



## Supreme Court of Georgia

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## CASES DUE FOR ORAL ARGUMENT

### Summaries of Facts and Issues

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**Monday, May 9, 2016**

### **10:00 A.M. Session**

#### **MOONEY V. WEBSTER, TRUSTEE (S16Q0895)**

A woman who filed for bankruptcy is appealing a federal court ruling, arguing that her health savings account is off limits to creditors under Georgia law because it acts as a substitute for wages in the event of an illness or medical need.

**FACTS:** Denise E. Mooney of **Ben Hill County** is a self-employed physical therapist and the sole owner of Rehab Specialists of the South GA, Inc. She HSA worked in the healthcare field for 37 years and HSA no current plans to retire. In June 2013, Mooney filed for bankruptcy in the U.S. Bankruptcy Court for the Middle District of Georgia in Albany, GA. In her petition, she listed as an asset a "Health Savings Account" containing \$17,570.93. On Schedule C of the petition, she claimed the HSA and its entire balance were exempt and out of reach of her creditors under Georgia Code § 44-13-100. Under the "exemption statute," a debtor is allowed to exempt certain property from the bankruptcy estate. The purpose for exemptions is to further one of the goals of bankruptcy, which is to give honest, unfortunate debtors the chance at a fresh start. The statute exempts from creditors' claims social security benefits, unemployment compensation, public assistance benefits, retirement benefits, disability, illness or unemployment benefits, alimony, support or separate maintenance, and payments under a pension, annuity or similar plan or contract. The language of the Georgia statute mirrors the language of the federal

bankruptcy exemption statute which is designed to insure that debtors who receive regular income from sources other than wages are also assured a fresh start.

At issue in this case is whether an HSA is considered an exemption under the statute. Mooney opened the health savings account in 2008 to help pay for medical expenses not covered by her health insurance. Health savings accounts are set up through an individual's tax-deductible contributions, allowing people with high-deductible health insurance plans to use the funds for future medical expenses that may not be covered by their insurance plans. After Mooney filed for bankruptcy, Joy R. Webster, who was appointed Chapter 7 Trustee of her estate, filed an "Objection to Claim of Exemptions," arguing that a health savings account (HSA) cannot be exempted under Georgia Code § 44-13-100. Following a hearing, in January 2014, the Bankruptcy Court agreed with the Trustee, finding that the "illness benefits" from a HSA are not "wage substitutes." The Bankruptcy Court relied on the Georgia Supreme Court's 2013 decision in *Silliman v. Cassell*, in which this court found that the "common feature" of all the exemptions in Georgia Code § 44-13-100 "is that they provide income that substitutes for wages." "Because the HSA is not a substitute for wages, it is not the type of illness benefit or right to receive payment on account of illness contemplated by Georgia Code § 44-13-100," the *Silliman* Court ruled. Mooney appealed the Bankruptcy Court's ruling to the U.S. District Court for the Middle District of Georgia, and in February 2015, that court upheld the Bankruptcy Court's ruling. It too relied on *Silliman* and found that the HSA was not exempt under the law. "Mooney's HSA is not a substitute for wages; it is a place to park wages that, if used for qualified healthcare expenses, allows favorable tax treatment," the District Court explained, pointing out that "unlike every other payment vehicle" listed as exemptions in § 44-13-100, a HSA "consists of a person's own earned wages," as opposed to set monthly payments from third parties that replace income. In March 2015, Mooney appealed to the U.S. Court of Appeals for the Eleventh Circuit in Atlanta. That Court HSA certified three questions to the state Supreme Court, asking for its interpretation of Georgia Code § 44-13-100 before making a final decision in the case.

**ARGUMENTS:** Mooney's attorneys argue the District Court and Bankruptcy Court erred in concluding that benefits under health savings accounts are not wage substitutes, and the Georgia Supreme Court should rule that her HSA is exempt under § 44-13-100. "A qualified health savings account containing only qualified contributions is covered by the Georgia exemption statute," they argue in briefs. "A health problem or disability would undoubtedly disrupt the flow of 'wages' so that the benefits from a qualified HSA would undoubtedly have to substitute for current wages." "Even a cursory look at the policies behind a HSA requires the conclusion that a HSA acts as a substitution for future wages, just as an annuity, IRA, unemployment benefits or social security benefits," Mooney's attorneys argue. "Simply put, without savings in a HSA, the average Georgian family with a high deductible health plan would be unable to use their current wages to pay medical bills in the event of a serious medical issue. The funds in a HSA act as a wage replacement in the event of an illness or medical need." "A debtor's right to receive funds from a HSA is no different than unemployment benefits. One is triggered by sickness, while the other by termination of employment. Both are intended as a financial aid in time of difficulty." None of the court decisions relied upon by the lower federal courts dealt with whether a HSA qualifies as an "illness benefit" that is exempt under the Georgia statute, Mooney's attorneys argue. "There is no public policy of Georgia that requires the subordination of a debtor's legitimate health needs to the immediate payment of debts to

creditors. Rather, Georgia public policy HSA intervened with a clear statement that private provision for the medical well-being of her citizens is expressly authorized and encouraged, within the limits established for annual contributions to HSAs.”

