



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Monday, July 11, 2016

10:00 A.M. Session

GENS, ADMINISTRATOR V. WHITE ET AL. (S161005)

A woman is appealing a **Forsyth County** court ruling that a plot of land on Lake Lanier belongs to a man who bought it, lived there, and made substantial improvements to the property. The woman claims she and her relatives have always had legal title to the land.

FACTS: In 1999, April Gens purchased 4.3 acres of land bordering Lake Lanier and subdivided the property into 15 separate residential lots. She financed the 4.3 acre tract with mortgage loans from Lumpkin County Bank and secured the repayment of her loans by granting the bank a security deed to the entire 4.3 acre tract, including Lot #7, which is the subject of this dispute. Gens borrowed additional funds from Lumpkin County Bank in 2001 and secured her repayment of this additional loan by granting another security deed. The 1999 security deed and the 2001 security deed contained conflicting information related to Lot 7. While the 1999 security deed "encumbered" the entire 4.3 acre tract, meaning the bank had claim to it in the event of non-payment of the loan, the 2001 security deed only included in the legal description "a part of Lot 7," which was a small dock access area at the southwest corner of the lot. In March 2003, Gens filed for bankruptcy. Lumpkin County Bank filed a motion in court stating that Gens had failed to make payments to the bank based on the terms of the 1999 and 2001 security deeds, that the accounts were delinquent and warranted foreclosure, and that Gens had little or no equity

in the property. Gens did not oppose the bank's motion, and the Bankruptcy Court held that Gens "had no equity in Lots 0, 7, and 8," and allowed Lumpkin County Bank to proceed with foreclosing those three lots. However, according to White, the bank mistakenly foreclosed on only a portion of Lot 7, and compounded its error by cancelling the 1999 security deed which contained a legal description of the entire 4.3 acre tract, including the entire Lot 7. Following foreclosure, the Lumpkin County Bank sold the lots to Lanier Property.com, conveying them by a "general warranty deed." Such a deed provides the buyer with a warranty that the title to the property is free from encumbrances and won't face legal challenges to the title.

In July 2004, John Keith White purchased Lot 7 from Lanier Property.com shortly before Lanier completed construction of a house on the lot. Lanier conveyed the new house and Lot 7 to White also by general warranty deed. The deed included a description of the entire lot. White granted Bank of America a first priority security deed to the property in June 2008.

On May 27, 2011 – six years and 10 months after White purchased Lot 7 – Gens filed a "Petition to Quiet Title" the property, asking the court to declare her the rightful owner of Lot 7. She argued that under the 2001 security deed, Lanier Property.com did not own Lot 7 when it sold it to White. Rather it only owned a portion of Lot 7 – about 150 square feet which was Lot 7's lake-front access strip. She argued she never lost legal title to Lot 7, other than to the small access strip. She also argued that White did not qualify to have gained title to the property through "adverse possession" because he had not lived there a full seven years, as required by Georgia Code § 44-5-164. Gens died in May 2012, and her daughter, Nicholle Jeanette Gens was appointed as administrator of her mother's estate and replaced her in the case. After reviewing arguments on both sides, a "special master" recommended to the judge that quiet title to Lot 7 be granted to White, except for the small lake-front access strip. (A "special master" is someone appointed by the court – usually a lawyer – to assist the judge with a particular case.) The judge accepted the recommendation but gave title of all of Lot 7 to White, including the dock-access strip. The judge ruled that neither Gens nor her estate had any ownership interest in any of Lot 7. Nicholle Gens now appeals to the state Supreme Court.

ARGUMENTS: Gens' attorney argues that the trial court erred in adopting the special master's recommendation and giving title to White. "There is no dispute about the fact that Gens owned the legal title to the property at the time of filing suit and that White had not possessed the property for the required time to succeed in adversely possessing it," the attorney argues in briefs. The trial court ruled that "Gens had a duty to exercise reasonable diligence to see that no one was taking ownership of her land and improving it." But that finding, the attorney argues, "along with the court's decision, is not in keeping with Georgia law." In its 1953 decision in *Owen v. Miller*, the Georgia Supreme Court "already answered all of the questions presented in this case." In that case, the person holding legal title, Owen, knew that another person, Miller, was making "valuable, permanent, and expensive improvements" on the property but did not object or reveal his title to the premises. Two days before the expiration of the seven years since Miller had purchased it, Owen let him know he had a claim to the property. Miller argued that Owen was prevented by the facts from laying claim to the property, and the jury agreed. But the state Supreme Court did not, finding that Owen was not barred from asserting his title to the property since it was within seven years from the date of the sale. "The mere fact that one owning land sees another putting valuable improvements thereon, although the owner may know that the other is doing so in good faith, believing himself to have title to the land, will not estop

[i.e. prevent] the owner from asserting his claim,” the attorney quotes from another state Supreme Court ruling. Furthermore, White could have obtained the truth about Gens’ claim to the land through a simple title search. “For more than a century, it has been recognized that a purchaser of land in this state is charged with notice of every fact shown by the records, and is presumed to know every other fact which an examination suggested by the records would have disclosed.” White only could have obtained title “by fulfilling the seven-year possession requirement of Georgia Code § 44-5-164, which he did not successfully complete,” Gens’ attorney argues. “White has suffered harm not at the hands of Gens but at those of a confused or dishonest seller and at those of a title searcher or closing attorney who ignored record title.”

