Supreme Court of Georgia
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SUMMARIES OF OPINIONS

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THE LANDINGS ASSOCIATION, INC. V. WILLIAMS ET AL. (S11G1263)
THE LANDINGS CLUB, INC. V. WILLIAMS ET AL. (S11G1277)

In a split 4-to-3 decision, the Supreme Court of Georgia has reversed a Georgia Court of Appeals ruling in a high-profile **Chatham County** case involving an elderly woman who was partially eaten by an alligator.

As a result of today's decision, written by **Justice Harold Melton**, the woman's family has lost its attempt to have a jury try their case against the owners of the gated community where Gwyneth Williams was killed.

"Because the record shows that Williams had equal knowledge of the threat of alligators within the community, we reverse," today's majority decision says.

According to briefs filed in the case, Williams was housesitting for her daughter and son-in-law at their home in The Landings, a gated residential community of about 8,500 residents located on 4,500 acres on Skidaway Island, a coastal barrier island near Savannah. The 83-year-old woman, who lived independently in Canada, had visited her daughter a number of times before, sometimes staying a couple of months. This time, she had offered to care for the couple's two dogs while they were in Italy.

Alligators are indigenous to the area, and the animals were there before and after The Landings was developed in the 1970s. In building the property, the developers had drained swampy areas and created an interconnected system of 151 lagoons. Since the community was developed, there had never been an alligator attack against a person. Although no warnings about alligators were posted at the lagoons, The Landings Association did warn residents in

publications and on its website that alligators were present and could be extremely dangerous. It also said it had a policy of arranging to have a state Department of Natural Resources trapper remove aggressive alligators or any greater than seven feet in length.

Behind the house where Williams was staying was Lagoon No. 15, which was bordered by a park-like common area on one side and a golf course owned by The Landings Club on the other. Although there were no witnesses, on the night of Oct. 5, 2007, Williams apparently went alone for a walk sometime after 6:00 p.m. At about that time, several boys reported to the property's security forces that they heard a woman crying for help. On Oct. 6, Williams' mutilated body was found floating in Lagoon No. 15. Her right foot and both forearms had been bitten off. Later an eight-foot alligator was found in the same lagoon and parts of Williams' body were found in the animal's stomach.

In October 2008, Williams' heirs sued The Landings Association and The Landings Club, joint owners of the lagoon, seeking damages for the wrongful death of Gwyneth Williams. The owners responded by filing motions for summary judgment. (A court grants "summary judgment" when it determines there is no need for a jury trial because there is no genuine debate over the facts and the person requesting the judgment is entitled to it based on the law.) Following a hearing, the trial court partially denied the owners' motions for summary judgment, meaning the case could proceed to trial. The trial court found that questions of fact remained as to whether The Landings failed to take reasonable steps to protect Williams from being attacked and killed by an alligator on its property. On appeal, the Court of Appeals found the trial court was correct in partially denying the owners' motions for summary judgment. The owners then appealed to the state Supreme Court.

"In this case, testimony shows that Williams was aware that wild alligators were present around The Landings and in the lagoons," the majority opinion says. "Therefore, she had knowledge equal to The Landings entities about the presence of alligators in the community." Furthermore, the majority states, Williams knew the alligators were dangerous, yet still chose to walk at night near a lagoon where she knew wild alligators were present. "Under these circumstances, the trial court should have granted the motions for summary judgment brought by the Landings entities regarding Williams' premises liability claims," states the majority, joined by Justices Hugh Thompson, P. Harris Hines and David Nahmias.

In the dissent, **Justice Robert Benham** writes that while there was evidence Williams had once seen an alligator in the area, there was no "competent evidence" that she knew there were alligators over seven feet in size living there. Premises liability cases such as this can only be resolved by summary judgment when the evidence is "plain, palpable and undisputed." Here it is not, says the dissent, joined by Chief Justice George Carley and Presiding Justice Carol Hunstein. For one thing, The Landings advertised it removed any alligators that were aggressive or longer than seven feet. "Indeed, there are very specific questions in this case that must go to a jury," the dissent says, including whether Williams knew there were large and aggressive alligators in the community and whether The Landings' owners had exercised reasonable care in keeping the premises safe. "Rather than allowing this evidence to be reviewed by a fact-finder, the majority opinion bars appellees' premises liability claim simply because the decedent once observed an alligator standing on the roadside. Such a result disregards all the other factual circumstances in the case and is not in keeping with our jurisprudence."

Attorneys for Appellants (Landings): Walter Ballew, III, John Foster, Morton Forbes

Attorneys for Appellees (Williams): Kathryn Pinckney, Robert Turner, Marion Pope, Daniel Snipes, David Conner

KESTERSON ET AL. V. JARRETT ET AL. (S11G0590)

A child excluded from almost all of a civil trial due to concern that her physical and mental disabilities could cause undue sympathy by the jury is entitled to a new trial, the Supreme Court of Georgia has ruled.

In today's 6-to-1 decision, the high court has reversed a Georgia Court of Appeals decision that limited the presence of Kyla Kesterson, a young child with severe cerebral palsy, during the trial of the medical malpractice lawsuit in which both she and her parents were parties.

"The right of a natural party to be present in the courtroom when her case is being tried is deeply rooted in the law of this Nation and, if anything, even more embedded in the law of this State," **Justice David Nahmias** writes in today's majority decision.

