



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Tuesday, October 4, 2016

10:00 A.M. Session

RILEY, COMMISSIONER V. SOUTHERN LNG, INC. (S16A1659)

The Commissioner of Georgia's Department of Revenue is appealing a **Fulton County** Court decision that was in favor of the natural gas company which had sued the Commissioner. This is the third time this case has come to the Georgia Supreme Court in which Southern LNG, Inc. argues that because it is a public utility, it must be taxed like other public utility gas companies – by the Revenue Commissioner rather than by the county taxing authorities in Chatham County where Southern's property is located.

FACTS: Southern LNG stores liquefied natural gas in a facility located on Elba Island in **Chatham County**. It delivers the liquid natural gas from its storage facilities through a network of pipes that are owned by its affiliates. Following a re-gasification process, the re-vaporized natural gas is then distributed to various companies throughout Georgia and the United States.

In 2010, Southern sued the Georgia Commissioner of Revenue, who was formerly Douglas MacGinnitie and today is Lynnette Riley, for refusing to accept its tax returns and for requiring that Southern file them locally. Southern argued that as a natural gas company, it is a "public utility," and under Georgia's Revenue Code, it must file its ad valorem property tax returns with, and be assessed by, the state Department of Revenue as opposed to the Chatham County taxing authorities. Southern sought a "declaratory judgment" from the court stating that

the state Revenue Commissioner, not the county tax commissioner, was to assess its property and receive its returns. Southern's suit also sought a "writ of mandamus" – which is used to compel a public official to do his/her job. The Revenue Commissioner filed a motion to dismiss the lawsuit, arguing that both of Southern's claims were barred by the doctrine of sovereign immunity, which protects state agencies from lawsuits. The trial court granted the Revenue Commissioner's motion and dismissed Southern's lawsuit. Southern then appealed to the state Supreme Court, arguing that the company merely wanted to be taxed uniformly with other gas utilities. In November 2011, the high court reversed the lower court's ruling, finding that Southern's mandamus action was not barred by sovereign immunity and the lawsuit could go forward.

The parties then went back to Fulton County court, where the Commissioner filed a motion asking the judge to grant him "summary judgment" – which a judge does after determining a jury trial is unnecessary because the facts are undisputed and the law falls squarely on the side of one of the parties. Southern also filed a motion for summary judgment. The trial court again ruled in the Commissioner's favor and granted him summary judgment, finding that mandamus is only allowed when no other legal remedy is available and in this case, Southern had the ability to appeal any assessments to the Chatham County Board of Equalization, thereby precluding mandamus. Southern again appealed to the state Supreme Court.

In March 2014, in a 6-to-1 decision, the Georgia Supreme Court reversed the Fulton County court decision and ruled in favor of Southern, finding that to prevent a party from bringing a mandamus action, there must be an alternative legal remedy available that would be "equally convenient, complete and beneficial" to the petitioner as mandamus would be. In this case, however, "the Chatham County tax appeals, as currently constituted, appear not to provide Southern with an adequate alternative to mandamus," the majority stated in its opinion. "But that does not necessarily mean that Southern's mandamus action may proceed, because it is unclear whether the Commissioner *could* be made a party to the Chatham County tax appeals or otherwise become legally bound by them...." The high court then remanded the case to the Fulton County court to decide that issue. (Justice Harold Melton dissented, writing that an appeal before the Chatham County Board of Equalization "cannot provide Southern with an adequate remedy at law." On remand, the trial court found that Southern's claim for a writ of mandamus is the only proceeding which affords it an adequate legal remedy, that no alternative remedy is available to Southern, and that Southern is a gas company under Georgia law, and is therefore a public utility. The trial court granted the writ of mandamus to Southern and ordered the state Revenue commissioner to accept Southern's ad valorem property tax returns. The state Revenue commissioner again appeals to the Georgia Supreme Court.

