



## Supreme Court of Georgia

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## CASES DUE FOR ORAL ARGUMENT

### Summaries of Facts and Issues

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**Monday, November 7, 2016**

### 10:00 A.M. Session

#### **GRANGE MUTUAL CASUALTY COMPANY V. WOODARD ET AL. (S16Q1875)**

The appeal in this case stems from a lawsuit brought by an insurance company against a couple whose daughter was killed in a car wreck. The insurance company is appealing a federal court ruling that said it failed to enter into a binding settlement with the couple because it failed to pay them on time, as the agreement stipulated. Before resolving the case, the federal appeals court is asking the state Supreme Court to interpret the applicable Georgia statute.

**FACTS:** In March 2014, Thomas Dempsey, an Ohio resident, was driving in Georgia with his wife when he collided with a vehicle driven by Boris Woodard who had with him his adult daughter, Anna. Both the Woodards were severely injured, and Anna subsequently died from her injuries. Dempsey was charged with vehicular homicide. Dempsey had liability insurance with Grange Mutual Casualty Co. that included bodily injury liability limits of \$50,000 per person and \$100,000 per accident. Dempsey's coverage would therefore allow for a \$50,000 recovery payment to Boris Woodard and his wife, Susan, in a wrongful death claim, and a \$50,000 recovery payment to Boris for his injuries. As is customary, the Woodards' attorneys offered the insurance company the chance to settle the claims by paying the policy limits. On June 19, 2014, the Woodards sent a "time-limited demand," or settlement offer, to Grange.

At issue in this case is the interpretation of Georgia's new settlement-demand statute (Georgia Code § 9-11-67.1), which became effective July 1, 2013. It states that prior to filing a lawsuit arising from a vehicle wreck that causes injuries or death, the attorney representing the plaintiff (here the Woodards) must make a written offer that contains five "material" terms, including the time by which the offer must be accepted, which cannot be less than 30 days from receipt of the offer; the amount of payment expected; the parties that will be released from liability once the offer is accepted; and the specific claims from which they will be released. The statute says the recipients of the offer may accept it "by providing written acceptance" of the terms. The statute also says: "Nothing in this Code section shall prohibit a party making an offer to settle from requiring payment within a specified period; provided, however, that such period shall be not less than ten days after the written acceptance of the offer to settle."

In their June 19 settlement offer, entitled "Offer to Settle Tort Claims Pursuant to Georgia Code § 9-11-67.1...", the Woodards gave an 11-item list of requirements with which Grange would have to comply to accept the settlement offer. A statement preceding the list and typed in bold said: "The following items must be noted and fully and strictly complied with in order to accept this offer." Among the items: "Pursuant to Georgia Code § 9-11-67.1, you have 30 days from your receipt of this offer to accept it," and "If we do not actually receive a timely acceptance, this offer will be deemed rejected..." The fourth and fifth items involved the two \$50,000 checks, and said that each "must be made payable" to the Woodards and their attorney within 10 days after their written acceptance of the offer to settle. Each of these two items ended with the sentence: "Timely payment is an essential element of acceptance." Under the offer, Grange had until July 23 to accept. On July 22, Grange's senior claims representative, Heather Conn, mailed a letter accepting the settlement offer. She then had 10 days – or until Aug. 1 – to make the payments. In a July 29 email to the Woodards' attorney, Conn said the checks were being issued that day. She then ordered the two settlement checks through Grange's automated claims payment system, which is the company's routine practice for ordering checks to pay claims. The adjusters never see the checks. However, by Aug. 12, the checks had still not arrived. Conn later determined there had been a glitch in the computer program and part of the Woodards' address apparently had been cut off. Conn stopped payment on the checks and reissued new ones, along with copies of screenshots confirming the July 29 timely issuance of the original checks. Under their settlement offer, the Woodards had agreed to a limited release of their claims against the Dempseys and Grange in exchange for payment of the \$100,000 policy limit. But the Woodards refused the late reissued checks, and their attorney said they were rejecting Grange's untimely response to the settlement offer. Their attorney informed Grange they would be filing a lawsuit against Grange in the near future.