Attorneys for White and the Bank of America argue that contrary to Gens’ attorney’s argument, Gens did not have legal title to Lot 7 when she filed her quiet title action. Nicholle Gens testified during a deposition “that her mother believed she had ‘lost’ Lot 7 after filing for bankruptcy, yet sometime around 2010, inexplicably began believing that she owned Lot 7,” the attorneys argue in briefs. Even though the Lumpkin County Bank mistakenly cancelled the 1999 security deed, because she did not pay her loans in full, “legal title to Lot 7 did not revert to Ms. Gens as a matter of law.” “Ms. Gens is not entitled to the inequitable windfall of free and clear legal title to Lot 7 simply because the Lumpkin County Bank recorded a mistaken cancellation,” the attorneys argue. In granting title to Grant, the trial court noted that the “law seeks to prevent a windfall to a party seeking to take advantage of a mistake created by that party’s actions....” The court correctly found “that under the circumstances of this case, Ms. Gens had a duty to exercise reasonable diligence to see that no one took ownership of and improved Lot 7 after the foreclosure sale. Because Ms. Gens failed to exercise this reasonable diligence...the Superior Court used its inherent power to select the most equitable solution to Ms. Gens’ and Mr. White’s competing title claims.” Gens filed for bankruptcy and voluntarily surrendered her interest in the entire 4.3 acre tract to the bank, the attorneys argue. She “knew about Lumpkin County Bank’s foreclosure and subsequent conveyance of Lot 7.” On the other hand, “Mr. White had no actual knowledge of any title deficiencies and performed all acts that a reasonable person would perform in purchasing and owning property,” White’s attorneys argue. “The special master and superior court did not err,” and the high court should uphold their ruling.

Attorney for Appellant (Gens): S. Jeffrey Rusbridge

Attorneys for Appellees (White): Richard Calhoun, Monica Gilroy, Louis Fiorilla

BANK OF AMERICA V. JOHNSON (S15G1878)

The Bank of America is appealing a Georgia Court of Appeals ruling, arguing that a man’s lawsuit to gain clear title to property in **Henry County** should be dismissed because he defaulted on his mortgage payments and has no standing to sue.

FACTS: In April 2014, Bobby Johnson filed a “Complaint to Quiet Title” in Henry County Superior Court to clarify that property located on Gallup Drive in Stockbridge belonged to him. He argued in his complaint that in 2006, he had obtained title to the property through a warranty deed from No T. Nguyen, and he attached the deed, along with a plat of survey of the land, to his complaint. To purchase the property, he obtained a loan of \$173,600 from Pine State Mortgage Corporation. In his complaint, he named as defendants Pine State, Bank of America, N.A. (National Association) and The Bank of New York Mellon. Johnson alleged that Pine State was “a dissolved mortgage lender,” that it had relinquished all of its rights as of Jan. 1, 2007, and

that it “no longer holds a security interest whatsoever in Plaintiff’s property.” He further alleged that although the two banks claimed an interest in the property based on certain recorded “assignments,” or transfers of security deeds dated 2011 and 2012, those assignments were “without any evidentiary basis...without foundation, doubtful and constitute a cloud recorded against Plaintiff’s title to the property.” Johnson asked the court to declare that the defendants had no right, title or interest in the property and that they be forever prohibited from asserting such a claim. The Bank of America filed a motion to dismiss the complaint, arguing that Johnson had no factual basis for contesting the assignments of the security deed and that he lacked standing to challenge them under the Georgia Court of Appeals 2013 decision in *Montgomery v. Bank of America*. According to the Bank of America, to secure repayment of his loan from Pine State, in 2006 Johnson had conveyed interest in the property via a security deed to Mortgage Registration Systems, Inc. (MERS), which in 2011 “assigned,” or transferred, the security deed and Johnson’s mortgage to Bank of America. Bank of America subsequently transferred the security deed to the Bank of New York Mellon by virtue of an assignment recorded on June 28, 2012 in the Deed Book in Henry County. Following a hearing, the trial court ruled in favor of Bank of America and dismissed Johnson’s lawsuit. But on appeal, the Court of Appeals reversed the ruling. It rejected the Bank’s argument that Johnson lacked standing to challenge the assignments of security deeds because he was not a party in the transfers. The appellate court reasoned that, “A plaintiff in a quiet title action need not be a party to possible clouds upon title in order to bring a quiet title action in an attempt to remove those clouds. Thus, the fact that Johnson was not a party to the assignments that he challenges does not destroy his standing to assert that those assignments are clouds upon his title.” The very purpose of the state’s Quiet Title Act of 1966 “is to create a procedure for removing any cloud upon the title to land,” the Court of Appeals opinion says. The Bank of America now appeals to the state Supreme Court, which has agreed to review the case to determine whether the Court of Appeals was wrong in ruling that Johnson had standing to challenge the assignments of alleged security interests in a quiet title action.

ARGUMENTS: Attorneys for the Bank of America argue that yes, the Court of Appeals erred in its ruling. “A borrower should not be able to challenge assignment of a security interest by merely formulating his claim as one for quiet title,” they argue in briefs. Since the recent recession, “Georgia courts have seen a deluge of litigation filed by borrowers seeking to stop or delay the foreclosure of their homes,” the attorneys argue in briefs. “One of the most frequently asserted claims by borrowers is that an assignment of their mortgage from one lender to another is unenforceable for one reason or another.” Johnson is “a serial litigant who has repeatedly filed lawsuit after lawsuit to delay scheduled foreclosure sales based on the same flawed theory – that assignments of the security interest he granted was improper.” The Court of Appeals’ decision erroneously manufactures an exception to the *Montgomery* decision, which was upheld this year by the Georgia Supreme Court in its decision in *Ames v. JP Morgan Chase Bank, N.A.* “As this Court recently held in *Ames*, a borrower who is not a party to the assignment of a security deed securing a mortgage loan lacks standing to bring affirmative claims challenging the validity of that assignment,” the attorneys argue. Yet, the Court of Appeals ruled that *Montgomery* does not control in this case because the *Montgomery* decision “did not examine whether the Quiet Title Act demanded a different result.” By disregarding precedent, the Bank’s attorneys argue, “the Court of Appeals has potentially opened the floodgates for meritless claims so long as they are

