Supreme Court of Georgia
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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Monday, March 7, 2016

10:00 A.M. Session

MCKINNEY ET AL. V. FUCIARELLI (S15G1885)

The president and a former vice president of Valdosta State University are appealing a Georgia Court of Appeals decision that says a lawsuit against them by a former graduate school dean at the university may go forward.

FACTS: As a tenured faculty member at Valdosta State University, Dr. Alfred Fuciarelli is a public employee who is employed by the Board of Regents of the University System of Georgia. Previously, Fuciarelli was an assistant vice president for research and a dean of the graduate school. In those roles, Fuciarelli recommended that the university put in place an electronic research administration system to better manage its grants and research programs and their funding sources. Although VSU initially approved the system, it later removed Fuciarelli as the system's budget manager and declined to fund the system. Fuciarelli complained to the administration about VSU's "noncompliance with laws, rules and regulations." He expressed concerns that the university's lack of research tools exposed VSU to liability, and he complained about his exclusion from certain internal audits. Subsequently, VSU terminated Fuciarelli's contract as assistant vice president and dean, which ended his administrative duties. He remained a tenured faculty member, but his salary and benefits were reduced. Fuciarelli appealed his termination to the Board of Regents, but the Board affirmed VSU's decision. On July 11, 2013,

Fuciarelli filed a lawsuit in **Fulton County** Superior Court against the Board of Regents, William McKinney, in his individual capacity and in his official capacity as president of VSU, and Karla Hull, in her individual capacity and in her official capacity as former Acting Vice President for Academic Affairs at VSU. Fuciarelli asserted a claim against each defendant for "False Claims Whistleblower Retaliation," and sought damages under Georgia Code § 23-3-122, which is the Taxpayer Protection Against False Claims Act, and under Georgia Code § 45-1-4, which is the Public Employee Whistleblower Retaliation Act. In December 2013, the trial court dismissed Fuciarelli's claims under § 23-3-122 because he had failed to obtain the Attorney General's written approval before filing his claims. The Act says that a civil action "under this article" may be brought "by a private person upon written approval by the Attorney General." However, the trial court denied the defendants' motion to dismiss Fuciarelli's claims that he brought under § 45-1-4, which prohibits retaliation against a public employee who discloses noncompliance with state law. On appeal, Fuciarelli argued that the trial court erred in dismissing his claim under § 23-3-122 because "a retaliation civil action belongs exclusively to the party bringing the claim and does not require Attorney General approval." The Court of Appeals upheld the lower court's dismissal of his claims under § 23-3-122 against the Board of Regents, as well as McKinney and Hull in their *official* capacities, on the ground that they are protected by the doctrine of sovereign immunity, which protects the State government and its agencies from being sued. However, the Court of Appeals ruled the trial court was wrong to dismiss Fuciarelli's retaliation claims against McKinney and Hull in their *individual* capacities, stating that "Attorney General approval is not required for retaliation claims, which are personal to the plaintiff." McKinney, the Board of Regents and Hull now appeal to the Georgia Supreme Court, which has agreed to review their appeal to determine whether the Court of Appeals erred in ruling that the Georgia Taxpayer Protection and False Claims Act's anti-retaliation provision does not require Attorney General approval for retaliation claims.

ARGUMENTS: The Attorney General's office argues on behalf of the Board of Regents, McKinney and Hull that the Court of Appeals erred because the language of the statute is clear. "The text straightforwardly requires that the Attorney General approve any claim brought by a private person," the State's attorneys argue in briefs. But the Court of Appeals determined, in a 4-to-3 decision, that retaliation claims under the Georgia Taxpayer Protection False Claims Act do not need to be approved by the Attorney General. The court's conclusion was based on unsupported assertions that such a requirement would be absurd and contrary to the intent of the legislature, even though, as the three-judge dissent noted, the language requiring Attorney General approval could not be more clear." Furthermore, the terms of the statute do not result in absurdity, the lawyers contend. The bar for declaring a statutory provision absurd is a high one, requiring "it must be one where the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application." "That is plainly not the case here," the attorneys argue. "Because the plain text of the Georgia Taxpayer Protection and False Claims Act requires approval by the Georgia Attorney General prior to the filing of any civil claim under the Act, the State requests that this Court reverse the decision of the Court of Appeals."