The Court of Appeals had upheld a **Clarke County** court's decision that excluded Kyla from most of the liability phase of the trial. The appellate court adopted a test used by the U.S. Court of Appeals for the Sixth Circuit which allows the trial court to exclude a civil party if her physical condition would generate jury sympathy and her mental condition would prevent her from understanding the proceedings. "We conclude, however, that a party may not be excluded from her own trial simply because her physical and mental condition may evoke sympathy, even under these circumstances," today's 30-page majority opinion says. "Instead, trial courts can and should address the risk of undue sympathy using jury instructions and other common and time-tested means of ensuring that both parties receive a fair trial, without infringing on the parties' right to be present. Accordingly, we reverse."

Following her birth in 1998, an MRI showed damage to parts of Kyla's brain that control motor function and she was diagnosed with spastic quadriplegia, a form of cerebral palsy. As a result, today Kyla cannot control her movements, is confined to a wheelchair, has a feeding tube inserted into her stomach, must have her airway suctioned several times a day, has bladder and bowel dysfunction, suffers frequent seizures, has limited cognitive function, and cannot speak. In February 2003, Catherine Kesterson and her husband, along with Kyla, sued Dr. Walter Jarrett, Athens Obstetrics and Gynecology, P.C., and St. Mary's Hospital for medical negligence, claiming that the staff did not promptly respond to readings from the fetal heart monitor and notify the doctors in time to perform a Caesarean section before the damage was done to Kyla.

The judge divided the trial into a liability phase and a damages phase. He granted a motion by Jarrett, his practice and the hospital to exclude Kyla from the liability phase, but ruled that she could come in prior to jury selection and at other times during the liability phase of the trial if the Kestersons requested it and he determined that her presence was essential and relevant to witness testimony. During the trial, the judge allowed Kyla in the courtroom for one of the three times requested by the Kestersons, denying the requests where the trial court determined Kyla's presence was not necessary with respect to the testimony. After a five-week trial, the jury returned a verdict in favor of Jarrett and the other defendants. The Court of Appeals affirmed the judgment, and the Kestersons then appealed to the state Supreme Court, which agreed to review the case to determine whether it was correct to limit Kyla's presence in the courtroom.

"The trial court was right to be concerned about jury sympathy," today's majority opinion says. "All of the parties in a case are entitled to a fair trial, and one element of a fair trial is that decisions by the jury and the judge be based solely on the evidence and the law, and not on bias – sympathy for or prejudice against one party or the other that is not based solely on the evidence."

"In our legal tradition, however, this concern is not resolved by excluding parties from the proceedings. Instead, the risk of improper sympathy is addressed as are other concerns about the jury deciding the case on an improper ground." For instance, venue may be changed, prospective jurors may be excused during jury selection based on their answers to questions, and opening statements and closing arguments may be restricted. "Most importantly, the jury can be instructed not to consider sympathy in its deliberations – a standard jury instruction in both civil and criminal cases that may be supplemented when the risk of sympathy is higher than normal." It is presumed juries will follow those instructions, and as a final protection, the jury's verdict may be reviewed by the trial court and again on appeal "to ensure that it was not the product of bias rather than fact and law."

"These manifold protections of the right to a fair trial, the outcome of which must be the product of reason rather than sympathy or other emotion, are employed on a daily basis, in the sound discretion of judges, in courtrooms across Georgia," the opinion says. "What is unusual – exceptional – is to exclude a party from the courtroom because of concern that her physical and mental condition will prevent the jury, notwithstanding all of these other measures, from doing its job. There is no precedent in this State for doing such a thing in a case like this."

"For these reasons, the exclusion of Appellant Kyla Kesterson from the courtroom during almost all of her trial was error, and she is entitled to a new trial," the majority opinion says. "Accordingly, we reverse the decision of the Court of Appeals and remand for further proceedings consistent with this opinion."

In the dissent, **Justice Harold Melton** writes that he believes the majority has erred by rejecting the test established by the U.S. Court of Appeals in its 1985 decision in *Helmiski v. Ayerst Labs.* That test, he writes, "is narrowly drafted to allow exclusion of an impaired party only when the party's presence would harm the judicial process while simultaneously providing no benefit to the party….As a result, I must respectfully dissent."

Attorney for Appellants (Kestersons): David Walbert

Attorneys for Appellees (Jarrett et al.): Thomas Carlock, Eric Frisch, Andrew Marshall, Weymon Forrester, Tracy Baker

CARL HUMPHREY, WARDEN V. LEWIS (S12A0154)

The Georgia Supreme Court has reversed a lower court's ruling and reinstated the convictions of a man found guilty in **Clayton County** of murdering his wife.

This is the fourth time this case has come before the Georgia Supreme Court. According to the evidence at trial, Cheryl and Christopher Lewis married in 1992 and separated in 1995. Following their split, there were several domestic violence incidents. After one, Lewis threatened his wife in front of a police officer, saying that once he got out of jail, it would be "this O.J. Simpson situation again." Following another, she told him she wanted a divorce. In October 1996, he began showing up at her apartment, banging on the door and sometimes watching her door for hours. In December 1996, Cheryl went to a Christmas party with another man. Her

children from a previous marriage, a girl and boy ages 13 and 10, remained at home. At about 11 p.m., Lewis started banging on the door, cursing and demanding they open up. Their mother had instructed them not to and they eventually went to bed. The girl later woke up to her mother's screams, went to her mother's bedroom and saw Lewis on top of her with a knife. The boy also heard his mother screaming before Lewis ran into his bedroom, then ran away.

The medical examiner testified that Cheryl had suffered 42 injuries, including as many as 20 stab wounds to the neck. Her carotid artery and jugular vein had been severed and she bled to death. When they later arrested Lewis, he had a 12-inch butcher knife hidden in his sleeve, and DNA evidence showed the blood on his shoe and sweat pants was Cheryl's.