ARGUMENTS: The Attorney General, representing the Revenue commissioner and the State, argues the trial court erred in ruling that Southern did not have an adequate legal remedy that precludes mandamus under Georgia Code § 48-5-311, which provides for appeals before county boards of equalization. The state Supreme Court has previously described the writ of mandamus as a remedy of "last resort" that is appropriate only in "limited circumstances." "To constitute an adequate legal remedy, the alternative remedy must be 'equally convenient, complete and beneficial' to mandamus." The property tax appeal under § 48-5-311 "clearly meets the test of an adequate legal remedy," the State contends, because it provides an effective and available administrative remedy. The trial court also erred in concluding that the Georgia

Revenue Commissioner had a “clear legal duty” to accept Southern’s property tax returns and centrally assess the company as a “public utility.” “Here, the Commissioner does not have a ‘clear legal duty’ to accept Southern’s returns as a public utility,” the State argues. Southern is not a gas company and does not operate a gas business. It provides a gas terminal service to the owners of the gas, but Southern itself does not own the gas, nor does it own or operate the interstate pipelines that transport the product from Southern’s facility to the gas owners’ customers. Those pipelines are instead owned by affiliates of Southern, which are centrally assessed and file returns as “public utilities.” Southern has not been granted authority by the Federal Energy Regulatory Commission, nor has it ever sought the authority, to construct or operate an interstate gas pipeline. The Elba Island facility began operating in 1978 and for 14 years, Southern filed its property tax returns with Chatham County. Southern appealed Chatham’s property tax assessments of its property for the years 2001 and 2003 through 2010, arguing its property should be valued only by the state Revenue commissioner. Southern’s appeals for tax years 2003 through 2010 remain pending. Southern “has failed to demonstrate that it has a clear legal right to the writ of mandamus it seeks and the commissioner did not commit a gross abuse of discretion in rejecting Southern’s claims,” the State argues.

Southern’s attorneys argue the trial court correctly ruled that Southern is a public utility and is therefore required under state law to file annual tax returns of all its property in Georgia with the state Revenue Commissioner. “It is undisputed that Southern, the owner of certain liquefied natural gas facilities located in Chatham County Georgia, is a corporation which is expressly chartered to engage in the natural gas and pipeline business,” the attorneys argue in briefs. Southern is regulated by the Federal Energy Regulatory Commission as a natural gas company pursuant to the National Gas Act. “As a result of these undisputed activities occurring on the property, as well as the specific undisputed provisions within its corporate charter, Southern is a gas company and thus a ‘public utility’ as that term is contemplated under Georgia Code § 48-1-2.” The trial court also correctly ruled that a property tax appeal before the county board of equalization is not an adequate legal remedy for Southern. Georgia law makes it clear that a writ of mandamus may be used to “compel performance by a public official” of a specific duty the law requires, as long as there is no other legal remedy. In making its ruling, the trial court was obviously aware of the state Supreme Court’s earlier 2014 opinion in this case, in which it stated that the “Chatham County tax appeals appear not to provide Southern with an adequate alternative to mandamus,” and that only “a judgment that formally enforceably binds the Commissioner – like a judgment in this mandamus action – would finally resolve the issue that Southern has raised.” “The Commissioner’s arguments in this appeal that a property tax appeal proceeding...is convenient, complete and beneficial blatantly ignores this Court’s previous opinion,” the state argues. The Georgia Constitution requires that “all taxation shall be uniform,” meaning that “all tangible property must be assessed and taxed alike.” Southern has suffered a pecuniary loss and is entitled to “uniform assessment of its property as it relates to all other public utilities in the state of Georgia,” Southern’s attorneys argue. “The trial court ruled correctly in granting Southern’s request for a writ of mandamus because Southern has a clear legal right to the relief it sought.”

Attorneys for Appellant (Riley): Samuel Olens, Attorney General, W. Wright Banks, Jr., Dep. A.G., Alex Sponseller, Sr. Asst. A.G., Mitchell Watkins, Asst. A.G.

Attorneys for Appellee (Southern): Lisa Stuckey, Herbert Gray, III, Brian Morrissey, William Seigler, III

DONALD MARKLE V. KATARINA DASS (S16A1750)

In this child custody dispute, the father of a boy who had been living with him in New Mexico for more than six months is appealing a **Cobb County** court decision ordering him to return the child to his mother in Georgia. The father argues that New Mexico's court, not Georgia's, has authority over the case.