Fuciarelli's attorneys argue that the plain language of the Act does not require the Attorney General's approval, and the Court of Appeals decision should be upheld. Whistleblower retaliation actions brought under § 23-3-122 are personal to the whistleblower

and, as such, do not require that the whistleblower seek the Attorney General's approval before a claim is asserted. The plain language and the legislative intent behind the Act "show that the Legislature did not intend to require written approval for retaliation actions," the attorneys argue. Only those civil actions that are brought in the name of the State of Georgia or a local government require written Attorney General approval. "There is simply no plausible way that an individual's private retaliation action could be brought in the name of the State of Georgia or a local government," the attorneys argue. "It would make absolutely no legal sense for a public employee's personal retaliation action to be brought in the name of the very defendant the employee is suing." Under such a scenario, "no state public employee would be willing to come forward to disclose fraud because doing so would mean that, if the employee was retaliated against, they would have to disclose their entire case to the defense attorneys who would be defending the State against their claims…." "While the Attorney General's office could use mandated approval to deny and control retaliation cases (and thereby minimize retaliation recoveries against state institutions), the real impact is that state public employee whistleblowers would have no meaningful protection from retaliation and in turn would be unwilling to come forward to report fraud. As a result, the entire purpose of the Taxpayer Protection and False Claims Act would be undermined and potentially millions of dollars of taxpayer recoveries may be deterred."

Attorneys for Appellants (McKinney): Samuel Olens, Attorney General, Britt Grant, Solicitor General, Dennis Dunn, Dep. A.G., Annette Cowert Sr. Asst. A.G., Shelley Seinberg, Sr. Asst. A.G.

Attorneys for Appellee (Fuciarelli): Brandon Hornsby, Graham Scofield.

MAYS V. SOUTHERN RESOURCES CONSULTANTS, INC. (S16A0516)

In this **Clayton County** case, a woman is appealing a temporary restraining order that removes a developmentally disabled woman, whom she has taken care of for more than eight years, from her home.

FACTS: Linda Mays cared for "S.F.", a developmentally disabled ward of the state who lived with Mays in her home. Southern Resources Consultant, Inc., a company which provides state-funded services to, and oversight for, Medicaid-funded developmentally disabled individuals, was contracted to provide in-home care for S.F. through the Department of Behavioral Health and Developmental Disabilities. Mays entered into a sub-contract agreement for the actual housing of S.F. In 2014, S.F. became increasingly dissatisfied with Southern Resources Consultants because she perceived the company was taking financial advantage of her and not treating her fairly. She asked her legal guardian with the Georgia Department of Human Resources to terminate her relationship with Southern Resources Consultants and transfer her care to a different Department of Behavioral Health and Developmental Disabilities residential services provider. At the same time, she requested she be permitted to stay in the home under Mays' care. To execute S.F.'s desires, the Department issued a waiver of its regulations to allow S.F. to stay in Mays's home, while changing residential service providers. Southern Resources filed suit against Mays for, among other things, breach of contract and violation of the Georgia Trade Secrets Act, and asked the court for an injunction to order Mays to stop caring for S.F., which would remove S.F. from Mays' home. The trial court granted the company's injunction request, ordering Mays to "cease and desist" caring for S.F. in her home and gave her 48 hours to

do so. Mays filed an emergency motion to stay the change in S.F.'s care, and on Sept. 18, 2014, the Georgia Supreme Court issued an order staying the injunction and allowing S.F. to continue living at Mays' home until the completion of this appeal. According to Mays, since the time of this incident, the Department has changed its policies to permit individuals to stay in their host home if they desire to do so, even when changing residential service providers.

ARGUMENTS: Mays' attorney argues that the trial court's injunction was unlawful, "requiring Ms. Mays to effectually evict S.F. from her home within 48 hours." The company, SRC, "was apparently angry to lose the revenue that it received from the State to care for S.F. Despite its knowledge of S.F.'s developmental disabilities, her long-term residence and strong bond with Ms. Mays, and [the Department's] specific approval of S.F.'s request to remain with Ms. Mays, SRC nonetheless lodged a lawsuit against Ms. Mays based upon her continued care of S.F. Not content to simply punish Ms. Mays, a woman of limited means, with the costs and inconvenience of the litigation, however, SRC took the additional aggressive step of demanding that the lower court enjoin Ms. Mays from continuing to care for S.F., a request that SRC knew, if granted, would require the abrupt uprooting of S.F. from her long-time residence, her family and community." The attorney argues that removing S.F. from Mays' home would cause "immediate, substantial, and irreparable harm" to both Mays and S.F. As her guardian testified, "abruptly removing S.F. from the only home, family and community that she has known for almost a decade would cause S.F. significant distress," the attorney argues in briefs. The guardian testified that it is in S.F.'s best interests to remain in her current host home with Mays. The attorney argues that despite the fact that Southern Resources Consultants, as a provider for the Department of Behavioral Health and Developmental Disabilities, "is supposed to prioritize the best interests of the developmentally disabled individuals such as S.F., it nonetheless argues that S.F.'s removal from her host home and caregiver of eight years is less important than protecting its own revenue stream." The attorney argues that Southern Resources did not present evidence supporting the grant of the injunction, presenting no witnesses or tendering any exhibits. "Nowhere has [Southern Resources] set out or defined what documents and/or information it considers to be confidential, proprietary trade secrets..." The attorney asks that the state Supreme Court reverse the lower court's injunction, "holding that the lower court improperly based its injunctive relief upon provisions in the relevant contract that are unenforceable as a matter of law; that the lower court's injunction was otherwise unsupported by proper evidence; that SRC has an adequate remedy at law; and that the lower court's injunction would require Ms. Mays to violate state and federal law."