On Oct. 10, 2014, Grange sued the Woodards in the U.S. District Court for the Northern District of Georgia for breach of the settlement contract, arguing that it had a binding and enforceable settlement agreement once it sent them its written acceptance letter of July 22. Furthermore, the company argued it had performed its duties with respect to payment when it issued the checks on July 29 within the 10-day time limit. The Woodards claimed no settlement contract was formed because timely payment was a condition of acceptance of their June 19 offer and therefore Grange had never accepted the settlement offer. The district court ruled in the Woodards' favor, concluding that the parties never formed a contract. The district court concluded that § 9-11-67.1 does not prohibit a party from requiring payment as a condition of

acceptance of a settlement offer and that the Woodards had made the timely payment a condition of acceptance of their offer. The district court also ruled that “payment” required more than writing checks. Grange then appealed to the U.S Court of Appeals for the Eleventh Circuit. Because no court has yet interpreted Georgia’s new § 9-11-67.1 statute, the federal appellate court has sent four questions to the state Supreme Court to answer before it makes a final ruling in Grange’s appeal. In their briefs, the parties have responded to the questions.

**ARGUMENTS:** The insurance company argues that the federal district court was wrong because under Georgia law, the parties entered into a binding settlement agreement when Grange accepted the Woodards’ offer in writing. “A plain reading of § 9-11-67.1 allows no conclusion but that a settlement was achieved,” the attorney argues in briefs. The statute plainly says that offers must contain five specific terms, and if those terms are accepted in writing, a settlement deal is struck. “That is what happened here, and that is why Grange (which has been seeking all along simply to enforce the settlement deal between it and the Woodards) should prevail.” The Woodards added other terms in the settlement offer, “but everything else should have been viewed as having to do with performance of Grange’s resulting obligations, not acceptance of the offer in the first place,” Grange’s attorney argues. The Woodards’ demand “called for written acceptance, not actual performance, to bind the parties,” and “acceptance” and “performance” are not the same thing. The statute also does not permit “unilateral contracts” – contracts in which “acceptance” is contingent upon actual performance as opposed to a declaration of one’s *intention* to perform. Bilateral contracts are favored because in a bilateral contract, both parties are protected by a set period of time prior to the beginning of required performance. The statute did not permit the Woodards to demand timely payment as a condition of accepting their offer. In passing § 9-11-67.1, “the General Assembly established a statutory scheme for settlement negotiations that mandates utilization of bilateral agreements and precludes use of unilateral ones,” Grange’s attorney argues. Under Georgia law and the facts of this case, there was a binding settlement agreement, and Grange did not breach that agreement as to payment. Despite “the apparent hiccup with the mailing address,” Grange still complied fully with the Woodards’ written demand, which stated that “payment in the amount of \$50,000 must be made payable to Boris and Susan Woodard....” Making something “payable” “could most aptly be deemed simply making out settlement checks,” the attorney argues. If the attorney who wrote the settlement offer “had intended for Grange actually to deliver the settlement checks to his office by a date certain, he could have said so with unmistakable clarity.”

“Under controlling law – Georgia law of contract formation – essential elements of a settlement contract include an offer and an acceptance,” attorneys for the Woodards argue in briefs. Here, there is no dispute there was an offer. “There is an absence of evidence, however, that Grange performed all acts necessary to accept the offer. Specifically, Grange did not make timely payment, which the offer plainly describe as “**an essential element of acceptance.**” As a result, the federal district court correctly ruled in the Woodards’ favor because Grange could not establish an element essential to its case. “Though they suffered a catastrophic loss, the Woodards provided all insurance companies involved an opportunity to settle for the inadequate policy limits available,” the attorneys argue. “Actions speak louder than words, and the offer required the action of timely payment. This court should reject the result Grange is seeking, i.e., insurance companies may pay a claim whenever they want without fear of consequences. Grange did not timely pay, so Grange did not accept the offer. No settlement contract was formed, and

this court should affirm the district court.” Insurance companies in particular like to hold onto money as long as possible, the Woodards’ attorneys argue. “That is one of the reasons requiring timely payment is a standard feature in the industry of settling liability claims.” Grange’s adjuster, Conn, clearly understood the offer and the requirement that payment be made as a condition for accepting the offer, because she assured the Woodards that Grange would pay “within the time constraints.” “If Grange actually believed the argument it now offers – that payment means ‘issuing’ a check and not getting the check to the payee – there would have been no sense of urgency to prepare new checks and to send them via overnight delivery.” “Payment is not the same as filling out checks,” the attorneys argue. Grange argues that because it issued the checks and “made them payable” to the Woodards within the deadline, they complied with the terms of acceptance. “Grange wants this court to interpret that language to mean, ‘Timely filling out checks, even if you don’t send them to us, is an optional method of acceptance.’ The offer does not ask Grange to fill out checks. It asks Grange to make ‘timely payment.’” The Woodards’ offer complied with Georgia’s new offer statute, § 9-11-67.1, contrary to Grange’s contention that the offer does not comply “under the radical notion that the statute outlaws unilateral contracts.” This is an “overly broad interpretation of the statute,” and “The statute does not outlaw unilateral contracts,” the Woodards’ attorneys argue. “The failure to settle was not caused by an unreasonable deadline, it was caused by Grange waiting for the last possible moment to actually pay.”