FACTS: Donald Markle and Katarina Dass lived together in Georgia and had a son in 2010, but they were never married. At some point Markle relocated to New Mexico and the child remained with his mother. She lived continuously in Georgia since 2012 and for most of his life, the little boy lived with his mother in Georgia. In July 2015, Markle and Dass agreed that their son would live with his father in New Mexico for the 2015-2016 school year and return to Georgia once school was out for the summer. According to Dass, in December 2015, Markle asked if their child could return after the summer and again live with him during the 2016-2017 school year. Dass refused. She claims she then demanded the boy's return but Markle refused. In January 2016, Markle filed a "Petition to Determine Paternity, Custody and Child Support" in a New Mexico court to legitimate the child as his and to fight for custody of the boy. Dass then filed a "Petition for Writ of Habeas Corpus and Emergency Motion for Return of Child" in Cobb County Superior Court in Georgia. He claimed she filed it in "retaliation" of his effort to establish parental rights. She claimed she filed it because she realized he no longer intended to return their son to her in Georgia. Markle filed a motion in Cobb County asking the court to dismiss Dass's habeas petition and emergency motion. In February 2016, following a hearing the court ruled in favor of Dass and ordered the father to return the boy to Georgia. In doing so, the court found that, "Georgia is the home state of the minor child within the meaning of the Uniform Child Custody Jurisdiction and Enforcement Act." In April 2016, the New Mexico judge issued an order requiring enforcement of the Georgia writ of habeas corpus. Markle now appeals to the Georgia Supreme Court.

ARGUMENTS: Markle's attorney argues the trial court made a number of errors, including ruling that Georgia is the child's "home state." Under the Uniform Child Custody Jurisdiction and Enforcement Act (Georgia Code § 19-9-41), "home state" is defined as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding." The child started living in New Mexico with his father in July 2015 and was scheduled to remain there until the end of the 2015-2016 school year – a period of more than six months. As the Georgia Court of Appeals ruled in 1986 in *Harper v. Landers*, "home state" under § 19-9-41 "does not mean residence or domicile of parent having legal custody, rather, it means place where child lives or has recently lived and where he would presumably still be living had he not been surreptitiously removed therefrom." "Home state" is not defined by a minor child's legal residence," Markle's attorney argues in briefs. "It is defined by *physical presence* in the state." The purpose of such a definition, the *Harper* opinion pointed out, is "to further the child's welfare and best interests and avoid or mitigate the harmful effects of exposure to such experiences as 'snatching,' frequent removal from one place to another, and the recurrent haggling and reciprocal recriminations of the contesting parties." The attorney argues that the policy behind the Act's

definition of “home state” is to avoid exactly what Dass did – filing a writ of habeas corpus and “snatching the minor child from the child’s home state after expressly agreeing for him to go live in New Mexico with his father. But for mother’s writ, the minor child would still be in New Mexico, attending school in New Mexico, and living with his father, who has been providing him health and dental care. Mother’s writ does nothing for the minor child’s best interest or his welfare but rather disrupts the minor child’s daily routine, school curriculum and relationship with his father.” Because Georgia was not the child’s “home state,” the Cobb County court also erred by making an “initial custody determination” in Georgia, the attorney contends. Under the Uniform Child Custody Act, Georgia “has jurisdiction to make an initial child custody determination only if: 1) this state is the home state of the child on the date of the commencement of the proceeding, **or** was the home state of the child within six months before the commencement of the proceeding **and** the child is absent from this state but a parent continues to live in this state,” according to the Georgia Supreme Court’s 2011 ruling in *Bellew v. Larese*. “Georgia is not the home state of the minor child on the date of the commencement of Georgia proceeding (Feb. 16, 2016), nor was Georgia the home state of the child within six months before Feb. 16, 2016,” Markle’s attorney argues. Furthermore, the trial court erred by making an initial custody determination because a custody proceeding had already started in New Mexico. Under Georgia law, a “court of this state **may not** exercise its jurisdiction under this part if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this article...” Among other errors, Markle’s attorney argues the trial court was wrong in basing its decision in part on Markle’s legal status as the father, stating that the natural mother of the child “is the only person entitled to legal and physical custody of the minor child unless Respondent is legitimated in a court of law.” This was error, because again, “it is the home state of the child, and not the legal status of the parents, that determines where an initial custody action should be brought.” And the court erred by finding that an emergency hearing was warranted. Under another Georgia statute, such a hearing may be held only if “the child is present in this state and the child has been abandoned **or** it is necessary in an emergency to protect the child because the child or a parent of the child is subjected to or threatened with mistreatment or abuse.” At the time Dass filed her emergency motion, their son was with his father in New Mexico, where he had been by agreement of both parties since July 2015. Furthermore, “nothing in Mother’s motion alleges any sort of abuse, violence, or mistreatment by Father,” the attorney argues.