The attorney for Southern Resources Consultants argues that although Mays contends that it would be disruptive to remove S.F. from her care, Mays "ignores that she chose to create the situation by breaching her agreement with SRC to enter into a contract with SRC's competitor, and sought to continue providing services to S.F. in violation of the agreement, which she voluntarily executed." Mays wants this Court to focus on S.F. and not herself because she has no valid defense to the preliminary injunction. The company's attorney has filed a motion to dismiss Mays' appeal, arguing that most of the arguments raised by Mays on appeal are now moot. The contract between Southern Resources and Mays stated that, "For a period of 180 Days after the termination of this agreement, Host Provider will not directly or indirectly engage in any business that competes with SRC, Inc. for this/these consumer(s)...." The attorney for Southern Resources argues that due to the Supreme Court's order staying the injunction, this

window has already passed. The only remaining issues involve breach of contract and damages, and they cannot be addressed here on appeal, as they are not within this Court's jurisdiction. The attorney for Southern Resources argues that the case should either be remanded to the trial court to rule on those issues, or that the Supreme Court should affirm the initial injunction to the extent that is does not determine that issue to be moot.
Attorney for Appellant (Mays): Holly Pierson of Pierson Law LLC
Attorney for Appellee (Southern Resources Consultants, Inc.): Richard Witterman of Witterman Law Group, LLC

MOSLEY v. THE STATE (S16A0514)

A **Fulton County** man is appealing his murder conviction and life prison sentence for his role in a shooting at an apartment complex in Union City involving a dispute over a small amount of marijuana.

FACTS: On June 21, 2010, Justin "Drama Boy" Evans was attacked on the grounds of the Arcadia apartment complex. Synekia Brittain, a resident of the complex who earlier had loaned Evans her red Ford Contour car, saw him pull up around 4:30 p.m., stop abruptly, and jump out of the car, limping. She witnessed a man with a gun chasing Evans, and a second car pull up with another armed man. The men followed Evans into the breezeway outside Brittain's apartment. After hearing four shots, she called 911 and went outside to find Evans. She found a bullet hole on the driver's side of her car before finding Evans in the back of the apartment building where a neighbor was trying to apply pressure to his wounds. Although Evans was life-flighted to Georgia Baptist Hospital, he bled to death as a result of his gunshot wounds to his lower extremities which severed his femoral vein in his right leg.

A police officer, who had been posted a few miles away in a marked car, heard a call on the radio regarding "shots fired" and describing a maroon Impala fleeing the scene. The officer began following the car on South Fulton Parkway, which eventually exceeded 100 mph in a 55 mph zone in a high-speed chase. The officer witnessed a weapon being tossed from the vehicle, which was later retrieved and identified as a shotgun. The car, which belonged to Gary Mosely's brother, eventually turned into a cul de sac, and the three occupants fled into a nearby wooded area, evading police.

According to testimony from his three co-defendants, Mosley told them earlier that Evans had robbed him when he tried to sell him marijuana. Mosely and his co-defendants planned to get back at Evans and waited for him at the gate to the apartment complex before shooting him. At trial, the investigator testified he believed that Evans had robbed Mosley and one of his co-defendants of two ounces of marijuana, and that Mosley and the other man were the shooters. In a separate trial in April 2013, the jury convicted Mosley of murder, aggravated assault with a deadly weapon, fleeing and attempting to elude police, and other crimes. He was sentenced to life plus 20 years in prison. Mosley now appeals to the state Supreme Court.