In 1998, a Clayton County jury convicted Lewis of his wife's murder and found three aggravating circumstances that under the law qualified him for the death penalty, including that the murder was "outrageously and wantonly vile." In 2004, the Georgia Supreme Court unanimously upheld Lewis' convictions and death sentence. The same year, Lewis filed a petition for a writ of habeas corpus – a civil proceeding available to prisoners that allows them another chance to challenge their case in the county where they're serving time.

In June 2009, the habeas court vacated Lewis' convictions and death sentence. The habeas judge made a number of findings, including that Lewis was mentally retarded and therefore could not be executed. The State did not appeal that part of the habeas court's ruling, so Lewis no longer faces execution. But it did appeal to the state Supreme Court – on behalf of Hilton Hall, the former prison warden where Lewis is incarcerated – the lower court's decision throwing out Lewis' convictions. In March 2010, the Georgia Supreme Court reversed that part of the habeas court's ruling and sent the case back to that court to rule on several other claims that contested the murder conviction. In August 2011, the habeas court for a second time concluded that Lewis' convictions for malice murder and related crimes were a "gross miscarriage of justice." The habeas court stated that Lewis' trial had been compromised by the State's suppression of certain evidence, by repeated instances of misconduct by the prosecutor and by several other trial errors.

The State has again appealed to the Georgia Supreme Court, arguing the habeas court erred in ruling that the State had suppressed evidence in violation of the U.S. Supreme Court's 1963 decision in *Brady v. Maryland.* Specifically, the habeas court found the State had withheld from Lewis' attorneys evidence that the victim's roommate, Kimberly Silinzy, said she had never witnessed any domestic violence between the couple and the two had slept together two weeks before the murder. The habeas court also ruled Lewis lacked a fair trial because his lawyers had not been given a GBI report that suggested the bloody footprint found at the scene did not belong to Lewis. The State argued that not only did Lewis fail to bring those issues up earlier, therefore waiving the right to bring them up on appeal, but they wouldn't have changed the verdict.

"Considering the investigator's notes regarding the Silinzy interview and the GBI report collectively, we conclude there is no reasonable probability that the result of Lewis' trial would have been different had the allegedly-suppressed evidence been disclosed to the defense," **Justice Hugh Thompson** writes in today's unanimous opinion. "Because Lewis cannot make that showing, we conclude both that Lewis' underlying *Brady* claim lacks merit and that he has failed to overcome the bar to that claim arising out of procedural default. Therefore, the habeas court erred in granting Lewis relief on this claim."

In today's opinion, the high court also finds the habeas court was wrong to grant Lewis relief on other matters, including his claim that the trial court committed reversible error when it refused to instruct jurors they could consider Lewis guilty of the less serious crime of voluntary manslaughter rather than murder, and his claim of several instances of misconduct by the prosecutor. In one, the prosecutor referred to O.J. Simpson, drawing an analogy between circumstances in Lewis' case and the glove evidence presented in O.J. Simpson's case. "However, '[a]nalogizing a defendant or a defendant's case to another well-known defendant or case is permissible during argument if the analogy is supported by facts in evidence," the opinion says. Here, "the prosecutor's comments were reasonable inferences from the evidence and were permissible."

Attorneys for Appellant (State): Samuel Olens, Attorney General, Mary Beth Westmoreland, Dep. A.G., Beth Burton, Sr. Asst. A.G., Richard Tangum, Asst. A.G.

Attorneys for Appellee (Lewis): Paul Greenwalt, Heidi Oertle, Ann MacDonald

THE STATE V. HODGES (S11G1820)

The Supreme Court of Georgia has unanimously reversed a Georgia Court of Appeals decision, in which that court ruled that a man convicted in **Cobb County** of involuntary manslaughter for killing a man should have been allowed to present evidence of what he claimed to have heard about the victim's violent past to support his contention that he killed the man in self-defense.

On Feb. 9, 2006, Mario Hodges shot and killed Rudy Turner at Hodges' home where Turner had stayed the night before. The two were on-again, off-again friends who in the past had gotten into physical altercations over money. Before Turner stayed at Hodges' home, he had been staying with mutual friends. But he asked Hodges to pick him up because he and the friends had "gotten into a disagreement." Hodges did so. The next day, Turner was agitated about various people who were indebted to him, including Hodges, and he told Hodges that he wanted the $500 he claimed Hodges still owed him. Turner became angrier as the day went on. He told Hodges that he was "going to get" the people who owed him money and if they failed to pay, he would "go after their relatives or the people they love."

Turner went upstairs to Hodges' home office, where Hodges had a collection of weapons, which included a "ball and chain" with spiked metal balls, a machete and a large Arabian knife. Turner brought the weapons downstairs one at a time and made threatening comments and gestures toward Hodges. Hodges told Turner to return the weapons each time and at one point, told Turner to pack up and leave. After Turner went upstairs with the machete, Hodges retrieved a loaded 12-gauge pump action shotgun from his downstairs bedroom and placed it near his seat in the living room. When Turner came downstairs a third time, he was armed with the Arabian knife. Hodges testified that Turner "just snapped," went "berserk," and approached Hodges, who believed Turner intended to harm him. Hodges shot Turner, who turned and ran up the stairs. Hodges said he thought his first shot missed Turner so he followed him up the stairs where he shot at Turner a second time. Hodges testified he thought this time he hit Turner because he fell. When turner moved, he hit Hodges with the gun, which discharged a third time. Evidence at trial established that Hodges actually hit Turner with his first shot, which was the fatal strike. Hodges then called 911, reported his location and told the operator he had shot Turner while defending himself. Two officers dispatched to the scene found Turner's dead body upstairs in Hodges'

home. A knife was located about six feet from Turner's body. When interviewed by the police, Hodges waived his *Miranda* rights and told detectives that the incident began when Turner threatened Hodges and Hodges' daughter.

