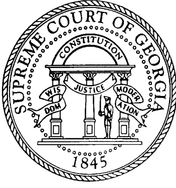

**Supreme Court of Georgia**
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# CASES DUE FOR ORAL ARGUMENT

**Summaries of Facts and Issues**

**Please note:** *These summaries are prepared by the Office of Public Information to help news reporters determine if they want to cover the arguments and to inform the public of upcoming cases. The summaries are not part of the case record and are not considered by the Court at any point during its deliberations. For additional information, we encourage you to review the case file available in the Supreme Court Clerk's Office (404-656-3470), or to contact the attorneys involved in the case. Most cases are decided within six months of oral argument.*

## Monday, February 6, 2017

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

**<u>YORK ET AL. V. RES-GA LJY, LLC</u> (S16G1245)**

In this complex case involving property law, two men are appealing a Georgia Court of Appeals decision in a lawsuit against them for money owed on several commercial property guaranties.

**FACTS:** At various times from 2005 to 2009, The Community Bank loaned money to several entities with which Jim L. York and John A. Drillot were affiliated. As security, York and Drillot executed five promissory notes and granted the bank a security interest in real estate located in **DeKalb, Gwinnett** and **Paulding** counties. To further secure the loans, the men signed commercial guaranties, guaranteeing "full and punctual payment and satisfaction of the indebtedness." The promissory notes and guaranties were later assigned to RES-GA LJY, LLC, a "domestic limited liability company." (A limited liability company is a business entity that combines the legal protection of a corporation with flexible taxation options. A *domestic* LLC is simply one that operates in the same state where it was organized.) When York and Drillot as the "borrowers" failed to pay off the loans, RES-GA foreclosed on the properties and then purchased them as the single bidder. It then sought confirmation from the courts that it had purchased the properties at fair market value. However, the courts in the counties where the properties were located refused to confirm that RES-GA had paid fair market value. On appeal, the Court of

Appeals upheld two trial court orders denying confirmation. Subsequently, RES-GA sued York and Drillot in **Walton County** as guarantors of the amounts they still owed on the promissory notes. They asked the court to rule in their favor, arguing that under Georgia law, because RES-GA had failed to secure confirmation of the foreclosure sales, it could not recover a deficiency judgment. RES-GA also asked the court to rule in its favor, agreeing that it sought the deficiency between the unpaid principal indebtedness and the price it had paid for the properties at foreclosure. But it claimed that York and Drillot had waived the confirmation requirement, thereby permitting recovery. The trial court ruled in favor of RES-GA, concluding that York and Drillot had waived the confirmation defense. On appeal, the Court of Appeals upheld the trial court's ruling. York and Drillot now appeal to the Georgia Supreme Court.

**ARGUMENTS:** Attorneys for York and Drillot argue the Court of Appeals erred in ruling that York and Drillot waived their rights as guarantors under Georgia Code § 44-14-161 (a), as there are no such waivers in their guaranties. Furthermore, "RES-GA lost the power to pursue a deficiency judgment against York and Drillot after its requests for judicial confirmations were affirmatively denied," they contend.

Attorneys for RES-GA argue the Court of Appeals correctly determined that York and Drillot waived the protection afforded by § 44-14-161 (a). The Georgia Supreme Court "has already held that the waiver provision at issue could waive the protections of the Confirmation Statute," they contend in briefs. Also, the courts' denial of confirmation has no bearing on RES-GA's ability to pursue a deficiency judgment against York and Drillot, the attorneys argue.

**Attorneys for Appellants (York):** Thomas Tate, R. Matthew Reeves, Elizabeth Clack-Freeman, Graham Brantley

**Attorneys for Appellee (RES-GA):** Jill Deutchman, Chelsea Dennis, Frank DeBorde, Lisa Wolgast

**RICKS V. THE STATE (S17A0465)**

A young man facing a death penalty trial is appealing a court decision denying his claim that the manner of creating jury lists in **Fulton County** violates Georgia law and the Georgia Supreme Court's Jury Composition Rule.