ARGUMENTS: Mosley's attorneys argue that improper evidence, including hearsay, was allowed at trial. "Most of the erroneously admitted testimony will be seen to have originated from persons who were charged in Jason Evans' death," the attorneys argue in briefs. "With each of them hoping for a break and shifting blame, these men were subject to impeachment that might well have sparked reasonable doubts about Appellant's [i.e. Mosley's] guilt. But throughout the trial, the State was allowed to present evidence improperly, to Appellant's

injury." Some of the evidence was inadmissible, such as double hearsay. Other evidence "blatantly bolstered prosecution testimony." They argue that the testimony admitted at trial prejudiced the outcome of Mosley's trial. For instance, the testimony of the investigator improperly bolstered other testimony presented by the State. Therefore, they are asking the State Supreme Court to reverse his sentence and convictions and grant him a new trial.

Attorneys for the State contend that the trial court did not abuse its discretion when it allowed the testimony of the investigator and other witnesses. Regarding the investigator specifically, the State claims that Mosley's attorney failed to raise some of the objections at trial that he now raises on appeal, and he is prohibited from raising them for the first time on appeal. They also claim that in regards to the objections the attorneys did make at trial, the judge properly overruled them. The State's attorneys argue that the trial court properly admitted the testimony of the witnesses and the investigator. If any error did occur, the State contends it was harmless, did not prejudice the outcome of the trial, and therefore does not require a reversal. Therefore, they are asking this Court to affirm Mosley's convictions and uphold the trial court's ruling.

Attorneys for Appellant (Mosley): Manubir Arora of Arora & Lascala, LLC, and Stephen Scarborough of Stephen Scarborough, P.C.

Attorneys for Appellee (State): Paul Howard, Jr., District Attorney, Paige Whitaker, Dep. D.A., David Getachew-Smith, Chief Sr. Asst. D.A., Samuel Olens, Attorney General, Patricia Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Mary Greaber, Asst. A.G.

2:00 P.M. Session

BIANCA THRASHER-STAROBIN V. MICHAEL STAROBIN (S16A0537)

In this **Fulton County** divorce case, a woman who is representing herself is appealing a ruling by the judge that she must pay her ex-husband $6,000 in legal costs.

FACTS: Bianca and Michael Starobin married in 2009 and separated two years later in August 2011. They have one child, a son born in November 2010. She filed for divorce in July 2011, but the case was dismissed when the parties failed to present a signed agreement to the court. She denied they had settled, fired her attorney and filed a complaint against the attorney. In January 2013, he then filed for divorce. In 2013, following a hearing, the trial court issued a Final Judgment and Decree of Divorce, making the following findings: The parties acknowledged they had a tumultuous relationship. She is a college graduate who pursued a career in business. According to Michael Starobin's testimony, his wife acted bizarrely on numerous occasions. She took trips without notice during her high-risk pregnancy that required bed rest. He said she showed up at his office unannounced with the baby or their dogs, demanding that he take charge. He said she terrorized him in their home with constant arguing, and that she refused to let the dogs outside to relieve themselves. He said that when he did not find a new home for their dogs, she took them to the pound where they were put to sleep. He said she was once arrested for threatening her mother in their home. And he said she charged him with rape, which led to his arrest before she elected not to pursue the charges. She later revived the charges, which led to his arrest during a business trip in Canada and resulted in his spending 21 days in jail. He was not permitted to see his son for three months until the Fulton County

District Attorney dismissed the rape charge. He complained that their son, who lived primarily with his mother, was not potty-trained or sufficiently socialized because she refused to put him in day care or arrange play dates for him. He said she had problems with alcohol and did not get along with her family members. Her father testified that Bianca Starobin and their son lived with him and could stay indefinitely. He said Bianca, as well as his other children, may have been abused by their mother. According to Bianca's testimony, her husband neglected her and her son to go out with his friends. She said he had raped her but she forgave him. She said she later revived the charges after a counselor told her it was important to do so. She said that after visits with his father, their son often returned to her with bruises and bug bites. She testified she had stopped drinking and returned to her job after her maternity leave. But she agreed with her employer to leave her job after two weeks. She said she had not found a job in two years and did not have a car but planned to move with the child to Buckhead.

Ultimately, the trial judge made a number of rulings in the case, including that the parents would have joint custody of their son, but Michael Starobin would be the primary custodian, and she would have visitation privileges. "The Court finds Wife's actions on occasion to be inexplicable and inappropriate, and at times outrageous," the judge wrote in the order. "Father was credible in his account of the marriage, and his testimony was not challenged in any substantive way. The Court finds Mother not credible and her testimony less than genuine." The trial judge ordered her to have a psychological evaluation and follow counseling recommendations to ensure she could continue visitation with her son.