Hodges was indicted for murder and other charges. At trial, Hodges sought to testify about three previous incidents involving Turner's violence toward other friends with whom he was living, two of which the trial court allowed. The third incident Hodges had heard about involved a friend who told him that Turner had shot at her and her daughter. Hodges argued his testimony about the incident would explain his state of mind and fear when he shot Turner. The trial court refused to allow the testimony because there was no independent evidence about Turner's alleged acts of violence. In October 2007, the jury acquitted Hodges of murder but convicted him of misdemeanor involuntary manslaughter (as a lesser included offense of felony murder), aggravated assault and possession of a firearm during the aggravated assault. He was given a 20-year sentence, with five to be spent in prison and the balance on probation. Hodges then appealed to the Court of Appeals, which reversed the decision, finding that the testimony was admissible under Official Code of Georgia § 24-3-2 as "original, admissible, competent evidence" of Hodge's state of mind when he shot Turner, and it was error to exclude it.

"We disagree," says today's opinion, written by **Justice P. Harris Hines**. Under the state Supreme Court's 1991 decision in *Chandler v. State,* while a defendant claiming justification may introduce specific acts of violence by the victim against third parties, the defendant must establish by "competent evidence" the existence of the prior violent acts. "This prevents the introduction into evidence of unreliable hearsay," the opinion says. "Yet, the Court of Appeals has ruled in this case that the safeguards of *Chandler* can be disregarded because Hodges stated that he wanted to testify about the alleged additional incident of the victim's violence to others in order to demonstrate Hodges' state of mind." The statute – § 24-3-2 – on which the Court of Appeals' analysis relies, requires that the evidence be "*facts* to explain conduct and ascertain motives," the opinion states. "Furthermore, this Court has refused to permit this statute to give a criminal defendant unbridled license to avoid the bar of hearsay and thereby introduce self-serving statements into evidence."

"The trial court correctly refused to allow Hodges to testify about the unsupported alleged violent incident involving the victim and third parties," the opinion says. "The judgment of the Court of Appeals cannot stand."

In a special concurrence, **Justice David Nahmias** writes he agrees that the Court of Appeals' decision must be reversed but for different reasons. "I disagree with the majority's claims that *Chandler v. State*…controls this issue; that this sort of evidence is hearsay; and that this Court has precedent directly on point," he writes. "I therefore believe the question is harder, and less settled, than the majority opinion suggests."

The special concurrence points out that the jury did hear evidence of two prior incidents involving a fistfight between Hodges and Turner and threats the victim was making toward others, including Hodges and his daughter. "In light of the ample evidence of the victim's character for violence that was admitted, Hodges' testimony about what he was told by his friend – an event he could not assert actually happened – would have been of limited probative value, and the risk of prejudice was significant," the special concurrence says. "Thus, the trial court would have been entitled to exercise its discretion to exclude the proffered evidence, and even though the court excluded the evidence categorically, any error was harmless." Chief Justice

George Carley and Justice Harold Melton join in the special concurrence.
Attorneys for Appellant (State): Patrick Head, District Attorney, Jason Samuels, Asst. D.A., Anna Cross, Asst. D.A.
Attorney for Appellee (Hodges): Lee

LEIBEL ET AL. V. JOHNSON (S11G0557)

The Georgia Supreme Court has also reversed a Georgia Court of Appeals ruling that upheld a $2 million award by a **Fulton County** jury to a physician who sued her lawyer for legal malpractice.

According to briefs filed in the case, in 1996, Dr. Mary Johnson, a pediatric neurosurgeon, sued Scottish Rite Hospital for age and gender discrimination in the United States District Court for the Northern District of Georgia. Her lawyer was Steven K. Leibel. Johnson's claims included allegations that the hospital diverted patients from her to male surgeons, appointed a younger male competitor to be chief of neurosurgery even though she was more experienced, excluded her from the hospital's clinics which were a vital source of patient referrals, and forced her into situations in which she constantly had to defend her work, despite "glowing recommendations" during the hospital's repeated reviews of her. The magistrate judge dismissed her claims and granted "summary judgment" to the hospital, concluding that Johnson had failed to establish that the hospital's actions were "discriminatorily motivated." (A court grants summary judgment when it determines there is no need for a jury trial because the facts are undisputed and the law falls squarely on the side of one of the parties.) The District Court adopted the magistrate judge's findings and also granted summary judgment to Scottish Rite. Leibel filed a notice of appeal on Johnson's behalf, but the Eleventh Circuit Court of Appeals dismissed it because he failed to file it on time.

Johnson then sued Leibel for legal malpractice, alleging he had missed the deadline for filing her appeal and he had failed to introduce evidence that would have shown there were issues of fact a jury should have decided. Following a two-week trial, in 2008, a jury ruled in her favor, awarding Johnson $2 million. During the trial, Johnson presented an expert in the legal profession who testified that in his opinion, the evidence in the discrimination lawsuit would have "tipped the balance" in Johnson's favor, had the lawsuit gone to trial. Leibel then filed a motion for a "judgment notwithstanding the verdict," asking the trial court to reverse in his favor, and a motion for new trial. The trial court denied the first motion but granted the second motion for a new trial. On appeal, however, the Court of Appeals reversed the grant of a new trial while affirming the denial of Leibel's other motion, ruling completely in Johnson's favor. Leibel then appealed to the state Supreme Court, which agreed to review the case to determine whether the Court of Appeals erred by concluding that expert testimony is admissible in legal malpractice cases in which lay people might not be able to discern whether the attorney's negligence caused his client to lose her case.