**Attorney for Appellant (Grange):** Thomas Allen, III

**Attorneys for Appellees (Woodards):** James Sadd, Richard Dolder, Jr.

### **PARKER ET AL. V. LEEUWENBURG ET AL. (S16A1505)**

The appeal in this **Hall County** case stems from an ongoing feud between neighbors over a variety of complaints, including one couple’s claim that the other couple intentionally hung wind chimes near their property to harass them.

**FACTS:** Andrew and Penny Leeuwenburg and Ken and Rochelle Parker are next-door neighbors whose properties on Woodlake Drive in Gainesville border Lake Lanier. The two married couples have been embroiled in conflict for several years, with each couple charging the other with harassment and wrongdoing. Three times, the Leewenburgs have gone to the Hall County Magistrate Court and obtained “Good Behavior Bonds” against the Parkers.

Under the state’s Good Behavior Bond statute (Georgia Code § 17-6-90), a judge may “issue a notice to appear for a show cause hearing to any person whose conduct in the county is sufficient to justify the belief that the safety of any one or more persons in the county or the peace or property of the same is in danger of being injured or disturbed thereby.” A hearing must be held within seven days from the time the persons requesting the bond submit an application. Under the law, if “sufficient cause” is shown, “the court may require from the person a bond with sureties for such person’s good behavior with reasonable conditions to ensure the safety of persons or property in the county or the preservation of the peace of the county for a period of up to six months.” Under the statute, the judge may have the person arrested if the allegations of the person’s conduct are “sufficient to justify the belief that there is imminent danger of injury to any person in the county, damage to any property in the county, or disturbance of the peace of the county.” The purpose of the conditional “Good Behavior Bonds” is to prevent the commission of a crime and to avoid having people arrested and charged with crimes when the conflict at issue

may be temporary and can be adequately dealt with by the issuance of a court order that governs the person's conduct for up to 12 months.

In January 2015, the Leeuwenburgs filed a motion asking the court to reissue a third bond against the Parkers, "to preserve the peace and goodwill," after an apparent truce between the couples had dissolved. In their motion, the Leeuwenburgs wrote that the Parkers had installed "a large number of wind chimes" as close as possible to the Leeuwenburgs' property, as well as "a decoration shaped like a cannon" aimed at their property. The Leeuwenburgs said they had "extreme sensitivity to noise." And they said the installation of the noise-making items "is quite odd," since the vast majority of the Parkers' complaints against them had been that the Leeuwenburgs "cause too much noise (dogs, music, etc.)" They also complained that the Parkers had installed security cameras aimed directly at their property and that their photographing and videotaping of the Leeuwenburgs' activities was the "proverbial 'final straw.'" And they complained that the Parkers had hired a tree-cutting service to trim branches but only trees whose branches fell into the Leeuwenburgs' property were trimmed. Finally, the Leeuwenburgs claimed that one night, at 1:00 a.m., Ken Parker stood outside with a strong-beam flashlight aimed directly into their bedroom, causing them to lose sleep. In response to the Leeuwenburgs' complaints, the judge issued several Good Behavior Bonds, prohibiting the couples from having any contact with each other, from going onto each other's property or dock, from calling 911 "unless there is a true, verifiable emergency at that time," from contacting the Army Corps of Engineers "concerning the other party's activities on Corps property," and from photographing or videotaping each other.

In June 2015, the Parkers sued the Leeuwenburgs, asking the court to declare § 17-6-90 unconstitutional and prohibit the Leeuwenburgs from ever seeking another Good Behavior Bond against them. In February 2016, the trial court ruled against the Parkers, finding that the statute was constitutional and that the Leeuwenburgs and others were "entitled to avail themselves of the relief provided by said statute." The Parkers now appeal to the highest court of the state.