Attorneys for Dass argue the trial court’s finding that Georgia is the child’s “home state” should be upheld. “The minor child’s *temporary* absence from the state of Georgia did not preclude Georgia’s assertion of home state jurisdiction,” the attorneys argue in briefs. The courts have created two approaches to determine what constitutes a “temporary absence.” One has to do with the parents’ intent and the other with the “totality of the circumstances.” Here, “the trial court was faced with a Father whose intentions differed over time and/or a Father who deliberately misled Mother into believing the minor child’s extended visitation would be temporary while masking his undisclosed intention to undermine that agreement and make it permanent,” the attorneys argue. A parent who uses “lies and subterfuge as a means of luring a child out of his or her home state should not be permitted to manipulate the home state of a child under the Uniform Child Custody Jurisdiction and Enforcement Act.” The Supreme Court should

also uphold the trial court's initial custody determination in the state of Georgia. In this case, the Georgia court was fully apprised of the pending action in New Mexico and made the appropriate inquiry of the New Mexico court. But that court declined jurisdiction over the case, Dass's attorneys argue. "The minor child resided and was physically present in Georgia for the entirety of his life with Mother (who continues to reside in Georgia), less short periods of visitation he spent with Father as agreed upon by the parties." Also, the trial court's ruling did not turn on the issue of whether Markle legitimated his son, the attorneys contend. "The fact that the Father in this case did not have legal custodial rights to the minor child was only one of several factors the trial court considered during the hearing. The trial court reviewed Father's failure to legitimate only in light of the fact that he had made no previous attempts to secure any formalized custody or pay any child support for the care of the minor child until his request to retain custody of the minor child was denied by Mother in December 2015." Among other arguments made by Markle, the trial court's finding that an emergency hearing was warranted also should be upheld. "At the time of the emergency hearing in this case, Father had already refused to return the minor child weeks earlier and cut off the child's access to his Mother giving rise to an urgent situation," the mother's attorneys argue.

Attorney for Appellant (Markle): Ryan Proctor

Attorneys for Appellee (Dass): Diane Cherry, Shana Webb

ANGELA BROWN V. KEITH BROWN (S16A1677)

A woman who represented herself in her divorce and has since lost her home and at times had to live in her car, is appealing an **Effingham County** judge's ruling denying her motion to hold her ex-husband in contempt for failing to pay the mortgage, as she says he agreed, and for failing to pay her directly for alimony and child support.

FACTS: Throughout Angela and Keith Brown's marriage, during which they had a son, she was a housewife and stay-at-home mom who did not work outside the home. He earned about \$36,000 annually. The couple separated and without lawyers to represent them, in May 2011, signed a Separation Agreement, basically by filling out a standard form, in which he agreed to pay her \$513 a month in alimony and \$647 in child support. Nothing in the agreement stipulated who would be responsible for mortgage payments. But in a typed attachment, Keith Brown wrote: "As the house and property represent an investment for us both, I, Keith Brown, agree to pay Angela L. Brown a combined alimony and child support payment of \$1160.00 each month. This will more than cover the mortgage payment, which includes the bank payment, homeowner's insurance payments and escrow payments for property taxes." She remained living in the house until the lack of mortgage payments put the house into foreclosure and she was evicted. She then lived in her car and also in motels. Eventually their son moved in with his father. Angela Brown filed a motion for contempt, claiming Keith Brown failed to pay the mortgage and failed to pay the child support and alimony directly to her. Instead, he deposited the amounts into a joint bank account which she claimed he had always controlled and from which he withdrew most of the funds. In her motion, she sought \$56,840 plus interest for back alimony and child support payments, motel and other expenses and attorneys' fees.

In December 2015, the trial judge denied Angela Brown's motion for contempt, finding that nowhere in the final divorce decree "is Defendant obligated to make any payments 'directly' to Plaintiff." For nearly five years, she knew he made all deposits into the joint checking account

at SunTrust Bank, expressed no opposition to this method of payment, and therefore, “acquiesced” to the payment arrangement, the court found. The trial court also ruled that the final divorce decree incorporating the Settlement Agreement “is too vague to be enforceable such that Defendant cannot be held in contempt.” The judge wrote that the attached typed document “is not sufficient to bind the Defendant to payment of the mortgage in addition to the child support and alimony under the terms of the document.” The judge denied her request for reimbursement of her motel costs and costs for storing furniture and her request for \$5,000 in attorneys’ fees, stating there was no credible evidence that Angela Brown “is unable to work.” Finally, the judge ruled that Keith Brown’s obligation to pay child support is “extinguished immediately.” Angela Brown now appeals to the Georgia Supreme Court, which has agreed to review the case to determine whether the trial court erred in denying the contempt motion.