The attorney for the Trustee, Webster, urges the state Supreme Court to uphold the District Court’s order. “A HSA is not expressly exempt under Georgia Code § 44-13-100 (a) (2) (C) or (E),” the attorney argues in briefs, “because a HSA is not an income replacement plan. Instead, it is a place to park money to pay for qualified medical expenses not covered by insurance. The debtor’s HSA is also not a benefit as that term is used in § 44-13-100 (a) (2) (C). A right to receive a payment from a HSA is not an illness or disability benefit because the right to receive a payment from the HSA is not triggered solely by an illness or disability.” The Georgia legislature intended the term, “benefit,” as used in the statute “to be financial assistance that is received from an employer, insurance or public program (such as social security) in time of sickness, disability or unemployment consistent with the Black’s Law Dictionary definition.” While at least six other states have amended their statutes to allow debtors to exempt HSAs in bankruptcy, “Georgia HSA not,” the attorney argues. “The debtor wants this Court to enact a statute where one does not exist, and this Court should not do so.” The HSA also is not exempt under the statute “because the debtor already received the funds. There was no ‘right to receive’ money or property. It had already been received by the debtor and was sitting in a bank account. This Court should affirm the District Court’s order sustaining the Trustee’s objection, so the Trustee can administer this asset for the benefit of creditors.”

**Attorneys for Appellant (Mooney):** Ward Stone, Jr., Matthew Cathey, Thomas McClendon  
**Attorney for Appellee (Webster):** Robert Matson

### **CISNEROS V. THE STATE (S16G0443)**

A man is appealing a Georgia Court of Appeals ruling that upholds multiple convictions against him, as well as a string of life prison sentences, for his role in a series of home invasions.

**FACTS:** Gustavo Cisneros and eight others were indicted in **Gwinnett County** Superior Court for various crimes arising from a series of markedly similar home invasions committed by men the State claimed were members of a Latino gang. According to prosecutors, between February and April 2004, a number of Gwinnett County homes were invaded by masked gunmen who tied up their victims with string and shoelaces and stole money, gold jewelry, stereo equipment and other property. At times, witnesses described “four or five” men – sometimes fewer, sometimes more – who largely spoke Spanish. In some cases, victims had a gun held to their heads. Witnesses said the men were armed with semiautomatic pistols and one victim was shot in the leg; another was hit in her head with a gun; and one man, who tried to snatch the intruder’s weapon, was shot five times. In two cases, one of the men penetrated female victims’ vaginas with his hand. In another home, they threatened to kill a woman’s children if she did not give them money before one of the intruders pulled down the woman’s panties and touched her breasts, body and legs, then forced her to take them to her sister’s house in the same mobile home park community. In April 2004, a resident whose home was nearby one of the invasions, which was on Davenport Park Lane, contacted police about a suspicious car driving repeatedly through the neighborhood. Police arrested the driver for driving without a license. Inside they found a pistol and an uzi-type automatic weapon. After interviewing the man about the series of armed robberies, police set up surveillance at the Willow Trail and Clairmont Springs apartment

complexes. Police subsequently arrested Cisneros after he got into a vehicle where they found a pair of gloves, a “mask or cap balled up,” and an empty holster. Initially Cisneros told police he’d been in Mexico the previous two months, but in a later interview, he acknowledged he had transported people to the “trailer park,” although he changed his story to say he had followed people to the trailer park. While executing search warrants at the Willow Trail and Clairmont Springs apartment complexes, law enforcement officers found electronic equipment, clothing, ski masks, guns, jewelry, and cash.

In 2008, Cisneros was the first of the men to go to trial. While the jury acquitted him on some counts, it convicted him of 19 offenses associated with seven separate home invasions. At his trial, two of Cisneros’ co-defendants testified for the State, saying that he was sometimes present at the home invasions and sometimes served as driver, as well as lookout. One of the co-defendants testified that he and the other men were members of a gang, called the “PL-14,” and that Cisneros, as an older gang member, was authorized to give orders to other members. Cisneros appealed the trial court’s ruling, and in a lengthy opinion, the Court of Appeals reversed eight of Cisneros’ convictions that arose from three of the home invasions, finding there was no direct evidence he was involved in those invasions and the circumstantial evidence was insufficient to allow a jury to conclude beyond a reasonable doubt that Cisneros was guilty of the crimes that occurred in those invasions. But the appellate court disagreed with Cisneros’ argument that the evidence was insufficient to convict him of counts 7-to-10 for burglary and armed robbery, which arose from two other home invasions. It upheld those convictions, pointing to an accomplice’s testimony that Cisneros was involved specifically in those two invasions and to independent evidence showing that Cisneros had participated in at least some of the other home invasions, which employed the same “modus operandi” (i.e. manner of operating, or “m.o.”) as the invasions underlying counts 7-to-10. The Court of Appeals ruled that even though “modus operandi” evidence *alone* would not be sufficient to support Cisneros’ convictions, it was sufficient to corroborate the accomplice’s testimony. Cisneros now appeals to the state Supreme Court, which has agreed to review the case to determine whether the Court of Appeals correctly concluded that the evidence presented at trial was sufficient to support the jury’s guilty verdict on counts 7-to-10.