presented as arising under the Quiet Title Act.” Additionally, the Court of Appeals improperly analyzed the facts underlying Johnson’s claims. “The indisputable facts established in the trial court show that Johnson and similarly situated borrowers lack sufficient title in their mortgaged properties to challenge the authority of their secured creditor to foreclose unless they have satisfied the underlying debt.” Johnson has presented no evidence that he ever did that. And, “the crucial fact that both Johnson and the Court of Appeals overlook is that the alleged dissolved lender [Pine State] never held a security interest in the property because the original security deed, which the Superior Court took judicial notice of, unequivocally granted a security interest to another entity [MERS] – not the original lender. Therefore, any allegations related to the lender (or its alleged bankruptcy) are completely irrelevant to an analysis of Johnson’s standing to challenge the assignments,” the attorneys contend. “The Court of Appeals erroneously relied on Johnson’s demonstrably false allegations.” Furthermore, the Court of Appeals failed to analyze whether Johnson had standing to attack his creditor’s security interest. “In his filings, Johnson made no reference to the fact that is of singular importance when a borrower seeks to assert a quiet title claim against his secured creditor – that he had not fully paid the debt referenced in the security deed.” “The inability of secured creditors to efficiently exercise the power of sale in security deeds as a means to address non-performing loans and reintroduce properties into the housing market would essentially convert the legislatively-approved, non-judicial foreclosure process into a quasi-judicial one at the whim of a borrower,” the attorneys conclude, urging the Supreme Court to reinstate the trial court’s proper grant of the Bank’s motion to dismiss Johnson’s case.

Johnson, representing himself “pro se,” argues the Court of Appeals decision is correct. The Bank of America “has misplaced the facts throughout its brief and misconstrued the quiet title lawsuit to that of a wrongful foreclosure,” he argues. While Bank of America argues that Johnson lacks standing, at the time Johnson filed his complaint, “Bank of America was not a creditor, mortgagee, had no legal interest in Appellee’s [i.e. Johnson’s] property or possessed legal title whatsoever.” “Appellee is doubtful how Bank of America claims an interest in Appellee’s property,” Johnson argues. The Bank’s assignment “was recorded four years after plaintiff’s security deed was relinquished in January 2007,” he contends. The *Ames* and *Montgomery* decisions do not apply in this case because they “are cases concerning a wrongful foreclosure which do not come within the framework of a quiet title.” The Court of Appeals did not err in holding that Johnson had standing to maintain his quiet title action,” Johnson argues. “Under the ‘right for any reason’ rule, an appellate court will affirm a judgment if it is correct for any reason, even if that reason is different than the reason upon which the trial court relied.” The Bank’s arguments “lack proper reasoning, where Johnson brings a quiet title claim against a party who, according to the allegations and evidence in the complaint, is not a mortgagee and who otherwise has no interest in his property whatsoever,” Johnson contends. “Appellant [i.e. Bank] speaks of a non-existing underlying debt that was never entered into the records.” This Court should uphold the Court of Appeals ruling.

Attorneys for Appellant (Bank): Andrew Phillips, Jarrod Mendel, Peter Lublin, Jody Campbell
Attorney for Appellee (Johnson): Bobby Johnson, Pro Se

ELLIS V. THE STATE (S16A1246)

Former **DeKalb County** Chief Executive Officer W. Burrell Ellis, Jr. is appealing his criminal convictions for Attempt to Commit Theft by Extortion and Perjury related to his alleged attempts to “shake down” a county contractor for campaign contributions.

FACTS: According to the facts at trial, in an effort to raise money to eliminate his campaign debt, in 2012 Ellis attempted to extort a campaign contribution from Power and Energy Services, Inc. through its co-owner, Brandon Cummings. Power and Energy Services, an Austell business, had a \$250,000 contract to provide generator repairs for the DeKalb County Department of Watershed Management. Beginning in June 2012, Ellis made several calls to Power and Energy in an effort to procure a campaign contribution from the company, but apparently the calls were not returned. In a Sept. 27, 2012 recorded telephone conversation later played for the jury between Ellis and Cummings, in Ellis asked for a campaign contribution four times and implicitly threatened Cummings that he would cut Power and Energy’s contract with DeKalb County if the company did not make a \$2,500 contribution to his campaign. Specifically, Ellis said to Cummings: (1) he had already told the DeKalb County Procurement Director, Kelvin Walton, to “just go ahead and cut (Power and Energy's) contract;” (2) “Why are we doing business with this company, that's my thought;” (3) “You know, I could ask the question, why is DeKalb County doing business with a Cobb County business;” and (4) “If I've got to answer that for you . . . I'm probably not talking to the right person,” when Cummings asked why Power and Energy should give to Ellis’ campaign. Cummings testified at trial that the call made him feel that his contract would be cut if he did not contribute, and that he felt “threatened.”