In today's opinion, **Justice Harold Melton** writes that the Court of Appeals was incorrect. "In a legal malpractice action, the plaintiff must establish three elements: (1) employment of the defendant attorney, (2) failure of the attorney to exercise ordinary care, skill and diligence, and (3) that such negligence was the proximate cause of damage to the plaintiff."

"Because the second element of the test involves answering the question whether certain professional standards have been met…expert testimony is necessary to establish the parameters

of acceptable professional conduct [for an attorney], a significant deviation from which would constitute malpractice," the opinion says. "This does not mean, however, that expert testimony would also be appropriate with respect to the third and final element of the test, causation."

To establish the final element, "the plaintiff must show that, but for the attorney's negligence in the underlying case, the plaintiff would have prevailed." The jury in a legal malpractice case is not tasked with deciding what the first jury in the underlying case would have done had the attorney not been negligent, but only what a *reasonable* jury would have done had the underlying case been tried without the alleged attorney negligence. It does this by independently evaluating the evidence in the underlying case as it should have been presented to determine whether it believes that the plaintiff has a winning case. "In this connection, the Court of Appeals was incorrect in its conclusion that the jury in the malpractice case was tasked with deciding an issue that could not be resolved by the average lay person," the opinion says. "Because the jury in the malpractice case was not being asked to decide what a prior jury would have done, it was merely being asked to do exactly what any jury in a discrimination lawsuit would do, which is, evaluate the evidence in the case and decide the case on the merits. This is a task that is solely for the jury, and that is not properly the subject of expert testimony."

Johnson's expert testimony went directly to the issue of what the first jury in the underlying case allegedly would have done, which was inappropriate, the opinion says. "Accordingly, the Court of Appeals erred in concluding that the testimony of Dr. Johnson's expert was admissible here."

Attorneys for Appellant (Leibel): Michael Goldman, Christine Mast
Attorneys for Appellee (Johnson): Jenny Jensen, Richard Harris, Richard Brittain

BUNN V. THE STATE (S11G0682)

In a 6-to-1 decision, the Georgia Supreme Court has affirmed a decision by the Georgia Court of Appeals, which upheld a young man's conviction in **Jackson County** for aggravated child molestation. The man had challenged the ruling on the ground that he was denied his constitutional right to competent legal representation.

But in today's majority decision, **Justice David Nahmias** writes, "there is no reversible error, and we affirm the Court of Appeals' judgment."

According to the evidence at trial, in 2005, Michael Shane Bunn moved in with his stepsister and became the after-school caretaker of her two daughters, 9-year-old "K.B." and 7-year-old "T.B.," while the mother worked nights as a certified nursing assistant. Bunn was about 19 at the time. In January 2006, K.B. and T.B. together told their mother that their uncle had been molesting them. Their mother contacted law enforcement and as part of the investigation, the children were interviewed at a child advocacy center called the Tree House by forensic interviewer Allison Salmon, according to briefs filed in the case. During the interview, which was later shown to the jury, T.B., the 7-year-old, said Bunn had touched her private parts with his "weewee" more than once in the family's living room. K.B., the 9-year-old, said Bunn touched her in her "privates" with his penis and hand. She said if she or her sister did not want to take off their pants, Bunn "would make us," and that he had touched her inappropriately "10 or 11 times." K.B. said she'd observed her uncle touch her younger sister inappropriately as well.

Salmon, who conducted the forensic interview, testified that T.B. told her that her uncle "pulled her up on him in the living room on the couch, that it happened more than one time. She

said she had seen it happen to [K.B.]…she was also asked to lick [Bunn's]…penis." The therapist testified further that K.B. told her Bunn had "pulled her up on him, as well…his private part had gone inside her private part as well as outside her private part, that he had moved around…that it happened every day from when he started watching them in August until several days before the interview."

In May 2006, a jury convicted Bunn of child molestation, aggravated child molestation and cruelty to children in the first degree. He was sentenced to 30 years, with the first 12 to be spent in prison. He appealed to the Georgia Court of Appeals on several grounds, but that court upheld his convictions and sentence. Among the errors, Bunn claimed his trial attorney was incompetent for failing to make a hearsay objection to the therapist's testimony that T.B. witnessed Bunn's acts against K.B. and vice versa. Bunn argued that such evidence is prohibited by the state Supreme Court's 1998 ruling in *Woodard v. State.* In that case, the high court declared unconstitutional an amendment to the Child Hearsay Statute that allowed the admission of hearsay statements made by a child under 14 who witnessed an act of abuse against another. But the Court of Appeals ruled that *Woodard* does not apply to this case "because both girls were victims" in addition to witnessing each other's abuse. Bunn then appealed to the state Supreme Court, which agreed to review the case to determine whether the Child Hearsay Statute allows one child victim to testify about what she saw done to a second victim.

In today's opinion, the majority concludes that the reasoning behind Division 3 of the *Woodard* decision, which struck down the 1995 amendment to the Child Hearsay Statute as a violation of the constitutional right to equal protection of the laws, "cannot be sustained."

Today's opinion notes that it is a crime under certain circumstances for adults to have sex in front of children. "If it is rational to *imprison* a defendant who causes a child to witness sexual contact or physical abuse, it is surely rational to make the defendant merely deal with *hearsay* from such a child (whom the defendant may require to appear in court to testify and face cross-examination…)," the majority opinion says. The Child Hearsay Statute's limitation to child witnesses under age 14 "and to a subset of crimes that may be particularly traumatic for a child to witness and testify about represents the sort of line-drawing and balancing of rights and interests regularly and properly done by legislatures."