ARGUMENTS: Angela Brown’s attorney argues that the trial court erred and abused its discretion in concluding that the agreement, which was signed by the parties and had previously been approved by the same court, was too vague to be subject to enforcement. In its 2014 decision in *Mori Lee, LLC. v. Just Scott Designs, Inc.*, the Georgia Court of Appeals stated that when considering whether a contract is unenforceable, “a trial court must bear in mind that the law leans against the destruction of a contract on the grounds of uncertainty....” The opinion goes on to say that this “is particularly true with respect to settlement agreements, which are highly favored under the law and will be upheld whenever possible as a means of resolving uncertainties and preventing lawsuits.” It is undisputed that the wife had no income at the time of the divorce while the husband earned about \$36,000 a year; that he knew he was obligated to make child support and alimony payments; that he never made those payments directly to her and instead deposited them into a joint bank account that evidence shows he “controlled;” and that while the divorce agreement did not say specifically who was responsible for the payment of the mortgage, she had “never made a payment,” the mortgage was only in his name, and therefore Keith Brown “was solely responsible to the lender and the only person with access to the account.” Common sense dictates that the court can easily decipher who is to pay the support and who is to be paid the support,” her attorney argues. “There is nothing vague about that....” Further, as a result of being left homeless, there is no question she incurred expenses she otherwise would not have incurred, her attorney argues, and after she was evicted she lived in a car. Not only did Keith Brown earn more money than Angela Brown, but he was also “much more educated” than she was. The trial court erred in failing to hold Keith Brown in willful contempt for failing to make a single payment directly to her. The question is whether he should be given credit for making deposits in a joint account from which, the evidence shows, he removed “the vast majority of the funds without accounting for them.” And the trial court erred by not requiring Keith Brown to pay for her out-of-pocket expenses as a direct result of his “egregious conduct.” Because the court did not find him in contempt, it did not even consider her request for attorneys’ fees. Finally, the trial court erred, “and was without discretion in violation of present Georgia case law, when it ‘extinguished immediately’ the child support obligation of the Appellee [i.e. Keith Brown] at a contempt hearing,” her attorney argues. The attorney asks the Supreme Court to correct this “most grievous miscarriage of justice that should not and cannot be tolerated if our justice system is to maintain any credibility for its citizens, especially its most vulnerable citizens without resources and helpless in the most troubling and sensitive of times, i.e. divorce,” her attorney concludes.

The attorneys for Keith Brown argue that the “decision in this case should not be made based upon an emotional level as Appellant [i.e. Angela Brown] wishes.” The trial court did not err or abuse its discretion in concluding that the agreement the parties signed was too vague to be enforceable. “Courts throughout the state acknowledge that some individuals are unable to afford legal counsel for a divorce or that some individuals simply choose not to seek legal counsel.” They instead resort to “fill-in-the-blank” forms that are readily available to the public. “However, there is a definite risk to using such tools without the review or input from an attorney,” the attorneys argue in briefs. Angela Brown herself testified that the Separation Agreement never obligated Keith Brown to pay her “directly” for child support and alimony. And even four years after the divorce was finalized, “she still acquiesced to all payments being deposited in the joint bank account,” the attorneys argue. It is a “misstatement” that he “controlled” the joint bank account. She knew she had the right to withdraw funds from the account. Also, under Georgia law, he cannot be held responsible for her motel costs since the foreclosure of her home. He continued to deposit in the joint account \$1140 a month, including for child support after their child moved in with him. “Even though Appellee is concerned about Appellant’s homelessness, it is Appellant who has chosen to be in that situation,” his attorneys argue. The trial court did not err in finding that he was not in contempt. Nothing in the divorce decree every required him to make “direct” payments to her. If he is not in willful contempt, he is not liable to pay her attorneys’ fees. However, as to Angela Brown’s final argument, Keith Brown’s attorneys agree that the trial court erred and “had no discretion to immediately extinguish Appellee’s child support obligation at the contempt hearing.”

Attorney for Appellant (Angela): Charles Grile

Attorneys for Appellee (Keith): Claude Kicklighter, Jr., Melissa Calhoun