In a Sept. 28, 2012 recorded telephone conversation between Ellis and Walton, the county’s procurement officer, Ellis told Walton to “let (Power and Energy’s contract) expire,” and “put a note in their file” so that Power and Energy could never win another contract with DeKalb County. At the time, Walton was working as a confidential informant for the District Attorney’s office. Walton also testified that Ellis had encouraged him to put pressure on Power and Energy by letting them know that Ellis had the power to cancel contracts. When Power and Energy did not make the requested campaign contribution, consistent with Ellis’ earlier threat, the company’s contract with the County was terminated. Ellis informed Walton that Power and Energy’s contract was cut due to its failure to return his phone calls. Walton testified that it was Ellis’ idea for the County to cease doing business with Power and Energy, and that a company’s failure to return phone calls did not present a valid reason for the County to terminate its contract with that company.

On Jan. 7, 2013, rather than admitting to a Special Purpose Grand Jury that he had cut Power and Energy’s contract, Ellis lied. The special grand jury had been impaneled by the Chief Judge of the DeKalb Superior Court to investigate the circumstances surrounding contracts involving the county’s Department of Watershed Management from Jan. 1, 2002 through Dec. 31, 2010. Specifically Ellis told the grand jurors, “I don’t get involved in who gets work and who doesn’t get work.” When asked if he’d ever ordered that a vendor not be given work under a contract like the one Power and Energy Services had, Ellis testified, “No.” And when asked if he’d ever ordered a contract be terminated for not returning phone calls, he said, “No.”

Ellis’ first trial ended in a mistrial after the jury was unable to reach a unanimous verdict. He was re-tried on nine counts in the indictment and on July 1, 2015, the jury convicted him of one count of criminal attempt to commit theft by extortion and three counts of perjury. Ellis was

sentenced to five years, with 18 months to be served behind bars. (Ellis was released from prison March 1, 2016.) Instead of filing a motion for new trial, Ellis now appeals his convictions directly to the Georgia Supreme Court.

ARGUMENTS: In a 60-page brief, Ellis' attorneys lay out nine ways the trial court erred and why his convictions should be reversed. Among them, they contend that the trial court placed a number of onerous restrictions on Ellis' testimony and the presentation of his defenses, as well as Ellis' access to his lawyers, which constituted legal error. "In this case, the trial court imposed numerous restrictions on Mr. Ellis' testimony which were arbitrary and often for no stated purpose whatsoever, in violation of Mr. Ellis' rights," the attorneys argue in briefs. "The trial court prohibited Mr. Ellis from testifying regarding statements in his testimony before the Special Purpose Grand Jury which were in evidence but which were not statements charged in the indictment." The attorneys list eight additional ways the judge prohibited Ellis from testifying. "An accused in a criminal case possesses a due process right to present a complete defense. He or she also possesses a 'right to present his own version of events in his own words,'" the attorneys argue, quoting the U.S. Supreme Court's 1987 decision in *Rock v. Arkansas*. "Mr. Ellis should have been permitted to explain his own statements, and testify regarding statements which had already been introduced into evidence against him by the prosecution," the attorneys say. "These rulings severely curtailed Mr. Ellis' defense to charges on which the jury ultimately found him guilty." In addition, the trial court erred in ruling that Ellis could not discuss his testimony with his lawyer during an overnight recess which occurred during his testimony. "An order preventing a defendant from consulting with his counsel during an overnight recess violates a defendant's right to the assistance of counsel guaranteed by the Sixth Amendment." Among other arguments, Ellis contends the trial court was wrong to exclude evidence regarding the Special Purpose Grand Jury's investigation into Ellis for perjury. "The trial court's prohibition on Mr. Ellis from arguing (1) that the Special Purpose Grand Jury exceeded its scope, (2) that the prosecution 'abused' or 'misused' the special purpose grand jury process, or (3) that the prosecution made misrepresentations to Mr. Ellis about the nature of the Special Purpose Grand Jury proceedings severely impaired Mr. Ellis' ability to defend against the prosecution's perjury charges against him on essential elements of the offense," his attorneys argue." The trial court's cutting off inquiry on subjects on which the defense was entitled to reasonable cross-examination also constituted error. Here the trial court placed unwarranted restrictions on the defense's ability to show "any" bias or prejudice on the part of Walton "or any State agent" based on whether the District Attorney's office had suggested that they would not be prosecuted. The trial court prohibited the defense from cross-examining or impeaching Walton regarding whether he decided that he needed to give the District Attorney's office "someone else" after he was confronted with evidence of his own illegal conduct, including his manipulation of the contract award process. And the trial court erred by excluding evidence and testimony regarding other vendors. The defense wanted to call several representatives of vendors to testify at trial that there was no retribution from the County or Ellis for not contributing to his campaign.

The State argues the trial court "was correct in not granting Appellant [i.e. Ellis] unfettered license to testify as to whatever he wished, and placed no unwarranted restrictions on Appellant's ability to present a defense or access to counsel." The record and the law "both utterly belie Appellant's complaint that the trial court prevented him from presenting 'a complete

defense.” The trial court specifically granted Ellis the opportunity to explore any motive or bias on the part of Kelvin Walton. As to his assertion that he could not consult with his attorney during an overnight court break, the break occurred while Ellis was still on the stand as a witness being cross-examined by the State. Although before adjournment that day, the judge said that like any other witness, Ellis should not be discussing his testimony with anyone, the next day before Ellis’ testimony resumed, the judge offered – and his attorney accepted – the chance to talk with Ellis about his testimony before the jury came out. The trial court did not err in limiting Ellis’ evidence and argument regarding the Special Purpose Grand Jury and his perjury charges. “A ‘complete defense’ as advocated by Appellant does not include the presentation of irrelevant and inadmissible evidence at trial,” the State argues. The trial also placed no improper restrictions on Ellis’ cross-examination or impeachment of Walton. The trial court specifically permitted Ellis “to explore the witness’s [i.e. Walton’s] motives or biases,” and laid out the process he would have to follow to do so. As to Ellis’ complaint that the trial court excluded evidence regarding other vendors, “Testimony from vendors from whom appellant did not attempt to extort campaign contributions is not evidence that Appellant did not attempt to extort the vendors the jury convicted him of attempting to extort, and it is not evidence of Appellant’s honesty or truthfulness,” the State argues.