In 2014, Bianca Starobin filed a motion asking the court to hold Michael Starobin in contempt and he counterclaimed, asking that she be held in contempt for violating the requirements of the final order, including her failure to get a psychological exam. He also requested that she be required to pay his attorney's fees. In February 2015, the court ordered her to pay $6,000 to cover his attorney's fees, based on her "baseless litigious actions against him."

She then appealed to the state Supreme Court. In April 2015, this Court issued an order stating it concluded that in making its attorney's fees award, the trial court had failed to make any findings necessary to support the award and had failed to state the statutory basis for it. However, the order stated that if Michael Starobin agreed the trial court had erred in this respect, the parties could file a consent order waiving their right to ask for oral arguments before the Supreme Court and asking the Supreme Court to throw out the trial court's order and send the case back with direction.

In a one-page brief filed in this Court by Michael Starobin's attorney, he states he agrees with Bianca Starobin and therefore asks the Supreme Court to remand the case for a rehearing on the issue of attorney's fees after vacating the trial court's order. He argues that the April 2015 order by the high court granted Bianca's request to appeal "solely on the issue of attorney's fees." He also points out that he asked her to agree to a consent order as the Supreme Court suggested in its order, but she "has refused to consent and insists on moving forward in this Honorable Court for a decision."

In her 22-page brief, Bianca Starobin, representing herself "pro se," writes that she is appealing numerous rulings by the trial court, including the award of primary child custody to Michael, the requirement that she be psychologically examined when he is not similarly required, and the obligation that she pay excessive child support when he earns an annual salary of more than $75,000 and she earned nothing at the time of their divorce so she could stay home

to care for their son. As to the issue of attorney's fees, "I am praying that the Supreme Court of Georgia dismiss the order for attorney's fees in the amount of $6,000 because no findings justified the support of this award," she writes in her brief. "Pro se litigant's pleadings should not be held to the same high standards of perfection as lawyers." "Litigation is very costly and this must not be a country where the judicial system is manipulated and exploited or based on how much justice one can afford. The trial court did not even grant my request that my name be returned to Bianca Thrasher after my divorce." She said this experience has motivated her to go to law school "to protect the rights of others who do not have a voice or the courage and intestinal fortitude to fight for their own rights."
Attorney for Appellant (Bianca): Bianca Thrasher-Starobin, pro se
Attorney for Appellee (Michael): Lawrence Zimmerman

SMART V. THE STATE (S16A0393)

A **Chatham County** man sentenced to life in prison with no chance of parole for beating and strangling to death his wife is appealing his convictions, arguing the evidence against him was insufficient to prove his guilt.

FACTS: On June 6, 2014, a man making a delivery to the home of Norman and Lauren Smart witnessed the couple arguing and heard the husband say, "this B's going to make me F her up," according to the deliveryman's later testimony. Later that night, Lauren called her friend, Maranda Self, to ask if she would buy her some vodka so she could relax. She told Self that Norman had left to go out drinking with friends but had slashed her tires before he left, so she could not go to the store herself. Self took the liquor to her, but didn't stay long as Lauren asked her to leave, panicking when she thought she saw Norman's headlights coming down their street. The morning of June 7, 2014, Savannah-Chatham Metropolitan Police Officer Ryan Smith responded to a 911 call on Walthour Road in Chatham County. Norman, who had placed the 911 call, led the officer to a back bedroom where the officer found a white female lying on her back on the floor. There was blood on both her pants legs and a puddle of blood beside her, and injuries were apparent on her face. The officer could tell she was dead. Norman told the officer he had returned home at about 1:30 a.m. and found his wife intoxicated. He said she passed out on the floor and he left her there, covering her with a blanket. When he awoke the next morning, he found her unresponsive. He said he called 911, and while on the phone, attempted to perform CPR. The couple's 6-year-old son later told a friend and family members that he had heard, "screaming, screaming, screaming," and had also heard his father hitting his mother during the night. The little boy imitated punching, saying, "bam, bam, bam, bam." His father later told the child the noise he had heard was only thunder, but the boy said he knew it was his father wearing his boxing gloves and hitting his mother as his father always wore the gloves when he hit her. The child said his mother was screaming at him to "please stop."