**FACTS:** Otis Ricks, Jr. is one of four co-defendants charged in the August 2012 murder of 53-year-old Vanessa Elaine Thrasher during an alleged armed robbery of the restaurant she owned, OT Lounge and Soul Food Grill in northwest Atlanta. She was shot seven times. Ricks, 23 at the time, was one of the first suspects arrested. In December 2012, Fulton County District Attorney Paul Howard, Jr. filed a Notice of Intent to Seek the Death Penalty against Ricks. His attorney subsequently filed a "Motion to Reserve the Right to Challenge the Indictment Due to the Unconstitutional Composition of the Petit Jury."

In 2012, Georgia Code §15-12-40.1 and the Georgia Supreme Court's Jury Composition Rule established rules for the creation of county master jury lists. Under these rules, the Council of Superior Court Clerks provides Fulton County with a list each year on July 1. The Jury Composition Rule requires a county master jury list to be at least 85 percent inclusive of the number of a county's adult population. The goal is to ensure that jurors are chosen in a manner that does not deliberately or systematically exclude distinct groups from serving in a particular term of court. Prosecutors claim that Fulton's list is 102 percent inclusive. In October 2013, the trial judge held a hearing where Ricks and five other defendants facing the death penalty in

Fulton County jointly challenged the use of the 2013 jury list as improperly altered by the county's management vendor, Courthouse Technologies, Inc. In June 2014, the judge denied the motion. The judge pointed out how large, fluid, diverse and mobile Fulton County's population was, concluding that the county's "jury management procedures account for that reality by including in the management process flagging undeliverable summons, duplicate listings, merging records and correlating annual master lists with historical legacy data files." The judge acknowledged that Ricks' attorney "has pointed out anomalies in the data and a lack of transparency in the vendor's coding scheme." But she concluded, "There has not been a showing of either a constitutional violation or a violation of the Jury Composition Rule." Ricks now appeals to the state Supreme Court.

**ARGUMENTS:** Ricks' attorneys argue that if the Jury Composition Rule (JCR) does not specifically authorize jury clerks to perform a specific action, a jury clerk violates the JCR by doing it. Courthouse Technologies, Inc. (CT), headquartered in Canada, holds a contract with Fulton County to implement its jury system through CT's proprietary software. In 2013, through CT, Fulton County improperly altered the list provided by the Council of Superior Court Clerks by "adding, deleting, or unlawfully inactivating records resulting in the net inactivation of 16 percent of eligible jurors," the attorneys argue in briefs. The same thing happened to the 2014 master jury list. "Fulton County's actions of adding, deleting, and inactivating names for non-statutory reasons are a clear violation of Georgia law," Ricks' attorneys argue. Also, the County's jury list alteration protocols are not transparent. "Fulton County's/Courthouse Technologies' failure to adhere to the Jury Composition Rule is unacceptable as a matter of law," Ricks' attorneys contend. "Mr. Ricks should not be in a position where he has to place his trust in the Jury Clerk or her vendor not to alter his jury list in a way that impacts his right to a fair trial."

The District Attorney's office, representing the State, argues that the list from which Fulton County jurors are summoned is produced in a manner that does not violate the Jury Composition Rule. Specifically the rule states that, "Local clerks and jury commissioners shall not add or delete names from the county master list, but may excuse, defer, or inactivate names of jurors known to be ineligible or incompetent to serve…." "Thus, the only acts the JCR specifically forbids a jury clerk from taking is adding or deleting names from the county master jury list," the State argues in briefs. While Courthouse Technologies' vice president admitted there was an addition of records on the 2013 list, and that the addition was a mistake, he noted that the affected records could be identified and the error corrected, such as by a court order. The State argues that the JCR "does not forbid jury clerks from managing the county's jury list by engaging in de-duplication procedures, whether manual or automated, and that is reasonable for a county to choose to manage its list in such a way." Also, "The State submits that attempting to determine whether a record includes an undeliverable address is an inherent part of managing a jury list and that flagging records for that purpose does not violate the law." As to an alleged lack of transparency, "The State submits that the issue before the [Supreme] Court is not one of best practices, but one of whether Fulton and its vendor are complying with the law," the District Attorney's office argues. And "despite indications of human error, the evidence before the trial court was that Fulton adheres to the essential elements and substantive procedures of the JCR."