Attorneys for Appellant (Ellis): Anthony Lake, Craig Gillen, Dwight Thomas, Kemay Jackson
Attorneys for Appellee (State): Robert James, District Attorney, Christopher Timmons, Dep. Chief Asst. D.A., Gerald Mason, Asst. D.A., Lenny Krick, Asst. D.A.

CARLA CHRISTIAN V. BEN CHRISTIAN, JR. (S16F1160)

A woman is appealing a **DeKalb County** judge’s ruling in her divorce, arguing that the date for determining the value of her husband’s retirement benefits and computing her fair share was the date they divorced, not nine years earlier when they signed a separation agreement.

FACTS: In 2006, Carla Graves Christian filed a “Complaint for Separate Maintenance” against her husband, Ben F. Christian, Jr. On Feb. 22, 2006, they reached a “Settlement Agreement.” Such a separation agreement is for couples who want to separate but not necessarily to divorce. It addresses, though, all the same issues involved in a divorce. In Paragraph VII of the Christians’ separation agreement, the parties agreed that Ben’s retirement benefits with Southern Company would be divided as follows: “The parties acknowledge that should they divorce, [Wife] shall be entitled to one-half of [Husband’s] retirement, 401(k), or other employment benefits.” The separation agreement was approved by the court in December 2008. Some years later, the couple separated and in 2013, Carla filed for divorce, alleging the marriage was irretrievably broken. She requested that the separation agreement, with the exception of child support, be made the order of the court in the divorce case. In a hearing before the judge, the parties contested the specific terms of the 2006 separation agreement. On Aug. 21, 2015, the trial court issued its Final Judgment and Decree in the divorce, stating that “the language of Paragraph VII of the 2006 Separation Agreement requires that the date for valuing and dividing the retirement, 401(k) or other employment benefits is the date of the Separation Agreement (Feb. 22, 2006) and not the date of divorce [Aug. 21, 2015], and that any pre-marital value of these accounts must be excluded from Plaintiff’s award.” The trial court also found “that [Wife] is only entitled to choose one of the three benefits described in Paragraph VII.” Carla now appeals to the Georgia Supreme Court.

ARGUMENTS: Carla’s attorney argues the trial court erred in concluding that the date for valuing and dividing the retirement benefits was the date of the 2006 separation agreement and not the 2015 date of the divorce. At the time they signed the 2006 Settlement Agreement, Carla “was only granted right to one-half of Husband’s retirement benefits if there were a divorce,” the attorney argues. “Since there was a divorce, Wife is entitled to one-half of those benefits at the time of the divorce.” Her right to retirement benefits “was conditioned upon there being a divorce.” “If the parties had wanted Wife to obtain a one-half interest in Husband’s retirement benefits at the time of the Settlement Agreement, they would have so stated.” The trial court also erred in determining that Carla could only select one of the retirement provisions listed in the separation agreement. The word “or” in the agreement’s language separates “401(k) or other retirement benefits,” so that her choice was one of those two, plus half of his retirement. The judge was wrong that she was entitled only to one of three, rather than two. And the trial court erred in ruling that any award to Carla must be reduced by the pre-marital value of the account. The parties did not mention “pre-marital value” in Paragraph VII of the agreement. “While the Husband had the right to claim a reduction in the share of his retirement benefits that he agreed to transfer to the Wife, the Husband also had the right to waive his claim to the pre-marital value of the retirements,” Carla’s attorney argues.

Ben’s attorneys argue the trial court’s judgment should be upheld because the separation agreement is not even part of the record, and a court “cannot address an argument dependent upon a document that is not in the record.” The trial court correctly ruled that the date for valuing and dividing the retirement benefits was the date of the separation agreement and not the date of the divorce. In its 1989 decision in *Friedman v. Friedman*, the Georgia Supreme Court ruled that “the last date on which assets may be acquired so as to be marital assets is **the date of the formal decree of separate maintenance or the date of the decree of final divorce.**” In a 1985 case, the high court ruled that, “Once separated by judicial determination in a separate maintenance judgment, property becomes part of the separate estate of the party to whom it is awarded and it is not thereafter subject to equitable division in a later divorce action.” In the 2006 agreement, Carla was awarded the house that the couple had shared as their marital home. Ben signed a deed over to her around the time they signed the agreement. Since then, the house has appreciated in value, yet “the appreciation of value in the home is not considered marital property and therefore not subject to equitable division, much to the detriment of [Ben],” his attorney argues. “Yet [Carla] wants the Court to rule otherwise as to retirement benefits.” The trial court correctly determined that Carla is entitled to select only one of the retirement benefits listed in Paragraph VII of the separation agreement. “There is no ambiguity in the document,” the attorneys argue. And the trial court did not err in excluding the pre-marital portion of the retirement benefits from Carla’s award. Georgia law holds that, “Equitable division of property... is ‘an allocation of assets acquired **during the marriage** to the parties, based on their respective equitable interests in those assets.’” Ben does not argue that Carla is not entitled to a portion of his retirement account, “only that it must be reduced by the pre-marital value of the account,” his attorneys contend.

Attorney for Appellant (Carla): Frank Virgin

Attorneys for Appellee (Ben): Louis Levenson, Cory Barnwell

2:00 P.M. Session

WEST V. THE STATE (S16A1369)

A father is appealing a pre-trial ruling by a **Glynn County** judge rejecting his motion to throw out the charge against him for violating a statute that prohibits insulting or verbally abusing a public school employee in the presence of pupils. He claims the statute is an unconstitutional violation of his right to free speech.