**ARGUMENTS:** Attorneys for Cisneros argue that the Court of Appeals erred in affirming Cisneros’ convictions for counts 7-to-10 based solely on his accomplice’s testimony, as modus operandi is not sufficient corroboration and this would be the first ruling to say otherwise. Under Georgia law, “the testimony of an accomplice, standing alone, is insufficient to convict an accused,” and “there must be independent corroborating evidence, either testimony from another witness or corroborating circumstances, which connects the accused to the crime.” “Thus the State had to present the testimony of at least one other witness or evidence of such corroborating witnesses” that directly tied Cisneros to the crime, his attorneys argue. Yet here, the Court of Appeals relied entirely on the modus operandi used in other home invasions to corroborate his accomplice’s testimony. “The Court of Appeals decision in Cisneros was unique in that it relied *solely* on a relatively common m.o., and nothing more, to find that the accomplices’ testimony about Cisneros’ participation in the Friendly Mobile Village and Davenport Park Lane robberies was sufficiently corroborated.” Here, where there is no other evidence tying Cisneros to the home invasions at issue and where the testimony of the two accomplices who testified at his trial is inconsistent on the issue of who participated in which

invasions, the modus operandi evidence alone should not be sufficient corroborating evidence. The appellate court also erred in upholding Cisneros' conviction of sexual battery even though the evidence was that Cisneros was merely the "driver" in that invasion, did not enter the home where the battery occurred, and had no advance knowledge that a sexual assault would take place. "The Court of Appeals paints the evidence against Cisneros as a party to the sexual battery alleged in Count 14 with far too broad a brush," the attorneys argue. Finally, the Court of Appeals erred in rejecting Cisneros' claim that his trial attorney was ineffective for failing to object during trial to the translation by the courtroom interpreter following complaints by a Colombian alternate juror who challenged the accuracy of the interpreter's translation. And the attorney rendered "ineffective assistance of counsel" by failing to insist on a hearing about the matter under the state Supreme Court's Rules for the Use of Interpreters. The trial attorney was on notice that persons more knowledgeable than he about the Spanish language believed the court interpreter's translations were faulty, and the appellate court erred in concluding that Cisneros had "pointed to nothing that should have caused counsel to object to the courtroom interpretation."

The State, represented by the District Attorney's office, argues the evidence was sufficient to support the verdict against Cisneros on counts 7, 8, 9, and 10. "Under Georgia law at the time, a second accomplice's testimony is sufficient to corroborate another testifying accomplice," the State argues, and here, a second co-defendant also identified Cisneros as a participant in the home invasions at issue. More than modus operandi tied Cisneros to the crimes, the State contends. "In determining the sufficiency of the evidence, this Court must consider inferences from the evidence that can be logically derived from the evidence presented at trial. Also, as long as there is some evidence, even though contradicted or insufficient to support or warrant a guilty verdict on its own, this Court must uphold the jury's verdict." In all of the charged crimes, the assailants stormed the house in force, tied up the home's occupants with shoelaces or strings, brought duct tape with them, wore masks, and spoke Spanish. Also, this Court must consider the fact that Cisneros told one of the co-defendants who testified at his trial that he, Cisneros, had "done these types of robberies before." However, the State acknowledges that the Court of Appeals "incorrectly made its ruling solely based upon the modus operandi of this crime when compared to the others, and held that the evidence was sufficient to support the verdict. While the State asserts that the Court of Appeals ruling was the correct ruling, the method of obtaining that ruling was flawed; i.e. there was more evidence than just the modus operandi in this charged crime to warrant a conviction." The evidence was also sufficient to convict him of one of the sexual assault counts when he only served as driver to one of the home invasions where the assault took place. Cisneros had been part of another home invasion that resulted in a sexual assault and therefore knew that such an assault was possible. Under state law, "a person may be convicted of commission of a crime even if he or she does not directly commit the crime but instead, "intentionally aids or abets in the commission of the crime," which Cisneros did as a driver. The State also argues Cisneros received effective legal assistance from his attorney at trial. There was no objection to the interpreter's translation during trial, and the three jurors, upon questioning by the judge, said they could put aside the alternate juror's challenge of the interpretation as inaccurate and decide the case upon the evidence. "In this case, there was no indication during the trial of the case that there was anything wrong with the interpretation," the State argues.

**Attorneys for Appellant (Cisneros):** Mark Yurachek, Bruce Harvey

**Attorneys for Appellee (State):** Daniel Porter, District Attorney, Lisa Jones, Dep. Chief Asst. D.A., Christopher Quinn, Asst. D.A.

**DENAPOLI ET AL. V. OWEN ET AL. (S16A0814)**

The appeal in this **Fannin County** case stems from a couple’s lawsuit against a builder who constructed a driveway on property they had just bought from him. The couple claims the builder had no easement rights permitting construction of the driveway on their land.