**Attorneys for Appellant (Ricks):** Brad Gardner, Emily Gilbert

**Attorneys for Appellee (State):** Paul Howard, Jr., District Attorney, Paige Whitaker, Dep. D.A., Kevin Armstrong, Sr. Asst. D.A.

**<u>JONES V. THE STATE</u> (S16G0890)**

A man convicted in **Cherokee County** of driving under the influence is appealing a Georgia Court of Appeals ruling that the trial court was correct in allowing in as evidence another DUI conviction the man had received six years earlier. This is the second time this case has come to the Supreme Court.

**FACTS:** The night of Jan. 21, 2011, a Cherokee County deputy sheriff pulled over Michael Jones for speeding. The officer smelled alcohol and noticed that Jones' eyes were red and watery. He asked Jones if he'd been drinking and initially Jones said he had not. But after failing several field sobriety tests, he said he'd had two beers earlier that evening. The officer arrested Jones based on his performance on the tests and his observations of Jones. Jones agreed to submit to state-administered breath tests which measured 0.147 and 0.139. Under Georgia law, a blood alcohol level of 0.08 or higher signifies intoxication and Jones was charged with "DUI less safe," meaning he was driving while under the influence of alcohol knowing that made it less safe for him to drive. He was also charged with speeding.

In January 2013, Georgia's new comprehensive "Evidence Code" went into effect. Anticipating that Jones' trial would not begin until after the new Code took effect, the State filed notice that it intended to introduce evidence of Jones' prior conviction six years earlier of "DUI less safe," to which Jones had pleaded guilty. The State clarified that its purpose for offering evidence of the prior conviction was to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The State later narrowed the purpose, stating the prior conviction evidence was relevant to show Jones' knowledge and intent to drive, knowing that he was less safe. The trial court granted the State's motion and allowed in the prior conviction evidence. The court also performed the balancing test required by Georgia Code § 24-4-403 (b), which states the evidence may be excluded if its "probative value" – or its value in proving something – is substantially outweighed by its danger of unfairly "prejudicing" – or harming – Jones' case. The court ruled that the "other acts" evidence was admissible because its probative value was not outweighed by its prejudicial effect. Jones was convicted following a jury trial. However, the Court of Appeals reversed the conviction, finding that the prior conviction evidence should not have been admitted at trial because it was not relevant to, or probative of, the commission of his most recent DUI. The State then appealed to the Georgia Supreme Court, and this Court reversed the Court of Appeals' decision and sent the case back to the appellate court with instructions to review the admissibility of the State's "other acts" evidence under § 24-4-403. The Court of Appeals subsequently ruled that the trial court did not abuse its discretion by allowing in the prior conviction evidence. Jones now appeals to the state Supreme Court, which has agreed to review the case a second time to determine whether the Court of Appeals used the proper analysis in determining that the trial court had not abused its discretion in applying the balancing test of § 24-4-403.

**ARGUMENTS:** Jones' attorney argues that his case remains the first to directly address the admission of prior DUI cases in later DUI prosecutions under the new Evidence Code and claims that guidance is needed on the balancing test of § 24-4-403. "This Court should hold that Rule 403 bars the use of prior conviction evidence to establish intent in a DUI case," the attorney

argues in briefs. "The Court of Appeals failed to adequately assess the probative value of the evidence of Jones' prior conviction and failed to weigh that value against the danger of unfair prejudice." The attorney argues the Court of Appeals essentially glossed over the serious prejudicial effect of the prior DUI evidence and incorrectly deferred entirely to the trial court's "limited assessment" of that issue. If left to stand, the Court of Appeals opinion essentially allows prior DUI convictions to be admissible as a matter of course in subsequent DUI prosecutions and such a rule is improper. He further argues that in Jones' case, the danger of unfair prejudice greatly outweighed the minimal probative value of his prior conviction since Jones' intent to drive drunk was sufficiently shown through other facts. "If the Court of Appeals employed the proper analysis, it would have determined that evidence of Jones' prior conviction should have been excluded under Rule 403," the attorney argues.

