* rights during the guilty plea constitutes reversible error," and this Court should therefore reverse the habeas court's ruling, Lejeune's attorney contends.

The Attorney General's office, representing the State and the prison warden, argues that LeJeune entered into his guilty plea knowingly and voluntarily, and this Court should uphold his sentence to life in prison without parole. The State further argues that the failure to advise a pleading defendant of his constitutional rights should be reviewed under a "harmless error" standard when challenged in a habeas petition. In its 1993 decision in *Brecht v. Abrahamson*, the U.S. Supreme Court ruled that, "granting habeas relief merely because there is a 'reasonable probability' that trial court error contributed to the verdict is at odds with the historic meaning of habeas corpus – to afford relief to those whom society has 'grievously wronged.'"

Attorney for Appellant (Lejeune): Adam Hames

Attorneys for Appellees (McLaughlin): Samuel Olens, Attorney General, Patricia Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Vicki Bass, Asst. A.G.

OWENS V. THE STATE (S16A0058)

In this **Franklin County** case, a woman is appealing her murder conviction and sentence of life in prison with no chance of parole.

FACTS: Marian Papacsi Owens was staying in Carnesville, GA at the home of a friend in December 2011. He was concerned that she was "acting strangely," and at one point asked her to leave. She then went to the Hart County Jail to bail out an associate. She was described as angry and irate. Tommy Janes, a friend of Owens, picked her up at the jail, purchased a meal for her, and drove her to his home in Franklin County, allowing her to spend the night. The next morning, a neighbor heard a commotion at Janes' house, so he walked over to investigate. He said he heard Owens singing loudly, "Jesus is with me and the devil is standing behind me." He then told his wife to call police. The neighbor could see through the window that Owens was straddling Janes, 71, and beating him with something. Police arrived, broke down the door and found Owens naked on top of Janes, beating him with a metal nutcracker. The police tased her, and as they removed her from the house, she continued to sing. They found Janes on the floor, suffering from multiple stab wounds. Janes was transferred to the hospital but later died as a result of the injuries.

Owens was initially deemed incompetent to stand trial, and was sent for treatment. Three months later, she was re-evaluated, deemed competent to stand trial, and her case proceeded to trial. During the proceedings, Owens made several outbursts, in which she asked for her appointed counsel to be discharged from representing her and for her to be able to waive her right to be at trial. She claimed, "[n]ot only do I not want to participate in this case, I want Harvey and all these people who are claiming to defend me to be removed, and whatever other process needs to be necessary that you think has to take place, will take place out of my presence and you will do it alone." The trial judge denied her request for self-representation because she was not going to be present in the courtroom to defend herself. Instead, Owens listened to the proceedings from her holding cell via an audio link provided to her by the court. Later in the trial, she did, however, take the stand for questioning against the advice of her trial counsel. At the conclusion of the trial, the jury found her guilty on all counts, resulting in a sentence of life without parole. She now appeals to the state Supreme Court.

ARGUMENTS: Among other things, Owens' attorney argues that the trial court should not have denied her request to discharge her trial counsel. He also argues that the trial court erred in allowing her trial counsel to continue to mount a defense that Owens specifically said she did

not want. She also received “ineffective assistance” from her trial attorney in violation of her constitutional rights, Owens’ appeal attorney argues. Additionally, he asserts that if she was not competent to represent herself at trial, then she was not competent to waive her right to remain silent at trial.

The State argues among other things that the trial court did not err in permitting her trial counsel to defend her despite her objections. The State’s attorneys argue that the court correctly denied her request to fire her attorney because she had stated before trial that she wanted him to represent her. Additionally, she had not previously expressed a desire to represent herself. In the end, Owens also chose to come back to the courtroom, expressed her support for her trial counsel, and chose to testify. Because the court correctly denied her request to fire her trial counsel, there is no error by the court, the attorneys contend. They also argue that Owens’ trial attorney was, in fact, effective in her defense. This Court should uphold her convictions, the State argues.

Attorney for Appellant (Owens): Howard Anderson

Attorneys for Appellees (State): D. Parks White, District Attorney, Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Youn, Asst. A.G.

KAREN HORTON V. CHRISTOPHER HORTON (S16F0167)

In this **Henry County** divorce case, a woman is appealing a judge’s ruling that the home where the couple had lived in Stockbridge, GA was her husband’s separate property and therefore not subject to a fair division between the two.

FACTS: In May 2013, after 20 months of marriage, Karen Horton filed for divorce from Christopher Horton. They had no children and had been separated a month. In her divorce complaint, she alleged cruel treatment by him and that the marriage was irretrievably broken. She sought an “equitable” – or fair – division of property, and also asked that he be required to pay her legal expenses. He filed a counterclaim, denying her allegation of cruel treatment, agreeing the marriage was irretrievably broken, and seeking the same thing: fair division of property and that she cover his attorney fees. In May 2014, the attorneys for both parties stated that the case was ready for trial and that both would submit a pretrial order within 45 days. Two months later, they submitted a joint 21-page “Consolidated Pre-Trial Order,” which set out each side’s “succinct outline of the case and contentions” to be determined by a jury, including which property should be considered “marital” and subject to division, and which was “non-marital.” Both parties’ outlines stated that “neither party shall pay alimony to the other party.” The order said the issue of attorney fees would be determined later by the court. It also stated that both husband and wife “reserve the right to amend their portion of the pre-trial order...in a reasonable manner so as to not delay the trial.” Just above the judge’s signature, the order stated that it “supersedes the pleadings which may not be further amended except by order of the court to prevent manifest injustice.” Trial was set to begin Aug. 18, 2014.