**ARGUMENTS:** The Parkers' attorney argues that under the U.S. Constitution, § 17-6-90 is overly broad and violates due process because "it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." "Good behavior bonds are a form of preventive crime control," their attorney argues in briefs. In these "quasi-criminal" proceedings, anyone may seek such a bond against another, and a court may then impose a bond with conditions for the safety of any person or for their property or peace. If the threat of harm is "imminent," the statute permits the arrest and incarceration of the individual. "These intrusions on an individual's liberty are permitted by the statute even though no crime has occurred," the attorney argues. The attorney contends that while "common at one time in this country, good behavior bond schemes (also called peace bonds) have fallen into disuse. They have long been criticized for permitting preventive detention of a citizen who has not committed any crime." Here, the Leeuwenburgs have sought three of these bonds against the Parkers "during a litigious dispute between two neighbors," and they have threatened to seek more bonds in the future "in response to a host of innocuous – and legal – conduct." The statute provides no guidance about how one might determine whether a sound or activity "disturbs the peace." "By its text, the statute risks prohibiting a host of protected speech," the Parkers' attorney contends. The statute violates the constitutional right to due process because it does not set a standard of proof. To be constitutional, "a statute cannot permit the arrest of an individual

without, at least, probable cause,” the Parkers’ attorney argues. “Here, the statute authorizes an arrest by a lesser standard.”

The Leeuwenburgs’ attorneys argue that § 17-6-90 does not violate the U.S. or Georgia constitutions. But if the high court finds that any provision of the statute runs afoul of constitutional requirements, it should limit that finding to the provision that provides for the arrest and “brief” incarceration of the person, the attorneys contend. However, the Parkers don’t even have the right to sue. Generally, the rule is that “a litigant has standing to challenge the constitutionality of a law only if the law has an adverse impact on that litigant’s own rights.” “Here, there is no evidence of any kind to find that Appellants [i.e. the Parkers] have ever been arrested for, or charged or threatened with, violating any criminal law,” the attorneys argue. If the high court determines they do have standing, however, § 17-6-90 is not overbroad under the First Amendment of the U.S. Constitution. The statute “does not criminalize conduct in any fashion, nor does it unlawfully restrict a person’s First Amendment rights.” The statute also is not unconstitutionally vague and in violation of due process, the attorneys contend. First, it is not a criminal statute and does not actually “prohibit conduct.” Also, under the statute, “the responding party must receive notice of the complaint and hearing, such that the respondent knows exactly what conduct is being complained of.” It is “specific enough to give fair warning of the prohibited conduct,” the Leeuwenburgs argue. The trial court also correctly ruled that § 17-6-90 sets a proper standard of proof and does not permit arbitrary enforcement of the law. Because it is not a criminal statute, “the ‘beyond a reasonable doubt’ standard of proof applicable in criminal cases does not apply here,” the Leeuwenburgs’ attorneys argue. “The good behavior bond provided for under Georgia law is a temporary measure to preserve the peace, and the statute clearly provides a standard of proof for the issuance of the same.”

**Attorney for Appellants (Parkers):** Jeffrey Filipovits

**Attorneys for Appellees (Leeuwenburgs):** Vanessa Sykes, Jessica Lund

#### **CITY OF CUMMING ET AL. V. FLOWERS ET AL. (S16A1884)**

The City of Cumming and its officials are appealing a **Forsyth County** court ruling in favor of homeowners who sued the City for granting a variance that allowed a developer to shorten the distance between the townhomes he was building and the owners’ property.

**FACTS:** The builder, Kerley Family Homes, LLC built townhomes in the Villages of Castleberry subdivision in Cumming that were in violation of the “setback” requirements of the Cumming’s Zoning Ordinance. “Setback” is a real estate term for the minimum amount of space required between a lot line and a building line. After constructing the townhomes, Kerley filed an application for a variance to reduce the rear yard setback of 20 feet required under the Zoning Ordinance. The Castleberry Homeowners Association Two, Inc. and homeowners affected by the setback encroachment, including Robert G. Flowers, complained that the townhomes were so close to their property lines that the windows looked down into their single family homes’ windows and back yards. They therefore opposed the setback variance, contending that under the Zoning Ordinance, a variance was not available to relieve the builder of a self-created hardship. The Planning Commission for the City of Cumming subsequently denied the builder’s application for a variance. The builder, Kerley, then appealed to the City’s Board of Zoning Appeals. On April 21, 2015, the Mayor and City Council – sitting as the Board of Zoning Appeals – granted the application for a variance. The homeowners and homeowners’ association