The Court of Appeals held that *Woodard* did not extend to hearsay by children who were both victims of, and witnesses to, sexual or physical abuse, rather than just witnesses. And that holding is correct, today's opinion says. "Thus, like the Court of Appeals, we could simply decline to extend *Woodard's* Division 3 to the circumstances presented in this case," the majority opinion states. "However, having determined that Division 3 was wrongly decided, we believe that the better course is simply to overrule it." In a footnote, the Court points out that in response to the *Woodard* decision, the General Assembly removed the language added by the 1995 amendment from the Child Hearsay Statute. The Court wishes "to make clear that the General Assembly has the authority to amend the statute as it did in 1995 if it so chooses."

"Having overruled the holding of Division 3 of *Woodard*, it follows that the Court of Appeals committed no reversible error in declining to extend that holding to the circumstances of this case," the majority opinion says. "Accordingly, we affirm the Court of Appeals' judgment."

Justice Robert Benham dissents, writing that he believes the Court of Appeals erred in ruling that the trial attorney's failure to object to the therapist's testimony relating hearsay statements did not constitute ineffective assistance of counsel. "I also take issue with the

majority's unnecessary act of overruling this Court's decision in *Woodard v. State.*" In *Woodard,* "[w]e recognized that the compelling reasons that supported admission of hearsay statements made by a child *victim* were not applicable to a child *witness* of abuse," the dissent says. "In the 14 years since that judicial declaration, the General Assembly, by its inaction, has acquiesced and given it its implicit legislative approval of our decision."

"To make matters worse, the majority acknowledges that its radical action is not required to resolve the issue on appeal in the case before us. The majority could, instead, adopt the restrictive interpretation of *Woodard* taken by the Court of Appeals in its decision in *Bunn,*" and conclude that because the hearsay statements in this case were made by children who were both victims and witnesses, *Woodard* did not apply. "Just as we address the issue of a statute's constitutionality only as a matter of last resort, so should we be guided in overturning decisions of this Court."

Because both children were victims, the Child Hearsay Statute authorized the admission of the out-of-court statements of each child recounting the facts of the crime committed against her. However, "it was error to admit the portion of the children's out-of-court prior consistent statements that recounted each child's observation of what Bunn did to the other child," the dissent says. "Therefore, it was deficient performance on the part of trial counsel to fail to object to the testimony that amounted to improper bolstering of the child's testimony with regard to what she had witnessed."

Attorney for Appellant (Bunn): S. Cindy Wang
Attorneys for Appellee (State): J. Bradley Smith, District Attorney, Robin Rowden Riggs, Asst. D.A.

NORTHWAY, MAYOR V. ALLEN ET AL. (S12A0492)

The Georgia Supreme Court has ruled in favor of the former mayor of Springfield, Georgia by reversing an **Effingham County** judge's order that had ousted the mayor from office.

In today's unanimous decision, **Justice Robert Benham** writes the trial court was wrong to remove the mayor from office, and it is sending the case back to that court with directions that it grant the former mayor's motion to dismiss the case.

Jeffery Northway was elected mayor of Springfield in 2009 and took office in January 2010. In October 2010, four of six city council members – Troy Allen and three others – brought an ethics complaint against Northway, alleging violations of the city's Ethics Code Ordinance. On Nov. 22, 2010, the four city councilmen voted for Northway's resignation. The Ethics Committee subsequently found no ethical violations. When Mayor Northway refused to step down, the council members petitioned the Effingham Superior Court for his removal.

At issue in this case is Section 45 of the City of Springfield City Charter, which was enacted in 1912 and states that "should the mayor or any member of the city council be guilty of malpractice in office, willful neglect of duty, gross and willful abuse of the powers entrusted to them or for any reason become incompetent or unfit to fill such office, in the judgment of any four members of council then and in that event, they are authorized to ask for his resignation…." If he fails to resign, the charter goes on to say, the four members may "bring a rule against such offending officer setting up the charges" and take the matter to court, where the judge may hear testimony, pass upon the rule and remove the officer.

Northway filed two motions to dismiss the case – one challenging Section 45 as unconstitutional and the other arguing the council members' petition failed to state a claim for which relief could be granted. The Superior Court judge denied both motions. In July 2011, a three-day "bench trial" was held before the judge with no jury. In August, the trial court entered an order removing Northway from office. In support of his decision, the judge referred to conduct by Northway that had undermined other city officials and included statements about alleged improper bidding processes. Northway then appealed to the state Supreme Court.

"If material allegations are missing from a pleading, then the pleading fails," today's opinion says. Here, the council members "did not include any allegations in their petition 'showing why they are entitled to relief.' The allegations in the petition state that appellees requested appellant to resign and that appellant failed to do so. These allegations, taken as true, cannot explicitly or implicitly be interpreted to support the relief appellees were seeking – namely, appellant's removal from office. Elected officials in Georgia have a property right in their office that cannot be taken away without due process of law."

"The trial court erred when it denied appellant's motion to dismiss and allowed the case to proceed…," the opinion says. "The error was not harmless because throughout the proceedings appellant was forced to guess as to what charges he would be required to defend himself."

Attorney for Appellant (Northway): Charles Herman
Attorney for Appellees (Council members): Richard Rafter

MCI COMMUNICATIONS SERVICES, INC. (VERIZON BUSINESS) V. CMES, INC. (S12Q0941)

In another split 4-to-3 decision, the Georgia Supreme Court has ruled in favor of a company that accidentally severed a telecommunications company's fiber-optic cable while doing excavation work.