FACTS: Michael Antonio West’s child had been harassed by two other students. On April 3, 2015, West allegedly boarded a school bus, cussing and threatening the students, according to prosecutors. He was immediately told by the bus driver that he could not be on the bus. The bus was packed with minor school-aged children. After being told to get off the bus, West continued to use profanity and threaten the students, as well as cuss the bus driver, prosecutors claim. Eventually West got off the bus, but he continued to use profanity while outside at the bus stop. That day, West was arrested and charged with violating Georgia Code § 20-2-1182. The statute says: “Any parent, guardian, or person other than a student at the public school in question who has been advised that minor children are present and who continues to upbraid, insult, or abuse any public school teacher, public school administrator, or public school bus driver in the presence and hearing of a pupil while on the premises of any public school or public school bus may be ordered to leave the school premises or school bus, and upon failure to do so such person shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed \$500.” On Dec. 9, 2015, West filed a “Motion to Dismiss and Quash the Accusation,” arguing that the statute violates his free speech rights. The State filed no response to his motion. In January 2016, the trial judge denied his motion. The Georgia Supreme Court subsequently granted his application to appeal the pre-trial ruling here.

ARGUMENTS: West’s attorneys argue the trial court erred in denying his motion to throw out his charge because the statute under which he is being accused is “unconstitutionally overbroad” and “vague” in violation of the First Amendment to the U.S. Constitution. “A speaker’s right to ‘upbraid, insult, or [verbally] abuse’ is constitutionally protected,” the attorneys argue. While there are exceptions to the ban against restricting free speech – e.g. free speech does not encompass obscenity, child pornography, true threats, or “fighting words” – no United States Supreme Court precedent “allows the State to bar an adult from making a non-harmful communication merely because it is made in the presence of a minor,” the attorneys argue in briefs. “Content-based restrictions on speech are presumptively unconstitutional, and the State bears the burden to rebut that presumption. On its face, § 20-2-1182 is a content-based restriction on speech because criminal liability depends on whether the listener considers the speech involved to be upbraiding, insulting, or abusive.” The prohibited speech “could include virtually *any* speech, as long as the listener was subjectively offended by it,” the attorneys argue. “It depends entirely on its subjective effect on the listener. As such, it is overbroad and its prohibition is unconstitutional.” It also is not narrowly tailored to serve a legitimate government interest. “It is not clear if the interest behind the statute is to protect the feelings of public school employees, or if the government fears a loss of order if a public school employee is scolded in front of a student.” In addition to being overbroad, the statute is unconstitutionally vague. “Due process requires that laws give people of ordinary intelligence fair notice of what is prohibited,”

the attorneys argue. “In this case, worse than the general vagueness of the statute, the prohibited speech depends on the sensitivities and effect on the person to whom the words are spoken.” Four other states already have found similar statutes unconstitutional, including Florida, Kentucky, Arkansas, and California.

The Solicitor, representing the State, argues that § 20-2-1182 is not overbroad. “Fighting words, threatening words, profanity are limits on free speech,” the attorney argues in briefs. “Nothing is or should be of unfettered discretion as there would be lawlessness, confusion and chaos.” The statute does not restrict the content of an individual’s freedom of speech. “It restricts the location in which the individual exercises this speech,” stating that a person may not continue to “upbraid, insult, or abuse” a public school employee in the presence of a pupil on school premises or in a school bus. “There are multiple more appropriate locations away from pupils in which an adult has the opportunity to express himself: the phone, a letter, scheduling an appointment to meet with school personnel.” The State has a legitimate interest in protecting its school children from a parent who is ranting and raving in their presence. “The safety of the children and the school personnel is the legitimate state interest in prohibiting a non-student from entering school property who is upbraiding, insulting or abusing school personnel,” the State’s attorney argues. “The statute only limits the location of the language and behavior.” “No 9-year-old child should be subjected to an adult’s threats and cussing.” The statute also is not vague. It is not “so burdensome or unclear that an average person would not understand the language and acts that are proscribed while in the presence of children.” The statute gives two warnings: to leave the premises and not to continue in the presence of children. “It does not restrict a disgruntled parent from appearing in person at the school to upbraid, insult and abuse school staff; just not in front of the students,” the Solicitor contends.

Attorneys for Appellant (West): Mark Bennett, Jason Clark

Attorney for Appellee (State): Maria Lague, II, Solicitor

DUBOSE V. THE STATE (S16A1299 and S16A1300)

A man convicted in **DeKalb County** of killing his girlfriend because he suspected she was seeing someone else is appealing his murder conviction and sentence to life in prison with no chance of parole.