The medical examiner who did the autopsy testified that Lauren died from multiple blunt force injuries, as well as strangulation. He described her numerous injuries as the result of "overkill." She had a left chest fracture and multiple rib fractures. Her tongue was bleeding from four areas, consistent with having been punched in the mouth and face. She had abrasions and bruises on her face, head, neck, back, right shoulder, knees, hips and buttocks. The internal examination revealed multiple bleeding injuries as well as swelling on the brain. She had multiple liver, kidney and spleen lacerations and injuries to her pancreas and adrenal glands. A

significant amount of blood was found in her stomach. A round pattern injury found on her upper chest was later compared to Norman's shoes, and the medical examiner testified there was a "very high degree of similarity" between the injuries on Lauren's torso and the bottom of Norman's shoe. He testified he believed Norman had stomped on his wife, causing the fractured chest and ribs and injuries to her liver and other areas of her body.

At trial, there was testimony that Norman had beaten his first wife regularly and had a history of beating Lauren. The sister of his first wife, Sarah Smart, testified that once when Sarah tried to climb through a window of their home after he had locked her out, Norman pushed her so hard that she fell out of the window and broke her tailbone. She was 8 months pregnant at the time. Two of Lauren's friends testified that once when they visited Norman and Lauren's home she was wearing sunglasses. When she took them off, she had two black eyes, they said. Another friend testified she recalled once when Lauren had a black eye and bruises down her left side, leg and arms. The friend said Lauren told her she had been trying to leave Norman when he stopped her and beat her with her suitcase. Lauren's own words were shown to the jury through text messages and letters she had written. In a text to Norman, she wrote, "I'm just not used to this type of violence. But I see the more I try to explain to you the worse it gets." "You're mentally, physically, verbally abusive." In a letter to "God," Lauren wrote, "I get man handled by Norman in front of the kids. I am battered and bruised a lot, all for speaking the truth about how I feel."

Following a three-day trial, in December 2014, a jury found Norman Smart guilty of murder, aggravated battery-family violence, aggravated assault-family violence, and cruelty to children in the first degree. He was sentenced to life without parole plus 20 years. Norman Smart now appeals to the state Supreme Court.

ARGUMENTS: Smart's attorney argues that five errors were made during the trial and his convictions and sentence should be reversed. First, the State failed to prove his guilt beyond a reasonable doubt. "To overcome the lack of direct evidence, the State relied heavily on unfairly prejudicial character evidence and unreliable hearsay evidence," the attorney argues in briefs. The closest thing to direct evidence linking Norman to the murder were the shoe print injuries, and yet, the medical examiner could not say that it was the exact pair of shoes police had taken from Norman's home that caused Lauren's bruising. The trial court also erred by allowing in evidence of prior acts of violence between Norman and his first wife through the testimony of her sister. "The evidence of prior family violence is not relevant to an issue other than Norman's 'bad character,'" his attorney argues. The effect of that evidence "only served to impermissibly inflame the sentiment of the jury." And the trial court erred by allowing the State to introduce inadmissible hearsay evidence, which lacked guarantees of trustworthiness. The trial judge also violated the law prohibiting judges from expressing their opinions by telling jurors, "I want to tell you what this case is all about. The defendant, Norman Smart, is charged with the June 7th of 2014 murder of Lauren Brown Smart, his wife." Finally, Smart's attorney argues, he received "ineffective assistance of counsel" when his trial attorney failed to present expert testimony to rebut the conclusions of the medical examiner, failed to present an adequate theory of his defense and argue someone else could have killed Lauren, and failed to object to testimony from witnesses regarding domestic abuse of his wife.

The District Attorney and Attorney General's office argue for the State that the evidence – including the delivery man who overheard Norman threatening Lauren the days she was murdered, the friend who was told by Lauren that Norman had slashed her tires, and the

statements by the couple's 6-year-old son who heard his mother being injured and screaming for help – are sufficient to find Norman guilty beyond a reasonable doubt. The trial court properly admitted the testimony of Norman's former sister-in-law for the purpose of showing motive, intent and lack of accident or mistake. And there was no error in the judge allowing in statements Lauren had made to friends, as well as statements she had made through Facebook, text messages and her letter to God, all of which met the requirements of Georgia Code § 24-8-807. Despite Norman's arguments to the contrary, these statements contained adequate guarantees of trustworthiness. The trial judge did not violate the law in opening remarks to jurors, because the statement did not at all suggest the judge's opinion about the case. Finally, Smart cannot resuscitate claims of trial counsel ineffectiveness as he already withdrew those claims, the State contends.