The Solicitor General's office, representing the State, concedes that the Court of Appeals did not use the proper analysis in reviewing the trial court's application of § 24-4-403 because it failed to adequately assess the degree of prejudice the admissibility of the prior conviction evidence created. Instead, the Court of Appeals' "evaluation of the evidence in this case focused almost exclusively on its significant probative value." But the next step required in the balancing procedure requires a court to inquire into the danger of unfair prejudice….," the State points out. "There can be no dispute that introduction of the facts surrounding Appellant's [i.e. Jones'] prior DUI conviction risked some prejudice." Yet the Court of Appeals "does not seem to have measured whatever prejudice might be associated with the introduction of Appellant's prior conviction." Nevertheless, "The Court of Appeals' failure to gauge the undue prejudicial effect of Appellant's prior conviction does not necessitate reversal of its conclusion that the trial court correctly admitted it," the State argues in briefs. "In fact, had the Court of Appeals employed the correct undue prejudice analysis, it would have reached the same result. Therefore, because the trial court's admission of the extrinsic evidence in this case did not constitute an abuse of discretion, this Court should correct the Court of Appeals' analytical error while upholding its decision."

**Attorney for Appellant (Jones):** Jeffrey Filipovits
**Attorneys for Appellee (State):** Jessica Moss, Solicitor General, Carlton Todd Hayes, Chief Asst. Sol. Gen.

**VASHTI MILBOURNE ET AL. V. JANAY MILBOURNE (S17A0450)**
**JANAY MILBOURNE V. VASHTI MILBOURNE ET AL. (S17X0451)**

The appeals in this **Gwinnett County** case stem from an ongoing dispute between the sister of a deceased man and his only child over who is entitled to his half million dollar estate.*

**FACTS:** Edison Jama Milbourne died in July 2014 when his daughter, Janay Milbourne, was still a teenager. In 1999, Edison was severely brain injured while at work. After a stay at Grady hospital in Atlanta and Shepherd Spinal Center for rehabilitation, for a while he lived at home with his daughter, then an infant, and his wife, Janita Beeks. But his around-the-clock care became too difficult for Janita, and eventually he was moved to Restore, a long-term facility in Lilburn. In 2009, Edison's sister, Vashti Milbourne, was appointed as her brother's guardian and she moved Edison into a facility in New Jersey where she lived. His care was covered by Workers' Compensation benefits. John Tomlinson was appointed as Edison's conservator. Following his death, Vashti went to probate court, asking the court to validate a will her brother

had signed on Oct. 1, 2013, which left his entire estate to Vashti. Janay, his daughter, filed a "caveat," challenging the will, and following a jury trial, in April 2015, the Gwinnett County Probate Court entered a judgment for Janay, finding the October will invalid because it was procured by Vashti's undue influence over Edison and it was not executed with the proper formalities. Subsequently, Tiffany Wootsen – Vashti's daughter and Edison's niece – sought to probate another, older alleged Last Will and Testament of Edison, this one dated Jan. 28, 2013. The January will left the bulk of Edison's estate – worth more than $500,000 – to Vashti, while leaving Tiffany, his niece, $50,000, and his only heir, Janay, $50,000. Again, Janay filed a caveat in probate court, alleging undue influence and fraud, lack of testamentary capacity on Edison's part, and that the January 2013 will should be deemed revoked. Vashti filed a Motion for Summary Judgment, asking the court to rule in her favor on all issues raised in Janay's caveat. A judge grants "summary judgment" only after deciding a jury trial is unnecessary because the facts are undisputed and the law falls squarely on the side of one of the parties. In December 2016, the probate court granted Vashti's motion in part and denied it in part. The judge ruled there remained questions of fact regarding whether Vashti exercised undue influence over Edison in the creation of the January 2013 will, but the judge granted her motion related to testamentary capacity and revocation. In this pre-trial appeal, Vashti and her daughter now appeal the trial court's denial of her motion for summary judgment on Janay's claim of undue influence, meaning that issue must still be decided by a jury. In a cross-appeal, Janay the trial court's rejection of her claim that the January will should considered revoked.