**FACTS:** Several years ago, Kenneth Owen, a builder and developer of homes in North Georgia since 1986, purchased 103 acres of land along Big Creek to build homes for sale to the public. A surveyor working with Owen prepared a preliminary plat that subdivided a portion of the larger tract into three contiguous lots. Lots 1 and 2 were on Big Creek Road while Lot 3 was behind them. After Kenneth and Kathy Owen’s company, Custom Log Homes, Inc., built and sold the home on Lot 1, the surveyor prepared separate final plats for Lots 2 and 3 and recorded them in the office of the Clerk of the Superior Court of Fannin County. The Lot 2 plat included markings along the western property line captioned as “Proposed 20’ Easement.” (An “easement” is a right held by a property owner allowing another person to use the land for a limited purpose.) According to the surveyor, Owen had instructed him to reflect on both plats an easement for access from Lot 2 to Lot 3. The Owens proceeded to build a spec home on Lot 2, which in May 2015, Anthony and Tina DeNapoli purchased. At the closing, the Owens gave title of the property to the DeNapolis through the signing of a two-page Warranty Deed, the first page of which said: “See Exhibit attached hereto and made a part hereof.” Exhibit A described the location of the property as recorded “in Plat book E413, Page 8, Fannin County, Georgia records, and by reference thereto, said plat of survey is incorporated herein and made a part hereof.” Several weeks after the closing of the sale to the DeNapolis, the Owens began constructing an access driveway over the easement. The DeNapolis sued, seeking damages and an injunction in the Fannin County court to prohibit the Owens from using the driveway and to require them to restore the 20-foot strip to its prior condition. The Owens countersued, asking the court to declare they had a right to the easement and also requesting an injunction that would prohibit the DeNapolis from interfering with their easement rights. In August 2015, following a bench trial (before a judge with no jury), the judge entered a final judgment against the DeNapolis, denying all their claims and granting all the Owens’ claims. The DeNapolis now appeal to the state Supreme Court.

**ARGUMENTS:** The attorney for the DeNapolis argues the trial judge erred because the Owens have no easement rights permitting construction of the driveway across their property. The Warranty Deed contained no specific reservation or expressed grant of easement rights to the Owens, nor was there any mention of any easements at the closing. Indeed, Owen assured them there would be no more building by him on their side of the road. While the plat mentioned a “proposed” easement, the DeNapolis concluded the reference was just that, “i.e. a proposed rather than an actual easement,” and as a result they went ahead and closed on the property. Barely three weeks later, “without warning or notice,” the DeNapolis pulled into their driveway one evening to discover that Owen “had cut a 20-foot wide driveway up the entire length of their property to serve his adjoining lot.” The couple was “stunned and appalled by the damage done by Owen’s machinery – trees uprooted and splintered, foliage scraped away and a 20-foot wide

scar of red earth starkly visible from their house.” The Georgia Supreme Court ruled in 1880 in *Boyd v. Hand*, and the Georgia Court of Appeals reiterated in 2005 in *Tew v. Hinkel*, that “when an owner conveys a piece of property with warranty and without express reservation of an alleged easement, the owner parts with any easement he might claim in the property,” the attorney argues. “The Warranty Deed by which Appellees [i.e. the Owens] conveyed the property to Appellants [i.e. the DeNapolis] does not mention an easement or specifically reserve any easement or other rights of Appellants.” The trial court erred in ruling that the recorded plat of the property was “key” and that the notation of the “proposed” easement put the DeNapolis on notice that “something was going on, thereby imposing the duty on [Appellants] to inquire and determine what it was.” The court erroneously ruled that under the legal doctrine of “caveat emptor,” which is Latin for “let the buyer beware,” the DeNapolis were warned that they were buying the property “as is.” “To the extent that the court denied injunctive relief to Appellants based on notice and caveat emptor, the trial court manifestly abused its discretion,” the attorney argues. Among other arguments, the DeNapolis’ attorney also argues that a “proposed” easement is not the same as an actual easement.

The attorney for the Owens argues that because in their briefs the DeNapolis raise arguments they failed to raise before the trial judge, they are prohibited from raising them for the first time when their case is on appeal. “It is well established that this [appellate] court will not consider arguments neither raised nor ruled on in the trial court and that are asserted for the first time on appeal,” the attorney argues. Nevertheless, the attorney argues that the DeNapolis were given express notice that the Owens intended to exercise their easement rights. “Prior to entering a contract with the DeNapolis, Mr. Owen stood in the yard of Lot 2 and, using the survey flags that were on site, pointed out to Mrs. DeNapoli where he would be building on Lot 3, and where the driveway to Lot 3 would go up the side of Lot 2,” the attorney contends. “Prior to entering into the Purchase Contract, the DeNapolis never raised any objection to the existence of the easement that appeared on the Lot 2 plat. According to the Purchase Contract, the DeNapolis had the right to examine title and furnish the Owens with a written statement of title objections.” The couple also acknowledged in the contract that: “(1) in every neighborhood there are conditions which different buyers may find objectionable; and (2) [the DeNapolis have] had the full opportunity to become acquainted with all existing neighborhood conditions (and proposed changes thereto) which could affect [their property].” The attorney also argues that the *Tew v. Hinkle* decision doesn’t apply to this case because in *Tew*, the Warranty Deed did not mention the easement or reserve any interest in the property. “In contrast, the recorded Lot 2 plat (referenced and incorporated into the Owens’ Warranty Deed to the DeNapolis) clearly reserved a 20-foot wide easement for the benefit of Lot 3.” Also, the Owens’ easement rights were not extinguished, nor were they passed onto the DeNapolis when they bought the property, as they contended. As the trial court found, “the recorded Lot 2 plat – at the very least – provided notice that the Appellees had reserved easement rights.” As the Court of Appeals ruled in 2007 in *Hernandez v. Whittemore*, “The crucial test in determining whether a conveyance grants an easement in, or conveys title to, land, is the intention of the parties, but in arriving at the intention many elements enter into the question. The whole deed or instrument must be looked to, and not merely disjointed parts of it.” “Under this test, the trial court was charged with the duty to consider the many elements that established the existence of an easement providing access over Lot 2 to Lot 3,” the attorney argues. “Having done so, the trial court concluded that