filed a lawsuit in Forsyth County Superior Court, requesting a “writ of mandamus” to force the City officials to do their duty and enforce the Zoning Ordinance. As an alternative, they requested an injunction to establish that the clear language of the Zoning Ordinance did not permit a variance for “a self-created, alleged hardship by the builder.” According to the homeowners, around this time, the lawyer for the builder ran for, and was elected to, the City Council. Following his election, the Mayor and City Council filed a motion, which the builder later joined, asking the court to dismiss the homeowners’ lawsuit on the ground they had failed to follow the proper court procedure by filing a petition for a “writ of certiorari.” Unlike a “direct” or automatic appeal, a court has the discretion to grant, or not to grant, a writ of certiorari. By granting it, it agrees to review the case and directs the lower tribunal to deliver the case record for it to conduct the review. The Forsyth Superior Court denied the City’s motion, finding that the homeowners’ appeal to the Superior Court was not barred by their alleged failure to first file a petition for a writ of certiorari, asking the court’s permission to appeal zoning board’s ruling. Therefore, the homeowners could continue to pursue mandamus and an injunction. In this pre-trial appeal, the City now appeals to the Georgia Supreme Court.

**ARGUMENTS:** The City’s attorneys argue the trial court was wrong because an appeal to the Superior Court of a judicial or “quasi-judicial” decision, including consideration of a variance application, is controlled by Georgia statute which requires the filing of a writ of certiorari. Georgia statutory law provides that one may appeal to the Superior Court from any decision made by the magistrate court or probate court, but all other appeals to the Superior Court must use the petition for certiorari process. “The grant of a variance by a Board of Zoning Appeals is a quasi-judicial decision,” the attorneys argue in briefs. Such a petition for certiorari must include a “bond” and must be filed within 30 days after final determination of the case. Any filed after 30 days must be dismissed by the court. Here, the homeowners did not file a petition for a writ of certiorari or a bond within 30 days, and the Superior Court should have ruled in favor of the City and dismissed the case. The state Supreme Court should clear up the confusion from previous court decisions and “explain that certiorari is the exclusive method of review of quasi-judicial decisions.” Likewise, the City’s Zoning Ordinance also calls for the petition for certiorari as the appropriate method of seeking review of a “quasi-judicial” decision by the Board of Zoning Appeals. The Zoning Ordinance specifically states that in “the case of administrative or quasi-judicial decisions (e.g., variances), review shall be based upon the existing record.” “The trial court erred in finding that the Zoning Ordinance did not state that a writ of certiorari is authorized for appeals of this nature,” the attorneys argue. “Because certiorari is the exclusive method of judicial review of the Board of Zoning Appeals’ decision, the homeowners’ claims for mandamus and injunction also should have been decided in the City’s favor and the case concluded at that point. Mandamus and an injunction are not available when there is another available remedy, and in this case there was another remedy: certiorari. Mandamus also cannot be used “to undo acts which have already been done,” the attorneys argue. Furthermore, an injunction is not available against the City and members of the zoning board because it is barred by the doctrine of sovereign immunity, which protects government agencies from being sued.

The homeowners’ attorney argues that Cumming’s Zoning Ordinance specifically states that decisions “may be subject to appeal only by suit filed in the Superior Court of the county.” “No procedural requirements of a certificate of payment of costs and ‘bond’ are mentioned in the Zoning Ordinance or City Charter, and authority to keep and forward the record of judicial

proceedings before the City Council to the Superior Court is not stated in either the City Charter or in the Zoning Ordinance,” the attorney argues. And while the City Charter does lay out a procedure for a writ of certiorari for appeals from the Municipal Court, it does not do so for appeals of decisions made by the City Council. Binding precedent from decisions made by the Georgia Supreme Court “established that the correct means to appeal the denial of a zoning-related request by a lower tribunal was by a general writ of mandamus,” the homeowners’ attorney argues. In its 1980 decision in *Atlanta v. Wansley Moving & Storage Co.*, the Georgia Supreme Court stated: “We hold that in the absence of provision in the zoning ordinance prescribing the means of judicial review, mandamus is a proper remedy for revising the denial of conditional and special use permits.” The attorney argues that the trial court and homeowners “simply followed binding precedent of this Court.” The homeowners also contend that the City ignored its quasi-judicial function in reviewing the appeal of the variance denial. They contend the builder’s attorney was running for City Council, “and the City acted in a legislative capacity by considering political factors unrelated in any respect to a fair and impartial quasi-judicial hearing.” This decision was neither judicial nor quasi-judicial. “Certiorari only flows from judicial decisions, and not from decisions that are legislative in nature,” the attorney argues. “In Georgia, a City Council is a legislative body.” To require a review of the legislative decision at issue by certiorari violates the Georgia Constitution’s provisions for separation of powers, as well as the right to due process. “The City Council may legislatively set the distance for zoning setbacks in the Zoning Ordinance, but once it has exhausted its discretion in creating the ordinance, variances could only be issued in a quasi-judicial review proceeding subject to the various criteria in the ordinance,” the homeowners’ attorney argues. “The City Council acted as a legislative body by amending the setbacks for one property owner through grant of a ‘variance’ where the existing code clearly did not allow a variance on its face.”