**ARGUMENTS (S17A0450):** Vashti's attorneys argue that "the uncontroverted positive evidence supports the validity" of the January will. For one thing, the information for the will drawn up by attorney Charles Tingle "*came from Decedent alone,*" they argue in briefs. "Tingle guarded against undue influence by having a second meeting with Decedent [i.e. Edison] on Jan. 28, 2013 to ensure that Decedent understood and agreed with the distribution that he instructed Tingle to make and to gauge whether Decedent's demeanor or anything of that nature had changed." There was no evidence of undue influence at the time the Tingle will was executed "that is sufficient to create a genuine issue of material fact for trial," they contend. Janay has merely attempted to create a fact issue when none exists. Also the trial court erred by overruling Vashti's objection to the offering of evidence that Janay did not file within the court's deadline. The state Supreme Court has "issued clear guidance that trial courts are not to indulge suspicion or speculation that undue influence *could have* or *may have* occurred in ruling on motions for summary judgment," Vashti's attorneys argue. "But that is all that Janay offered. And the trial court plainly erred by indulging it."

Janay's attorney argues that, "There is substantial irrefutable evidence that Vashti Milbourne unduly influenced Edison Milbourne to create and execute multiple wills." Since he was alive, Vashti "did everything in her power to ensure that she received a 'piece' of Edison's money," including trying to access his substantial Workers' Compensation benefits, as well as requesting from his conservator an annual salary of $30,000 for her guardianship, money for a $300,000 house, and an Escalade car, the attorney argues. The trial court already has previously declared one of Edison's wills to be invalid due to the influence of his sister, Vashti. Whether Edison's will was the product of undue influence is a question of fact that should be decided by a jury. "In the current case, Edison was brain injured and under the complete control of Vashti for several years," the attorney argues in briefs. "Although his legal status did not prevent him from

making a will, Edison's lack of capacity and his 'weak mind' certainly allowed Vashti to exercise her will over Edison." Furthermore, Edison's guardian ad litem testified that she thought Edison was "afraid" of Vashti. The probate court was correct in denying Vashti's Motion for Summary Judgment on the issue of undue influence, Janay's attorney argues.

**ARGUMENTS (S17X0451):** Janay's attorney argues the trial court erred in granting Vashti's Motion for Summary Judgment concerning Janay's claim that the January will should have been deemed revoked. Edison explicitly told Vashti and his guardian ad litem that he "did not want" the January will, the attorney argues. Georgia Code § 53-4-44 states that "express revocation may be effected by any destruction or obliteration of the will done by the testator with an intent to revoke or by another at the testator's direction." The law does not require that the testator – the person making a will – perform its actual revocation. The will may still be revoked "if the testator directed another to perform the act…." "Vashti breached the fiduciary duty she owed Edison as his legal guardian, and her failure to act in his best interests will cause her own unjust enrichment should the January will not be revoked," Janay's attorney argues.

Vashti's attorneys argue the trial court properly rejected Janay's revocation claim. Lacking any evidence that Edison revoked the January will, "Janay wishes to argue on appeal that even if the Tingle will was not actually revoked, Janay should have been permitted a trial on the issue of whether the Tingle will *should have been deemed* revoked based on one utterance by Decedent to Vashti that he no longer wanted the Tingle will and wanted her help to create a new will." There is "no evidence whatsoever" that Edison ever gave an instruction to destroy the January will. The trial court concluded that Edison had the "testamentary capacity" to make a will. "The Tingle will was never revoked," Vashti's attorneys argue. "An oral utterance of testamentary desire is legally insufficient." And Vashti "had no duty to destroy the Tingle will."
**Attorneys for Vashti:** David Cooper, C. Joseph Hoffman
**Attorney for Janay:** Robert Hughes, Jr.

* Under legislation passed last year, appeals of wills, which were previously reviewed by the Georgia Supreme Court, are now under the jurisdiction of the intermediate appellate court, the Georgia Court of Appeals.