an easement was reserved by the Owens, and it entered its judgment accordingly.” Under the doctrine of “caveat emptor,” the trial court also correctly concluded that “the DeNapolis were on notice of facts regarding the easement which triggered their duty to inquire.”

**Attorney for Appellants (DeNapolis):** James Cox

**Attorney for Appellees (Owens):** Frank Moore

## **2:00 P.M. Session**

### **NIX V. 230 KIRKWOOD HOMES, LLC (S16A0913)**

A woman is appealing a trial court’s ruling that she does not have legal title to a vacant lot in **DeKalb County** that she claims she has owned for 16 years. This is the third time the case has come to the state Supreme Court.

**FACTS:** This complex property case began in 1993 when DeKalb County assumed title of a lot after the owner failed to pay property taxes. In 1998, Geraldine Nix, a DeKalb schoolteacher, submitted the winning bid to purchase the lot that was behind her house from the County. In November 1998, she contacted her bank, now known as Bank of America, seeking a loan to purchase the property. Nix signed a note with the bank and gave it a deed to secure debt. Three months later, the County gave her the deed to the property. In 2003, Community Renewal and Redemption, LLC – a company involved in tax liens and title acquisitions – purchased the “redemption” rights of the woman who had originally defaulted on her taxes. Under the law, people who lose their property after failing to pay property taxes have a chance to “redeem” their property – or get it back – by following certain procedures, including paying back the taxes they owe. The same month, Community Renewal sent a \$16,000 check to Nix so it could redeem the lot, or regain possession of it. Nix returned the check, saying it was less than the taxes she had paid on the property. Community Renewal then sued her to force redemption. The company argued that neither Nix nor the County had properly “foreclosed,” or terminated, its right to redeem the property.

In 2004, the trial court ruled in favor of Nix. It found that DeKalb County had title to the property prior to selling it to Nix, thereby foreclosing Community Renewal’s effort to redeem title. But the following year, this Court reversed that decision, ruling that the trial court erred by holding that DeKalb County owned the land “by virtue of the passage of time.” After the case was sent back to the trial court, Nix filed a motion to dismiss it based on the company’s failure to pay “the full amount of the redemption price” to the Bank of America prior to filing suit, as state law requires. A “special master” conducted a hearing and granted Nix’s motion, which the trial judge adopted in his final order. (A special master is someone appointed by the court – usually a lawyer – to assist the judge in a particular case.) Community Renewal again appealed to the state Supreme Court, which in January 2011 upheld the trial court’s decision in favor of Nix.

Subsequently, Community Renewal transferred its remaining interest in the property to Belfare, LLC, which in February 2015, transferred it to Kirkwood Homes, LLC. In March 2015, Kirkwood Homes offered Nix \$75,000 to redeem the lot. Nix rejected the offer, or “tender,” claiming that the right of redemption was barred by the state Supreme Court’s 2011 ruling. In March 2015, Kirkwood Homes sued Nix to force redemption, i.e. require Nix to accept the offer, execute a quitclaim deed, and return the lot to Kirkwood Homes. Following a hearing, this time

the trial court ruled against Nix, ruling that she had not foreclosed the right of redemption of her tax deed and that she had not possessed the property based on “prescription” or the passage of time. It found that Kirkwood Homes was the owner of the property as the last grantee in the “chain of title,” or the history of ownership, that began in 1993 with the woman who defaulted on her taxes. And by offering Nix the redemption amount, Kirkwood Homes had successfully redeemed the property and is now its owner, the trial court ruled. Nix now appeals to the state Supreme Court.