**Attorneys for Appellants (City):** Dana Miles, Lauren Giles

**Attorney for Appellees (Homeowners):** Stuart Teague

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

### **MCCOY ET AL. V. BOVEE ET AL. (S16A1660)**

This **Chatham County** appeal stems from a dispute that culminated in a lawsuit by homeowners against the president and board of directors of their homeowners association.

**FACTS:** Willow Lakes Plantation is a subdivision of 192 single family homes in Savannah, GA. A set of “covenants” governs the Willow Lakes Plantation Homeowners Association, Inc. and authorizes it to manage the properties and collect homeowners assessments. Leonard McCoy is the former president of the Homeowners Association, and he also served as one of five members of the association’s board of directors, as did his wife, Alzenia McCoy. In 2012, Joyce Bovee and 16 other homeowners in the Willow Lakes Plantation subdivision sued McCoy, the board and the Homeowners Association over mismanagement of the association and the use of its funds. In their motion to the court, they requested a temporary injunction and the appointment of a “receiver” to take over the association’s management. Among the homeowners’ allegations: The association contracted for financial management services with a business owned by McCoy’s wife; it contracted with a landscaping business

operated by McCoy's stepson; McCoy engaged in questionable financial transactions involving association funds. Following a hearing, the trial court granted their motion and appointed as receiver J. Hamrick Gnann, Jr., an attorney and municipal court judge for the City of Pooler, which is in Chatham County. The judge made the appointment after finding that certain financial improprieties had occurred under McCoy's control which justified the appointment of a receiver to protect and oversee the collection and disbursement of the corporation's funds. According to briefs filed by the homeowners' and receiver's attorney, McCoy informed Gnann he did not agree with the court's appointment of a receiver, "that he believed the court receiver was a liar and was only out to help his friends through the 'good old boy' network, and that the receiver did not reflect the best interests of the Homeowners Association in his decision making."

In 2014, the receiver hired a property management company, Lanier Realty, which also manages several other homeowners associations in the Savannah area. The homeowners' attorney claimed that McCoy, acting on behalf of the board, encouraged property owners not to pay their Homeowners Association assessment fees to the new management company. Around that time, both McCoy's wife's company and his stepson's company filed lawsuits against the association to recover fees allegedly due under their contracts with the association. Ultimately both lawsuits were dismissed. After McCoy accused Lanier Realty of being responsible for a lapse in the association's liability insurance, and his wife and association board member shouted racist comments at the property management company's president, Jody Lanier, the property manager resigned. At that point, the receiver filed a "Petition to Enjoin Board of Directors and Particularize Powers of Receiver" in June 2015, seeking to stop McCoy's interference with the management of the Homeowners Association. The receiver objected to McCoy's family personally benefiting from contracts signed without competitive bidding, to McCoy's solicitation of lawsuits against the association, to the board's failure to hold open board meetings with notification to homeowners, to the board's failure to maintain corporate minutes and records as required, to the board's insistence on holding a membership meeting at the pool area after liability insurance had lapsed, and to the "blatantly racist and obstructive comments and actions lodged against the receiver and the property manager by McCoy...." In January 2016, the trial court ruled in favor of the receiver and the homeowners, and by court order, expanded the receiver's powers and removed McCoy from the board and as president of the Homeowners Association, while declining to remove the other board members. The order stated that, "the remaining Board of Directors of the Willow Lakes Homeowners Association are hereby ordered to cooperate with the receiver and the property manager in order to effectively operate the Homeowners Association." McCoy and the Homeowners Association now appeal to the Georgia Supreme Court.

**ARGUMENTS:** Attorneys for McCoy and the association argue the trial court made a number of errors. Among them: The court was wrong to deny their motion asking Gnann to recuse himself because he is a judge in the same circuit as the judge deciding their case. They claimed in an affidavit that Gnann's actions "demonstrated bias and prejudice" in favor of the homeowners and Gnann and against the Homeowners Association, its board of directors and its president. In addition to being a municipal court judge, Gnann is also a Judge Pro Tempore who was appointed to serve in both the State and Superior Courts of Chatham County. Opinion 220 of the Judicial Qualifications Commission "states in effect that a judge of a particular court should never preside over a matter involving another judge from the same circuit," the attorneys argue.