Attorney for Appellant (Smart): Tanya Miller

Attorneys for Appellee (State): Margaret Heap, District Attorney, Christine Barker, Asst. D.A., Lyndsey Rudder, Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Scott Teague, Asst. A.G.

DRURY V. THE SECURITY STATE BANK (S16A0518)

A man who sued a bank for foreclosing on his property is appealing a **Fulton County** judge's ruling denying his motion to continue litigating the case.

FACTS: After Carl M. Drury, III stopped paying his mortgage on his Buckhead home, the Security State Bank foreclosed on the property in November 2010. In September 2011, Drury sued the bank in Fulton County Superior Court, alleging wrongful foreclosure and asking the court to set it aside. He also asked for an injunction of the bank's "dispossessory" action to evict him and his wife from their home. The trial judge dismissed his lawsuit in March 2012 on several grounds, including the fact that Drury had filed an almost identical action in Telfair County, where the bank has its primary place of business. (In May 2012, the Telfair County Superior Court ruled against him and in favor of the bank. Drury appealed to the Court of Appeals, but he failed to do so within the time required, and the Court of Appeals dismissed the appeal.) Drury appealed the Fulton County judge's dismissal, but in in April 2013, the Court of Appeals ruled against him and affirmed the dismissal. He then filed a petition asking the Georgia Supreme Court to review the Court of Appeals decision, but this Court denied his petition. Representing himself "pro se," Drury then filed an action in the Fulton County court seeking reversal of its dismissal order and asking for a "default judgment" against the bank. He argued that the motion to dismiss never should have been granted because the bank had failed to file any response to his complaint that he had filed in Fulton County, and the bank was therefore in default. In August 2013, even though the case had been dismissed, Drury, again representing himself, filed an emergency motion seeking a temporary restraining order and pre-trial injunction. This time the bank responded, arguing that any further court action on its foreclosure of Drury's property was barred by the "doctrine of res judicata," which prohibits the relitigation of an issue that has already been settled by judicial decision. Due to the protracted litigation relating to the foreclosure, the trial judge entered a "bill of peace," prohibiting Drury from filing any further actions against the bank regarding the foreclosure of his home without first obtaining written permission from the Chief Judge. In April 2015, Drury filed what he called an

"Emergency Petition," seeking permission from the Chief Judge to file a "writ of mandamus" in the state Supreme Court, requesting that the trial court be forced to rule on his April 2013 motion seeking a default judgment against the bank. The Chief Judge denied his petition and he now appeals that denial to the state Supreme Court.

ARGUMENTS: Drury's attorney argues that because the bank failed to file any response to his complaint, the case is automatic default and all subsequent rulings are therefore void under the law. "Because the case is in automatic default – no defensive pleadings having been properly submitted to the trial court and filed with the clerk of court – the trial court's subsequent improvident rulings, the Chief Judge of Fulton Superior Court's denial of Drury's request for a ruling on the default, and the Chief Judge's denial of Drury's petition for mandamus, are all procedurally legal error which require reversal." As a result, "the case should be remanded to the trial court for further proceedings in that posture," his attorney argues.

The bank's attorneys argue that "Drury has had his day in **three trial courts** and **four times** in the Court of Appeals, all over the very same 2010 foreclosure." "The facts underlying this appeal are simple: Drury did not pay his mortgage, and the bank foreclosed." This appeal presents a "textbook example" of the reason the Legislature passed a statute allowing for a "bill of peace" to prevent perpetual litigation over the same issue. The rights of Drury and the bank have been established by more than one trial court and Drury's propensity for a multiplicity of actions could not be more evident, the attorneys argue. The Chief Judge's conclusion that Drury's case "has been fully adjudicated and given consideration by multiple courts," is sound, the bank's attorneys argue, "and in furtherance of the Legislature's express declaration of 'the interest of this state that there shall be an end of litigation.'" The trial court's judgment should be affirmed, "and sanctions for Drury's frivolous appeal should be imposed."

Attorney for Appellant (Drury): Mark Webb
Attorneys for Appellee (Bank): Carol Clark, Elizabeth Boswell

EDDIE AMOAKUH V. MARIAMA ISSAKA (S16A0534)

A man is appealing a **Fulton County** judge's ruling holding him in contempt for violating his divorce decree by interfering with the custody of his daughter and failing to pay child support.