**ARGUMENTS:** Nix’s attorney argues the trial court erred by finding that Kirkwood Homes holds “fee simple title” to the property. This action is barred by the doctrine of “res judicata,” which prohibits relitigating an issue the courts have already ruled on. “The claims made in this action are the exact same claims made by [Kirkwood Homes’] predecessor in title, Community Renewal and Redemption,” the attorney argues in briefs. “Community Renewal and Redemption fully litigated its case for seven years, resulting in two decisions of this Court, the second of which affirmed the dismissal of Community Renewal’s case for a failure to state a claim. Such a dismissal is res judicata as a matter of law. The trial court, in its Final Order, erred when it concluded that the merits of the litigation were not reached in *Community I* and *Community II*, and that the dismissal was not ‘on the merits.’ That holding is clear error.” “Additionally, as a matter of law, Nix has possessed the property for more than 16 years and has title by prescription,” the attorney argues. The trial court also erred by failing to rule in Nix’s favor on her counterclaim asking the court to remove any clouds on her title and decree her to hold fee simple title as the rightful owner. Finally, the trial court erred by ruling that \$26,658.54 is the correct redemption price, Nix’s attorney argues. Kirkwood Homes “provided no admissible evidence in support of its assertion as to the amount due for redemption, and the ruling of the trial court is error,” the attorney contends.

The attorneys for Kirkwood Homes argue the trial court ruled correctly in finding that Kirkwood Homes holds fee simple title to the property. The doctrine of res judicata does not apply because, as the trial court correctly found, this case and the prior case involving Community Renewal and Redemption “do not involve the same facts at all, and are not the same, and Community Renewal and Redemption’s prior incorrect tender could not prevent Community Renewal and Redemption’s successors from redeeming the property in the future.” As the special master found, “the dismissal of the prior Community Renewal and Redemption case by the Georgia Supreme Court for insufficient pre-litigation tender did not bar future attempts to redeem the subject property and file litigation to enforce the redemption....” Under Georgia law, there are only two ways to gain ownership of property following the purchase of land sold in a tax sale – “either by foreclosing the right of redemption by sending out the requisite notices under [state law] or adversely possessing the property for four consecutive years,” the attorneys argue. It is uncontested that Nix never sent out the notices required under the Georgia statute in order to foreclose the right of redemption. And the trial court correctly found that she had not “adversely possessed” the property for four consecutive years, as the law requires. The sworn affidavit of one man said the property was “wild, unfenced and unoccupied,” the attorneys argue and Nix presented no evidence that she had actually possessed the property. She also couldn’t meet the time requirements because “from 1999 until 2009 the tax deed was actually held under the Bank of America Security Deed” as this Court found in its Community Renewal decision. Finally the trial court found that Nix was only entitled to \$26,658.54 to properly redeem the

property. The amount was based on available information from DeKalb County and City of Atlanta tax records. Nix provided no evidence that she had paid taxes on the property, nor did she file a response or an objection to the amount, the Kirkwood Homes attorneys contend.

**Attorney for Appellant (Nix):** Gregory Sturgeon of The Sturgeon Law Firm, LLC

**Attorneys for Appellees (Kirkwood Homes):** Jon Ayoub and Carolina Bryant of Ayoub & Mansour, LLC

**GARY WILBUR MURRAY V. BRENDA KAY MURRAY (S16A0857)**

In this **Appling County** divorce, a man is appealing a judge's refusal to enforce a post-nuptial agreement that would have given him the vast majority of the couple's assets based on the court's finding that the agreement was induced by fraud.

**FACTS:** Gary Wilbur Murray and Brenda Kay Murray had been married 34 years when they decided to purchase sex toys to spice up their sex life. All was well until the husband discovered that his wife had been using the toys independently when he was not around, according to both the husband's and wife's briefs. Upon that discovery, he threatened divorce. She indicated she did not want a divorce and subsequently wrote a letter of apology on June 2, 2014 stating she wished that "any lands or earthly material things to be put in the name of Gary Wilbur Murray only without my name to be attached to it. Wilbur has always worked extremely hard to have and provide what his family needs." She testified she wrote what he told her to; he testified he played no role in the letter. He then consulted an attorney who recommended the couple execute a post nuptial agreement. The husband proposed the agreement to his wife and "promised to tear it up once he was comfortable they were in love again," according to his lawyer's brief. He told her if she did not sign it, he would divorce her, according to both parties. In June 2014, the husband and wife both signed the agreement, in which the lion's share of the family's pecan and cotton farming operation, his New Image Salon business, and a number of tracts of land would go to him. A nurse, she later said she did not read the agreement or understand it; she said she signed it to save their marriage. However, Gary Wilbur Murray never tore up the agreement. On Oct. 23, 2014, Brenda Kay Murray filed for divorce. In response, he filed a motion to enforce the post-nuptial agreement. The trial court subsequently denied the husband's motion, ruling that, "The legal effect of Mr. Murray's representation that the parties' agreement would not be enforced is that it cannot be enforced." In this pre-trial appeal, Gary Wilbur Murray now appeals that decision to the Georgia Supreme Court.

Both parties agree that in determining whether to enforce a post-nuptial agreement, the trial court must consider the three criteria established by the state Supreme Court in its 1982 decision in *Scherer v. Scherer*. Those criteria are: (1) Was the agreement obtained through fraud, duress or mistake, or through misrepresentation or nondisclosure of material facts? (2) Is the agreement unconscionable? (3) Have the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable?