FACTS: For several years, Atima Smith was involved in a relationship with Courtney DuBose. In the summer of 2012, DuBose had been living with Atima and her daughter, 16-year-old Gavanti, for about a month. The teenager slept on the couch of the one-bedroom apartment while her mother and DuBose shared the bedroom. DuBose had recently been in prison, and while he was incarcerated, Atima dated Dontell Thomas for about six months. She and Thomas worked together, but they stopped dating shortly before DuBose moved in with Atima, although she continued to call Thomas at times. On the night of Aug. 23, 2012, Thomas received a call from Atima Smith’s cell phone. But the call was made by DuBose who told Thomas to “stop calling my girl.” Gavanti later testified that DuBose had gone out that evening while her mother stayed home. When DuBose returned, Gavanti was lying on the couch, talking on her phone while her mother was in her bedroom asleep. DuBose came back to the apartment with a new X-box gaming center and went into the bedroom to play video games. Gavanti soon heard DuBose and her mother arguing, then she heard gunshots. Gavanti called 911, then headed to the bedroom where her mother was. DuBose came out of the bedroom, pointed the gun at Gavanti,

then left, returning later to grab Atima's cell phone. Gavanti found her mother in bed, bleeding profusely. A DeKalb police officer, who responded to the scene, found the woman conscious and covered in blood. She told him she had just been shot and could not breathe. Gavanti told the officer that the shooter had taken her mother's keys and cell phone and fled the scene in Atima's car. About 20 minutes after the officer arrived, Gavanti received a call from her mother's cell phone. When the officer answered it, a male on the other end asked three times, "Is she dead?" and then hung up. Atima Smith was still conscious and communicating when she arrived at Grady hospital in Atlanta. But she had been shot 12 times and ultimately died from gunshot wounds to her chest and abdomen. Meanwhile, DuBose fled the apartment in Atima's car. Later that day, police in Cobb County spotted the car being driven by DuBose's sister and pulled it over. The officer told the woman there was a man wanted for murder in the area and asked her if she knew anything about it. Initially she said she did not, but subsequently she told the officer that DuBose was in the trunk with a gun. The officer instructed her to get out of the car and run from the scene. More units arrived and surrounded the vehicle, before they eventually coaxed DuBose from the trunk, who told them, "It's me you're looking for."

In March 2014, a jury found DuBose guilty of voluntary manslaughter as a "lesser-included" – or less serious – offense of malice murder. He was also convicted of two counts of felony murder, aggravated assault, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a felony. After he was sentenced to life without parole for felony murder plus 25 years for aggravated assault and possession of a firearm during commission of a felony, DuBose began the process of appealing to the state Supreme Court. Nine days later, the trial court entered an order clarifying the court's re-sentence of DuBose in which it had vacated his 20-year sentence for voluntary manslaughter, although the order pointed out DuBose was still sentenced to life without parole plus 25 years in prison. DuBose then filed a second notice of appeal from that order. The two cases were consolidated, and DuBose now appeals to the state Supreme Court.

ARGUMENTS: DuBose's attorney argues there was only one central issue at trial: "whether the killing was mitigated by passion or provocation such that DuBose is guilty of voluntary manslaughter instead of murder." "The court's instructions to the jury regarding mitigation due to sudden passion therefore were crucial to the jury's decision," the attorney argues. "But the court's instructions to the jury were an inaccurate and incomplete statement of law. On the malice murder count, the jury found DuBose guilty of the lesser included offense of voluntary manslaughter, but the jury convicted DuBose of felony murder with an underlying felony of possession of a firearm by a convicted felon. DuBose's felony murder conviction should be vacated because the trial court's instructions were erroneous and because the jury found that the act of killing was mitigated by sudden passion in the malice murder count." In his opening statement, DuBose's attorney argued that there was no dispute that DuBose had killed Atima Smith, but that the crime was committed in a sudden fit of passion when he discovered evidence on her cell phone that she was having an affair with another man. Prior to the jury's deliberations, the trial judge correctly gave jurors the definition of voluntary manslaughter, which is essentially a murder where the person acts as a result of "sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person." Where the evidence would authorize a verdict for either felony murder or voluntary manslaughter, the judge must instruct the jury that "before making a decision on a

felony murder charge, it must consider whether passion or provocation mitigates the killing,” the attorney argues. But the trial court erred in instructing the jury on the issue of provocation by using an outdated jury instruction and stating, “To kill a lover for past acts of adultery or to prevent the apparent commission of the completion of an act of adultery in progress between them is murder.” The drafters of the Georgia Pattern Jury Instructions changed the instruction in 2009 and rather than saying the act “is murder,” the instruction now says it “is not justified.” “In this case, the trial court instructed without qualification that killing a lover for past acts of adultery, without qualification, ‘is murder,’” the attorney argues. While such a killing may be murder, it may also be voluntary manslaughter. “Where the only issue in the case was whether the killing was murder or voluntary manslaughter, it will likely affect the outcome where the court tells the jury without qualification that the conduct to which he admits ‘is murder.’” The trial judge also erred by failing to “properly tailor the adultery instruction to explicitly include sexual infidelity outside of marriage,” the attorney argues. DuBose and the victim were not married, but they were in a long-term relationship. “DuBose’s only defense to the murder charge was mitigation by sudden passion caused when he found out about the victim’s infidelity.” Among other arguments, DuBose’s attorney argues it was error to sentence DuBose for both aggravated assault and felony murder based on possession of a firearm by a convicted felon because those offenses “merge.” If a person is convicted of multiple crimes involving the same incident, courts must “merge” them into the most serious offense or treat them as a single crime for sentencing. “Therefore, DuBose’s convictions for aggravated assault with intent to murder and felony murder are both based on the same conduct – shooting the victim.” Similarly, his conviction for the other felony murder charge merges with voluntary manslaughter. Finally, DuBose’s attorney argues it was improper for the prosecutor to quote a passage from the Bible in making closing arguments.

The State, represented by the District Attorney and Attorney General, argues that DuBose’s challenge to the jury instructions on voluntary manslaughter is moot because the trial court vacated that sentence so he has no conviction for voluntary manslaughter. Also, the trial court did not err in sentencing DuBose for both aggravated assault and felony murder based on possession of a firearm by a convicted felon, the State argues. Since the felony murder based on aggravated assault was vacated, there was no felony murder count into which the aggravated assault count could merge “and the trial court was authorized to determine if it did or did not merge into the other felony murder count which was predicated on possession of a firearm by a convicted felon.” The State argues that it did not merge into that felony murder count. The trial court did not err in sentencing DuBose for felony murder even though the jury convicted him of voluntary manslaughter. And “the brief and unattributed reference to a Bible verse was proper,” the State contends.