Specifically, Opinion 220 states that “this Commission concludes that it is inappropriate for any trial court judge to preside in any action wherein one of the parties holds a judicial office on the same or any other court which sits in the same circuit.” The trial court also erred because in the court order, missing from the list of areas of authority given to the receiver is the right to sue or file a lawsuit on his own. “Georgia law gives a non-party no right to intervene in a lawsuit,” the attorneys argue. Rather, a non-party must apply to intervene, which Gnann did not do. Therefore, his Petition to Enjoin the Board was filed “with no statutory authority or judicial authority.” Among other arguments, attorneys for McCoy and the association argue the trial court erred in removing McCoy as president and as a member of the board. While the receiver attempted to show that McCoy’s management style resulted in “irreparable harm” to the Homeowner’s Association, the receiver’s belief that McCoy was “argumentative; inappropriately questioned the receiver’s decisions or even was impolite” cannot serve as the legal basis for removing the board’s president, the attorneys contend.

The attorney for the receiver, Gnann, and the homeowners argues the trial court correctly denied McCoy’s motion asking Gnann to recuse himself because under court procedural rules, it was late in being filed. The trial court also properly permitted the receiver to file the Petition to Enjoin the Board. Under the statute cited by McCoy to support his position that before a non-party can file a pleading in a case, Gnann first had to ask the court to allow him to intervene, which Gnann did not do. But under that statute, Georgia Code § 9-8-8, “The receiver is an officer and servant of the court appointing him, is responsible to no other tribunal than the court, and must in all things obey its direction.” “Intervention is allowed in order to put all of the necessary parties before the court,” the attorney argues, but “the receiver is not only already before the court but is a creature of the court.” Gnann is not a third party to the litigation, and he filed the petition in this case to augment his powers so he could do the job the court ordered him to do. Finally, the trial court “properly and justifiably removed Leonard McCoy as president and as a member of the board of directors,” Gnann’s attorney argues. To be clear, the receiver objected not to McCoy’s “style,” “but for the many reasons detailed in trial testimony and the trial court’s order showing a detailed and pervasive attempt to thwart and obstruct the receiver and the trial court at every turn through conduct which potentially exposed the Homeowners Association to litigation and damages.”

**Attorneys for Appellants (McCoy):** Walter Ballew, III, Michael Frick, Steven Bristol  
**Attorney for Appellees (Gnann):** Christian Steinmetz, III

### **BARNETT V. THE STATE (S16A1892)**

In this **Glynn County** case, Steven Barnett is appealing his murder conviction and life prison sentence for the stabbing death of a man he found sleeping with his former girlfriend.

**FACTS:** Brenda Johnson and Steven Barnett had a two-year turbulent relationship, at times living together and at times not. During their time together, he was possessive, beat her, threatened to kill her, and accused her of sleeping with other men, including her cousin. At least twice, these incidents resulted in family violence charges against him. In one incident in 2001, after she had moved in with her sister, he found her, beat her, blackened her eye, pulled out her hair and threatened to cut her throat with a pocket knife. Injuries to her head and face required hospital treatment. Barnett was arrested and charged with family violence battery, but the case was dismissed after Johnson refused to cooperate with the prosecution. She subsequently moved

back in with Barnett. In July 2002, Johnson left again and moved in with her mother. Soon she started seeing George “Bubba” Bennett. On the night of Sept. 6, 2002, Johnson and Bennett went on a date before she returned to his house to spend the night. Sometime after midnight, they were awoken by loud banging on the door. Bennett answered the door while Johnson remained in the bedroom. She heard Barnett shouting at Bennett and accusing him of sleeping “with my old lady.” She could hear them fighting and called 911 while she remained hidden in the bedroom. Bennett’s neighbor later testified that he saw Barnett come “flying” down the road in a pickup truck, then banging on Bennett’s door as if he were “trying to tear the door down.” The neighbor later saw Barnett come back outside and speed away. A Glynn County police officer, who was responding to the 911 call, almost hit Barnett head-on as Barnett swerved into the oncoming lane. The officer turned around to pursue the truck and subsequently arrested Barnett. He was covered in blood, later determined as Bennett’s, although he himself had no defensive wounds.

Officers found Bennett lying in the hallway behind the door, unconscious and bleeding from a large stab wound to his chest. They called for an ambulance, but Bennett was later pronounced dead. The medical examiner determined he had died from a single stab wound to his chest which pierced his aorta. Investigators learned that two days before Bennett’s death, Barnett accused another man of sleeping with Johnson and threatened to give him an “ass whipping.” Police later found the butcher knife that had killed Bennett in the front yard.