**ARGUMENTS:** The husband's attorney argues the trial court erred by finding the agreement was the product of fraud and therefore was unenforceable. The judge "chose to believe the Wife's testimony that Husband promised to destroy the agreement upon her execution and based on this alleged promise, held the agreement unenforceable," the attorney argues in their brief. "While the trial court does not refer to fraud in its order, its refusal to enforce the agreement based on Husband's alleged promise to tear it up appears to be based on

the concept of fraud.” Yet for his act to constitute fraud, “there had to be evidence of a present intent not to tear up the agreement.” In fact, the trial judge found that both the husband and wife intended to tear up the agreement and only differed on when that was to occur. Therefore, “there was no present intent to not perform,” his attorney argues. The trial court erred because all of the *Scherer* criteria were established under the facts of the case. His wife was under no duress and signed willingly. “She was not held at gun point or threatened,” the attorney argues. “Husband only told her he would divorce her if she did not sign.” “She is an educated woman being a licensed practical nurse.” Under the agreement, she would receive one of the tracts of real property, which the couple purchased from her family, and he would receive all the other tracts, which they purchased from his family, along with the salon. She also would receive the retirement accounts from her job, which had a value of \$62,000, and a separate payment of \$62,000 from other accounts. The agreement likewise was not a product of “mistake or misrepresentation through the nondisclosure of material facts,” his attorney argues. She knew what she was signing. “Wife was intimately involved in the parties’ finances,” and the agreement “made a full disclosure of the parties’ assets.” Also, the fact that he would receive a greater share of the assets “does not render the agreement unconscionable when, as here, there was a disclosure of the assets of the parties prior to the execution of the agreement, and Wife entered into the agreement fully, voluntarily, and with full understanding of its terms after being offered the opportunity to consult with independent counsel.” Finally, “the record is devoid of any evidence to support a finding of a change in circumstances outside the parties’ contemplation as would require the court to decline to enforce the agreement,” his attorney contends.

The wife’s attorney argues the trial court did not err when it found that the parties’ agreement was unenforceable because it was obtained through fraud. When the judge asked Mrs. Murray during the hearing if her husband had threatened her in any way, she replied: “Just that if I signed it, he wouldn’t divorce me and he would know I loved him and he would tear it up.” “Since the Husband did not tear up the agreement prior to the Wife filing for a divorce 139 days after the post-nuptial action was signed, and now seeks to enforce the agreement in the divorce action, the trial court could have reasonably concluded that Husband never intended to tear up the agreement and telling the Wife that he would do so if she signed it constituted fraud,” her attorney argues in briefs. None of the *Scherer* criteria are established by the facts of this case. Under cross-examination, she testified “she had no life other than her husband,” the attorney argues. “Husband was certainly situated as to exercise a controlling influence over the will, conduct, and interest of Wife. Clearly, Wife was under duress when she wrote the letter of apology to Husband and later signed the document presented to her. Husband threatened to expose to their family and to the world by jury trial Wife’s solo use of the parties’ sex toys if she did not do so.” While he testified that she had told the couple’s daughters about the sex toys, their daughter testified at the hearing in the matter that neither of her parents had disclosed this. The circumstances surrounding the agreement further shows it was obtained through misrepresentation for the same reasons. And the Husband, “who is seeking to enforce this agreement, has failed miserably to meet his burden of proof as to disclosure of material facts.” The agreement is certainly “unconscionable” when both parties, married for 34 years, worked at separate jobs and provided for the family, yet under the agreement, she would receive a total property value of \$189,608 while he would receive property worth \$2.423 million. In total marital assets, she would get 7 percent, while he would receive 93 percent. “There is no question

that based on the figures the post-nuptial agreement is unconscionable,” her attorney argues. Finally, based on all the evidence, “it cannot be said that this agreement is fair or reasonable.”

**Attorney for Appellant (Gary Wilbur Murray):** Howard Kaufold, Jr.

**Attorney for Appellee (Brenda Kay Murray):** Earl McRae

### **KENNEDY, WARDEN V. PRIMACK (S16A0821)**

In this **Bulloch County** case, the State is appealing a court ruling in favor of a woman who was sentenced to 10 years in prison for failing to seek medical help for her 4-year-old daughter after her boyfriend broke the child’s leg.

**FACTS:** In late May 2012, concerned bystanders witnessed 23-year-old Esther Primack pushing her 4-year-old daughter in a stroller. They noticed that the child, N.P., appeared to be in significant pain. After Primack refused to let them take her to the hospital, they called the Statesboro Police Department and directed officers to the Deluxe Inn where Primack and her boyfriend, Jerome Swan, were staying with Primack’s daughter, and the couple’s younger child. Officers discovered the child lying on the bed in obvious pain. A detective testified the little girl’s leg was severally mangled and swollen, and she was unable to hold her leg out straight. N.P. was transferred to the hospital where she had surgery and was placed in a body cast. Investigators later determined that Swan had thrown the child on the ground and broken her leg. According to testimony from the Bulloch County Foster Care case manager, when N.P. came into the State’s custody, her teeth were brown and had holes in them, and she required 10 procedures for gum infections and numerous cavities. According to testimony, N.P.’s mother had been feeding her dog food, and the child did not appear bonded to her mother.