FACTS: Eddie Amoakuh and Mariama Issaka, natives of Ghana, divorced in May 2010. They had three daughters who are all American citizens. In a settlement agreement, the couple agreed the father would maintain primary custody of the girls. Two were in high school and according to the father, wanted to finish school in the United States as the mother was returning to Ghana for a job opportunity. In 2012, she filed for modification of custody, claiming the children no longer wanted to live with their father due to "his controlling and mentally abusive behavior." Rather than engage in a lengthy custody dispute, she said he consented to the modification, and she was awarded primary physical custody of the two remaining minor children. By then, the oldest daughter was in college and no longer a minor. Amoakuh said he consented because the middle of the three daughters wanted to live in London where her mother was on a temporary job assignment and he felt it was important the two girls were together. The parties continue to dispute the facts. He claims the mother returned to Ghana, leaving the youngest child alone in London. She says that never happened. She claims that for two years, he did not exercise his visitation with the children while they were living in London. By the time he

visited in 2014, the mother had taken the youngest daughter back to Ghana while the middle daughter returned to the United States for college. When the father came to Ghana to take the youngest daughter back to the United States for his summer visitation with her, the mother claimed he refused to get the girl's passport renewed so she would be able to return to Ghana. Afraid he would not return their daughter, she had him placed on the "Do Not Fly" list shortly before they were to leave. Eventually, after her passport was renewed, the daughter was allowed to return with him to the United States. After the father ceased contact with the mother, she got a leave from her job and flew to the United States to get her daughter back with the help of the Atlanta Police Department. She claimed he would not give her the child's passport and had enrolled her in an Atlanta school without consulting her. He claims the mother never told him of her intent to move back to Ghana and take their daughter with her.

In September 2014, Mariama Issaka filed against Eddie Amoakuh a Petition for Contempt and Petition for Modification of Custody. She claimed he was in "willful contempt of the court's order" because he had failed to give her a travel itinerary for the minor daughter's summer visitation in Atlanta; failed to return the daughter after the visitation was to have ended; and failed to pay child support. She claimed that in 34 months, he had made only four payments. He filed a counterclaim for contempt and modification of custody, alleging she had failed to provide notice of a change of address; failed to inform him about their daughter's education; and failed to provide the daughter's passport so that he could exercise his full parenting time. He requested that primary physical custody of the remaining minor daughter be returned to him. The trial court ruled in her favor, granting her motion holding him in contempt and denying his. The court gave her sole legal custody and ordered that he never again have possession of the daughter's passport and that he only exercise his visitation privilege by traveling to Ghana. He now appeals to the Georgia Supreme Court.

ARGUMENTS: His attorney argues the trial court improperly modified the parties' custody order by giving the mother sole legal custody; by limiting his access to their daughter's passport; and by denying his motion asking the court to grant custody to him. "The trial court's order violates the appellant's [i.e. Amoakuh's] constitutional right to parent his minor child," the attorney argues in briefs. By determining that he would no longer have joint legal custody with the mother, "the trial court has essentially stripped the appellant father of his constitutional right to parent his minor child." The modification of custody should be reversed "because it did not consider the best interests of the child," the father's attorney argues. The trial court erred in granting her motion for contempt and denying his. He presented evidence that he has remarried and has two other children. "He is also a student on a fixed income," his attorney argues. "Any contempt for the failure to pay child support was not willful." Finally, the trial court erred by granting the mother's request that he be required to pay $3,423.47 for her legal fees.

Her attorney argues the trial court's award of sole custody to her should be upheld because it is supported by the evidence. "The uncontroverted evidence in this case demonstrates that appellant was granted visitation pursuant to a valid order," the attorney argues in briefs. "He refused to return the minor child at the conclusion of his visitation." And he presented no logical reason for detaining her in the United States and preventing her mother from communicating with him or relatives. The trial court's order does not violate his constitutional right to parent his child. He has not been stripped of his parental rights, and while his access to his minor child has been restricted, it is due to his "blatant and wanton refusal to abide by the trial court's previous

order and failure to consider the best interests of the minor child," the attorney argues. He maintains significant visitation rights. The trial court record "reflects ample evidence to support its finding that sole legal and physical custody to appellee [i.e.Issaka] is in the best interests of the minor child." The trial court also complied with Georgia law by granting the mother's motion for contempt and denying the father's motion. He made no attempt to satisfy his debt and remit past due child support before trial. Finally, the trial court's order granting her attorney's fees was supported by the law and should be affirmed, the mother's attorney contends.
Attorney for Appellant (Amoakuh): Camille Jarman
Attorney for Appellee (Issaka): S. Alexandra Manning