Ten days before trial, Karen Horton filed an amendment to the complaint, seeking to add a claim for alimony, along with a corresponding amendment to the pretrial order. Her amendment also sought to designate two new witnesses. Christopher Horton subsequently filed an amendment seeking to add three new witnesses, and he filed a motion asking the court to strike her amendment requesting alimony because it did not comply with the pre-trial order. Three days later, they appeared for trial having agreed in writing that she had owned her home in

Savannah prior to the marriage and he had owned the “marital residence” on Country Club Road in Stockbridge prior to the marriage and that the mortgage balance on the marital residence was \$152,062.81. After a hearing, the trial judge denied the amendments.

At trial, Karen Horton testified that she had spent \$15,078 of her own money to remodel the marital residence in preparation to sell it. She also testified that in February 2013, her husband had deeded the property to her in contemplation of filing a bankruptcy petition due to a large out-of-state judgment against him. He did not want the property to be seized by creditors as part of that proceeding. But the next month, he had her deed the property back to him after learning that the transfer would not put the marital residence beyond the reach of a bankruptcy trustee. The husband’s attorney then filed a motion asking the judge to direct a verdict in the husband’s favor on the issue of equitable division, noting that the parties had already agreed to the division of all personal property acquired during the marriage and arguing that she had failed to produce sufficient evidence to find that the home they had shared was “marital property” that was subject to equitable division. Her response was that the jury could find it was marital property – or property they had acquired together and subject to equitable division – because he had deeded it to her, they had made mortgage payments during the marriage, and she had spent thousands on remodeling. The judge granted Christopher Horton’s motion, ruled in his favor and dismissed the jury. In June 2015, the trial court denied Karen Horton’s request for attorney fees but awarded Christopher’s request, awarding him \$14,876. She now appeals to the state Supreme Court, which has agreed to review the case to determine: 1) whether the trial court erred in denying her motion to amend the pre-trial order and add a claim for alimony, and 2) whether the trial court erred in determining that his home prior to the marriage was not marital property subject to division.

ARGUMENTS: Attorneys for Karen Horton argue the trial court erred in determining that the Stockbridge proper was Christopher Horton’s separate property and erred in directing a verdict in his favor. “Whether or not the Stockbridge residence was marital property was a question of fact for the jury,” not the judge, the attorneys argue. And there was evidence that could have led the jury to determine an equitable division of property was appropriate. When one spouse brings property to the marriage, the other spouse contributes her separate assets to its improvement. Each spouse is entitled to an interest in the property based on the ratio of his or her separate contribution to the property’s overall value, with the remaining interest in the property being part of the marital estate and thus subject to equitable distribution. The wife invested money in the residence by paying for renovations in contemplation of a sale based on her husband’s promise they would be moving into another home. She testified he had tricked her and she never would have paid for the renovations had she known he wanted a divorce and had already secretly met with a divorce attorney, which he admitted. When the property changed hands from husband to wife and from wife back to husband, the home became marital property, her attorneys argue. The transfer was not just a gift between spouses. The trial judge also erred in denying her motion to amend the complaint. The consolidated pre-trial order signed by both parties said that she “reserves the right to further amend her succinct statement and contentions of her case,” as long as it did not delay the proceeding. Even if the pre-trial order did not allow her to amend her complaint, the trial court’s refusal to allow the amendment was an abuse of discretion. She had just discovered before trial that he had hired a bankruptcy attorney, and she specifically wanted to amend her complaint to add a claim for alimony and protect herself in case

he later filed for bankruptcy. It was an abuse of discretion to strike the alimony claim under these circumstances, her attorneys argue, especially since no delay in the proceedings would have resulted. Finally, the trial judge erred in awarding Christopher attorney fees. There was a question of fact as to whether the home was marital property and what an equitable division of the property should be. As this was a jury issue, the trial court was not authorized to award attorney fees to the husband, her attorneys argue.

Christopher Horton's attorneys argue the trial judge correctly ruled that his pre-marital home remained his separate property. The temporary transfer of the residence did not convert the property into marital property that was subject to division. Under the Georgia Supreme Court's 1997 decision in *Avera v. Avera*, "Only the real and personal property and assets acquired by the parties during marriage is subject to equitable property division." The trial court correctly ruled that because there was no evidence of an increase in value of the residence due to her contributions, it could not be considered marital property. The trial court also did not err in denying her motion to amend her complaint. The pre-trial order specifically stated the order "supersedes the pleadings which *may not be further amended except by order of the court....*" Finally, because there was no evidence to support Karen Horton's claim that she was entitled to a division of his separate property, and because her legal arguments against the directed verdict in his favor were "substantially groundless," his attorneys argue, "the trial court was required to assess attorney's fees, and did so with requisite specificity."

Attorneys for Appellant (Karen): Pandora Palmer, J. Scott Key

Attorneys for Appellee (Christopher): Daniel Greenfield, Ashley Brannen