Primack was indicted by a grand jury on July 9, 2012 on one count of cruelty to children in the second degree based on her allegedly criminally negligent failure to seek medical treatment for her child. Swan was charged with aggravated assault and first-degree child cruelty for allegedly breaking the little girl’s leg and allowing her to suffer. On Nov. 20, 2012, Primack entered a “non-negotiated” guilty plea. (Unlike a “negotiated plea,” in which the prosecutor and defense attorney agree on the sentence they will recommend to the judge, a non-negotiated plea is one in which the defendant pleads guilty without an agreement from the prosecutor regarding the recommended sentence.) Following her plea, the judge sentenced Primack to the maximum of 10 years in prison. After retaining a new lawyer, Primack filed a motion to modify the plea but the trial court denied it. In April 2015, Primack 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 Kathleen Kennedy.) In her habeas petition, Primack argued her trial attorney rendered “ineffective assistance of counsel” for failing to do several things, including failing to present evidence that Swan had also abused her and she was the victim of Battered Persons Syndrome. Primack also argued her guilty plea had been “unknowingly and involuntarily” entered, as she did not understand the “criminal negligence” element of the charge to which she pled. Following a hearing, the habeas court ruled in her favor and granted her relief, throwing out her guilty plea. The State, on behalf of the warden, now appeals to the Georgia Supreme Court.

**ARGUMENTS:** Representing the State, attorneys with the Attorney General’s office argue the habeas court erred by granting relief to Primack. First, she did not have a valid claim

that her plea attorney was ineffective, the State argues. The habeas court incorrectly analyzed Primack's ineffective assistance of counsel claim, relying on the U.S. Supreme Court's 1984 decision in *United States v. Cronin*, rather than its decision the same year in *Strickland v. Washington*. Applying the two-pronged *Strickland* standard, the habeas court incorrectly found that Primack satisfied her burden of proving that her plea attorney's performance was deficient and that had it not been for that deficient performance, there would have been a different outcome to her case. Primack "did not prove she was prejudiced by counsel's failure to introduce evidence that Petitioner was suffering from Battered Persons Syndrome in mitigation at the plea hearing, as the evidence was later submitted at the hearing on Petitioner's motion to modify her sentence, and the trial court declined to alter her sentence," the State argues in briefs. The habeas court also improperly found that Primack's plea was "void" on the basis that she did not understand the meaning of "criminal negligence." Her plea was, in fact, knowingly and voluntarily entered, the State contends, and therefore she does not have a legitimate claim to relief on that ground either. "To determine whether the defendant understood the nature of the crimes charged, the reviewing court should look to 'the totality of the circumstances and determine whether the substance of the charge, as opposed to its technical elements, was conveyed to the accused,' rather than to whether the legal elements of the offense were formally recited to the defendant," the State argues. Primack's plea counsel admitted that he might not have used the exact term of "criminal negligence," as he often tries to avoid "legalese" when explaining charges to defendants, but he was satisfied that Primack understood with what she was being charged and to what she was pleading guilty. The State points to a U.S. Supreme Court case from 1969, *Boykin v. Alabama*, which does not require any "precisely-defined language" or "magic words" to "convey a defendant's rights to her during a guilty plea proceeding." Therefore, "guilty plea attorneys are not required to utilize specific language when explaining complicated legal definitions of elements of a crime to a criminal defendant," the State argues.

Primack is asking this Court to affirm the habeas court's grant of relief. The court was correct in finding that her plea counsel was ineffective and that her plea had not been voluntarily entered. She raised the issue of ineffective assistance of counsel in the habeas court for, among other reasons, the failure of her attorney to present evidence of her Battered Persons Syndrome as mitigating evidence, which would have helped her get a less harsh sentence than the maximum under the law. "Ample evidence was available regarding the abuse Ms. Primack had suffered at the hands of Jerome Swan, as well as testimony regarding Ms. Primack's psychological condition..." her attorneys argue in briefs. "None of it was presented. Defense Counsel could not recall doing or attempting to do anything for Ms. Primack other than not pursuing leads and explaining to her that the evidence against her was overwhelming and that she should plead guilty." Also, by assuring Primack that the trial judge would sentence her to less than the maximum for the crime to which she was about to plead guilty, she went ahead and pleaded guilty when she otherwise would have had no reason to do so. "A 10-year sentence was the most she could receive even if she had gone to trial." Primack's plea was not made "knowingly and voluntarily" because "she did not understand a fundamental element of the crime, and would not have pleaded guilty if she had," her attorneys argue. Primack specifically asked the judge at the hearing, "...what's criminal negligence?" But after providing an answer, the judge never confirmed if she understood. There was evidence available to the plea counsel

that could have been presented on her behalf, but instead, no effort was made to do so and Primack was clearly unprepared for the hearing. Her attorneys argue that the “presumption of prejudice based on a total denial of representation applies in this case.” Therefore, the Supreme Court should affirm the habeas court’s ruling.

**Attorney for Appellant (Warden):** Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Vicki Bass Asst. A.G.

**Attorneys for Appellees (Primack):** W. Keith Barber, Cris Schneider