On March 30, 2007, CMES was working on a roadway improvement project in Stone Mountain, **DeKalb County**, when it inadvertently cut an underground fiber-optic cable that ran between MCI's terminals in Atlanta and Augusta. As a result, an outage occurred at 9:41 a.m., which MCI claims resulted in more than 568,000 blocked calls and 242 customer complaints. Further disruption in service would have occurred had MCI not previously installed $6.4 million-worth of spare restorative capacity for just such an emergency. MCI identified the location of the cut by 10:00 a.m., and by 3:45 p.m., 95 percent of the transmission systems on the cable were back up. By 5:42 p.m., all traffic on the cable had been restored.

MCI sued CMES in the U.S. District Court for the Northern District of Georgia, alleging trespass and negligence and seeking recovery of the cost of repair – roughly $27,000 – punitive damages, and about $362,000 in damages for "loss of use" of the cable during the time it took to repair it. MCI based its amount of loss of use damages on the theoretical rental value of the full capacity of the severed fiber-optic cable for the approximately eight hours that it was being repaired. MCI claimed that it may not have had to rent capacity from another carrier *after* the cut, but that was only because it had installed the spare restorative capacity *prior* to the cut. In January 2010, CMES sought "partial summary judgment" on MCI's claim for loss of use damages, arguing that MCI could not show any monetary loss because its service was only momentarily interrupted due to its spare restorative capacity and that estimating loss of use

damages on a theoretical rental value would be improper. (A court issues a summary judgment when it determines there is no need for a jury trial because the facts are undisputed and the law falls squarely on the side of one of the parties.) MCI responded that it should not be punished for having the foresight to install a backup system at considerable cost. The District Court granted CMES' motion, ruling that MCI could not recover loss of use damages. MCI then appealed to the U.S. Court of Appeals for the Eleventh Circuit, which has asked the Georgia Supreme Court to answer one question before issuing a decision: Under Georgia law, may a telecommunications service provider whose cable is severed recover loss of use damages that are measured by the rental value of substitute cable when it has not rented such cable or incurred any loss apart from the cost of repair?

In today's majority decision, **Chief Justice George Carley** writes that loss of use damages are a type of compensatory damage, and the award of such damages has long been approved by Georgia courts. However, based on legal principles, "it is clear that MCI cannot recover loss of use damages absent some showing of monetary loss apart from the cost of repair."

"An injury to a person or damage to property is required for a tort to be actionable, and MCI did not expend any money to keep its system running, nor did it suffer any lost profits, and thus it has failed to show damage qualifying as loss of use that would require compensation," the majority opinion says. "Moreover, another underlying principle of compensatory damages law is not triggered here, that is, that the purpose of damages is to put the aggrieved party in the position, as near as possible, as he or she would have been without the injury or damage. In the present case, MCI cannot argue that it would not have invested in the spare restorative capacity if the severance had not occurred….To require CMES to reimburse the costs of a system that MCI uses for several purposes and for all kinds of outages, including those caused by MCI or other third parties, would be inequitable and would result in placing MCI in a position significantly better than it would have been without the severance."

"MCI also has not met its burden of proving its losses in such a way that a jury or trial judge can calculate the loss of damages with a reasonable degree of certainty."

"Finally, the majority of courts that have addressed this issue in identical lawsuits brought by MCI against contractors for similar damage to an MCI fiber-optic cable has held that loss of use damages measured by a theoretical rental rate are inappropriate in such a factual situation….In summation, we conclude that a telecommunications carrier is not entitled to loss of use damages measured by the hypothetical cost to rent a replacement system where it suffered no actual loss of use damages and did not need to rent a replacement system because it was able to reroute calls within the existing redundant cable system the carrier necessarily installed in order to operate its business," the majority opinion states. Joining the majority are Justices Robert Benham, Hugh Thompson and P. Harris Hines.

In the dissent, **Justice Harold Melton** writes that even with backup lines, MCI's network could not provide "seamless coverage" for users while the damaged cable was being repaired. The damage was "mitigated" by the existence of the backup lines, but it was not "eliminated," as the majority implies. "Under these circumstances, both common sense and general fairness would indicate that MCI should be entitled to loss of use damages for its severed line," the dissent says. "Georgia law and the Restatement of Torts indicate the same."

"MCI lost use of its cable, was required to use a substitute to restore capacity, and is entitled to the fair rental value of that substitute," the dissent says. "This value may easily be calculated." Substitute capacity can be rented on a 30-day basis, and it is not difficult to prorate an hourly rental rate, says the dissent, which is joined by Presiding Justice Carol Hunstein and Justice David Nahmias.

Attorneys for Appellant (MCI): William Deveney, Brent Wilson, James Proszek, Anthony Jorgenson

Attorney for Appellee (CMES): Jason King

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OTHER CASES APPEALED FROM THE GEORGIA COURT OF APPEALS

HOOVER V. MAXUM INDEMNITY COMPANY (S11G1681 and S11G1683)

In another split 4-to-3 decision, the Supreme Court of Georgia has also reversed a Georgia Court of Appeals decision that was in favor of an insurance company which denied coverage to a man who suffered brain damage when he fell off a ladder.

According to the facts of this complex case, James Matthew Hoover was a water technician employed by Emergency Water Extraction Water Services, a company that provided water damage restoration services. The water company had a commercial liability insurance policy with Maxum Indemnity Company. On Oct. 20, 2004, Hoover's supervisor asked him to deliver an extension ladder to the residence of one of the company's customers. The house was undergoing roof repairs by a contractor who was not affiliated with the water company. While there, the contractor asked Hoover to climb onto the roof and assist with the roof repairs. Hoover agreed and climbed to the roof. His duties as a water extraction technician did not include climbing on ladders or making roof repairs.When he later descended, he used a different ladder, which collapsed, causing him to fall 25-to-30 feet to the ground. Hoover struck the back of his head and neck, resulting in a catastrophic brain stem injury. On the day of the accident, Jeff Owen, co-owner of the water company, went to the hospital and spoke to Hoover's stepfather, Jerry McEntee, who Owen testified was an insurance agent for State Farm Insurance Co. (Hoover's stepfather later died in September 2007.) While at the hospital, McEntee requested the water company's insurance information and told Owen he would be contacting Maxum to verify the policy and coverage. About a week later, McEntee told Owen he had notified Maxum of the occurrence and had discovered that the water company's policy with Maxum had a $1 million liability limit. Owen did not take any steps independently to notify Maxum of the occurrence.