Attorney for Appellant (DuBose): Patrick Hannon

Attorneys for Appellee (State): Robert James, District Attorney, Anna Cross, Dep. Chief Asst. D.A., Gerald Mason, Asst. D.A., Zina Gumbs, Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Crowder, Asst. A.G.

JOEL DALLOW v. MARY ELLEN DALLOW (S16A1210)

In this contentious **Fulton County** divorce, a man is appealing a trial court’s order granting his ex-wife’s petition to modify the custody arrangements of their teenage daughter and

requiring him to pay her more than \$46,000 to cover her attorney's fees. He is also appealing the court's refusal to hold her in contempt for interfering with custody.

FACTS: Joel and Mary Ellen Dallow divorced in April 2014, with an agreed-upon parenting plan for their then 14-year-old daughter. They also had a son who was about to graduate from high school. The parenting plan stated that time with their daughter would be split evenly between the parents during the week due to the father's unconventional work schedule as a musician in the Atlanta Symphony orchestra. But the plan also said that "due to the fact that ... [the child] is over the age of 14, [father] will have parenting time at any time mutually agreeable to [father] and each minor child." According to Mary Ellen, the parties did not enforce the minimum schedule dictated in the Parenting Plan if a deviation was mutually agreeable to the parties. She also claims that Joel conceded that she never withheld visitation from him. Joel asserts in his brief, however, that Mary Ellen "repeatedly violated the parenting plan by failing to confer on major issues and withholding and interfering with visitation. [She also] helped the child draft text messages to [him] to avoid visitation." Later, Joel became insistent on enforcing the visitation schedule, so that their daughter would be with him every Sunday through Wednesday. Mary Ellen claimed it became apparent that the schedule was becoming increasingly detrimental to their daughter. She states in her brief that Joel acknowledges his daughter "will hide herself away in her room or not speak with [Joel] or not eat the food [Joel] buy[s]" when she is at his home. The daughter later signed an affidavit which stated: "It is my desire to eliminate the minimum time required to reside with my father as stated in the Parenting Schedule dated April 14, 2014." In August 2014, Joel – representing himself "pro se" – filed a Petition for Contempt against Mary Ellen, which he later amended to include a Motion to Modify the Parenting Plan, seeking an increase in his parenting time. He also requested that he and his daughter be ordered to attend therapy. Mary Ellen also filed a Petition for Modification of Parenting Schedule, arguing her daughter was experiencing "significant stress," and her "quality of life" had been "significantly damaged" by the visitation agreement. The girl's affidavit was attached to her mother's petition. The trial court issued a final order granting the mother's petition for modification on July 1, 2015, finding it was in the daughter's best interest to adopt Mary Ellen's plan. The trial court also awarded her \$46,593.05 in attorney's fees in connection with her petition to modify visitation.

Joel filed a Motion to Dismiss the court's order, and amended it five times, which the trial court denied. The trial judge observed that "Despite the child's clear election to live with the Mother and not see the Father, the Father pressed on with this litigation. Not only did he press on, he turned a simple litigation into a complex one." The judge pointed out that Joel filed 517 "requests to admit," including requests such as "admit you have never worn a tuxedo" and "admit you did not confer with [Joel] on a graduation gift" for their son. Joel now appeals to the Georgia Supreme Court, asking it to throw out the trial court's rulings on the petition for modification and the award of attorney's fees to Mary Ellen. (A separate appeal from the contempt action is pending before the Supreme Court under a different case number, which the parties have submitted for a decision on the briefs only, with no Oral Arguments.)

ARGUMENTS: Joel's attorney argues, among other things, that the trial court erred in when it denied his motion to dismiss, because Mary Ellen failed to respond within the allowed time frame. He also argues that her petition for modification was barred by Georgia Code statute 19-923 and 19-924. He believes he was denied due process by the trial court when it awarded

Mary Ellen attorney's fees without a hearing and without specifying a particular statute. He asserts in his brief that his daughter has "lost the loving, healthy, and close relationship she once shared with her Appellant father, despite [his] valiant efforts to invoke the authority, power, and duty of the court to provide remedies to protect him and his child from the emotional savagery inflicted on their relationship by [Mary Ellen's] contemptuous and repeated interference in their relationship and time together."

Mary Ellen's attorney is asking the Supreme Court to uphold the lower court's ruling granting her request for a modification. She points to the trial court's statement in its order that, "The petition clearly states that 'the child has experienced significant stress and emotional hardship resulting from the inconvenient visitation agreement; and the child's quality of life has been significantly damaged as a result of the hardship created by the visitation.' Upon reading this language, the Court thought it was boilerplate lawyer language; but upon hearing the evidence and testimony in this case, the Court finds it to be sadly true." The attorney does not respond here to Joel's enumerations of error regarding the contempt matter, saying they will be addressed separately in the matter pending before this court regarding the contempt issue. Mary Ellen argues that the trial court acted within its discretion when it granted the modification and attorney's fee award. She also argues that husband's other arguments, that she did not timely respond to his motion to dismiss and that statutes prohibit the modification, both lacked merit. For these reasons, she is asking the State Supreme Court to affirm the trial court's rulings.

Attorney for Appellant (Joel): Terrance Sullivan of Insley & Race, LLC

Attorneys for Appellees (Mary Ellen): Joann Brown Williams of Meriwether & Tharp, LLC