In February 2004, a Glynn County jury convicted Barnett of Bennett’s murder and he was sentenced to life in prison. At trial, the judge allowed in the evidence of the 2001 incident as “similar transaction evidence.” Following denial of his motion requesting a new trial, Barnett now appeals to the Georgia Supreme Court.

**ARGUMENTS:** Barnett’s conviction should be reversed because he was deprived of a competent attorney during his trial, in violation of his constitutional right to effective assistance of counsel, his attorney argues. “The record reflects that Steven Barnett never had meaningful, conflict-free representation at any time prior to his conviction,” the attorney argues in briefs. The first attorney Barnett hired was disbarred months before his trial. Barnett was subsequently represented by a series of assistant public defenders, but they later withdrew due to their office’s heavy caseload. The trial judge then appointed Newell Hamilton, despite the fact that Hamilton “had never tried a murder case before.” Hamilton also suffered from mental impairments which hindered his defense of Barnett and ultimately led to his suspension from the practice of law, Barnett’s appeal attorney argues. While Hamilton denied his problems existed during the time he was representing Barnett, according to the June 2007 disciplinary opinion about Hamilton by the Georgia Supreme Court, “beginning in 2003, he began to experience difficulties in his family life,” the opinion said, and “he developed severe depression, began to suffer from anxiety attacks and started to abuse alcohol.” Barnett and others later testified that at the time of his trial, Hamilton “looked rough” when he came to see Barnett – unshaven and wearing wrinkled clothes. “The severely impaired Hamilton had only 18 days (12 business days) to prepare for his FIRST murder trial,” his appeal attorney argues. The attorney details other shortcomings, including Hamilton’s failure to request that the judge instruct jurors that they could consider what happened an accident. “The failure to request a charge on accident was not trial strategy,” his attorney argues. The attorney also failed to move for a mistrial after a witness suggested Barnett was on probation, introducing his character as an issue, which is prohibited. “Hamilton did not have the facts and failed to argue the law, leaving the jury with little choice but to convict

his client.” Due to his mental impairments, Hamilton also failed to allow Barnett to testify. “Any trial strategy that did not revolve around Steven Barnett’s testimony was necessarily ill-conceived,” the attorney argues. Also, the trial judge erred by failing to recuse herself prior to the trial. Before becoming a judge, she had represented Bennett in an unrelated matter. “The trial court’s failure to recuse herself prior to the trial of the case constituted not only a violation of judicial ethics but a violation of Appellant’s [i.e. Barnett’s] due process rights under our state and federal constitutions,” Barnett’s attorney argues.

The District Attorney’s and Attorney General’s offices, representing the State, argue that Barnett’s trial attorney was effective, as the trial court correctly ruled. First, Barnett “has failed to show that counsel was even laboring under a mental impairment at the time of [Barnett’s] trial,” they argue in briefs. His attorney merely “hypothesizes” that based on the Supreme Court’s 2007 opinion, Hamilton must have been “laboring under a mental impairment” during Barnett’s trial. However, the “record simply does not support Appellant’s argument that trial counsel was laboring under a mental impairment during the trial,” the State argues. Second, the law of ineffective assistance of counsel is hardly “unsettled,” as Barnett’s attorney contends. The Supreme Court and the Court of Appeals of Georgia “have consistently held that subsequent discipline of counsel does not lead to a per se finding that counsel was ineffective in an unrelated case – even in cases where counsel was subsequently disbarred.” The trial court correctly found that Barnett failed to show deficient performance of his trial attorney, or damage to his case, both of which are required to prove “ineffective assistance of counsel.” Indeed, the record shows that Hamilton “aggressively cross-examined nearly every prosecution witness.” He “hammered” on inconsistencies, and he raised doubts about the credibility of defense witnesses based on their criminal records and drug and alcohol use. “The transcript also shows that counsel was consistently pursuing a self-defense theory of the case based on the idea that the victim had multiple drugs in his system, specifically cocaine and hydrocodone, and would have behaved aggressively and/or erratically” toward Barnett. As to the attorney’s alleged failure to have Barnett testify, the record shows Barnett made an independent decision not to testify after being advised by the judge that he had a right to do so. Furthermore, the decision was a matter of trial strategy by his attorney. Testifying would have presented a risk to his case, as it would have exposed Barnett to cross-examination and the risk of impeachment with his statement to police. Finally, Barnett agreed in open court that he did not believe that the judge’s earlier representation of Bennett necessitated her recusal. Therefore, he waived his right to bring that issue up for the first time on appeal.

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