In September 2006, Hoover filed a personal injury lawsuit against the water company, alleging it was liable for the negligence of its supervisor. The following month, the company's counsel forwarded the complaint to Maxum. Maxum now claims that the correspondence from the water company dated Oct. 19, 2006 enclosing the complaint was its first notice of Hoover's injury. On Oct. 23, Maxum sent a letter to the company disclaiming coverage and informing the company it would not be defending it or reimbursing it for any claims made by Hoover. Maxum's letter said coverage did not exist for the occurrence because the policy contained an "Employer Liability Exclusion," which stated the insurance did not apply to bodily injury of an

employee while performing duties related to the company's business. The letter also stated that Maxum was reserving its right to claim a number of other defenses, including that "coverage for this matter may be barred or limited to the extent the insured has not complied with the notice provisions under the policy," which requires notification "as soon as practicable" following an occurrence that could result in a claim. Maxum filed a number of pleadings in the various underlying legal proceedings, many of which did not raise the water company's failure to comply with the notice provisions as a reason for denying coverage.

Following a bench trial – before a judge with no jury – on Hoover's claim against the water company the court awarded Hoover a judgment of $16.4 million.

In August 2009, after obtaining that judgment against the water company, Hoover's attorneys sued Maxum in **Cobb County** superior court, claiming it had breached its duty to provide a defense of the water company and to provide coverage under the policy. In response, Maxum raised as a defense the company's failure to comply with notice provisions as a reason for denying coverage. In July 2010, the trial court granted partial "summary judgment" to the water company, finding that Maxum had breached its duty to defend the water company. But it also granted partial judgment to Maxum, finding that Maxum had no duty to provide coverage because the water company had breached the policy conditions by not providing timely notice to Maxum. (A court grants summary judgment when it determines a trial is not needed because the facts are undisputed and the law falls squarely on the side of one of the parties.) On appeal, the Court of Appeals ruled totally in favor of Maxum. It agreed that the water company had breached the notice conditions by not providing notice of the "occurrence" until two years after Hoover was injured and that the breach voided coverage. At the same time, it reversed the trial court's ruling that Maxum had a duty to defend the water company. Hoover then appealed to the state Supreme Court, which agreed to review the case to determine whether the Court of Appeals properly analyzed the claim that Maxum waived its right to assert a defense based on untimely notice and whether timely notice of the occurrence was a prerequisite to Maxum having a duty to defend the water company.

"We reverse as to the notice issue, finding that Maxum waived its right to assert a defense based on untimely notice because it did not properly alert [Emergency Water Extraction Services] that the lack of timely notice would be a potential bar to coverage," **Presiding Justice Carol Hunstein** writes in today's majority opinion. "We also reverse the Court of Appeals' decision regarding Maxum's duty to defend, finding that since Maxum waived its right to assert a defense related to [the water company's] failure to give timely notice of the occurrence, timely notice of the occurrence was not a prerequisite to Maxum's duty to defend."

"An insurer cannot both deny a claim outright and attempt to reserve the right to assert a different defense in the future," the opinion says. "The Court of Appeals erred when it held, contrary to Georgia law, that Maxum could both deny the claim and reserve its right to assert other defenses later."

"A reservation of rights does not exist so that an insurer who has *denied coverage* may continue to investigate to come up with additional reasons on which the denial could be based if challenged," the majority opinion says. "Rather, a reservation of rights exists to protect both the insurer and the insured by allowing an insurer who is uncertain of its obligations under the policy to undertake a defense while reserving its rights to ultimately deny coverage following its investigation or to file a declaratory judgment action to determine its obligations."

Maxum's letter made it clear it was denying coverage based on the Employer Liability Exclusion, yet the record shows Hoover "was not performing duties related to the conduct of the insured's business at the time of the accident. The trial court was obligated to strictly construe the language of the policy exclusion in favor of the insured…As a result, the trial court correctly concluded that Maxum had a duty to defend the underlying tort action and that Maxum breached that duty. The Court of Appeals' holding to the contrary was incorrect." Joining the majority are Chief Justice George Carley and Justices Robert Benham and Hugh Thompson.

In a partial dissent, **Justice Harold Melton** writes that contrary to the majority opinion, "Georgia law does not broadly provide that 'an insurer cannot both deny a claim outright and reserve the right to assert a different defense in the future.' As this pivotal statement of the law is incorrect, I disagree with all of the majority's analysis." Under the Georgia Court of Appeals' 1991 decision in *Brazil v. Government Employees Insurance Co.,* "[e]ven without disclaiming liability and giving notice of its reservation of rights, *any* insurer who merely proceeds to investigate a claim with knowledge of facts which might otherwise constitute a defense to coverage is not [barred] from thereafter setting up the defense." Nonetheless, when Maxum filed its action in court, it appeared to abandon its notice defense, which would preclude a grant of summary judgment to Maxum. "I agree, therefore, that the Court of Appeals erred in affirming the grant of summary judgment on this point as a question of fact remains." However, he disagrees that Hoover was entitled to summary judgment that the notice issue had been waived. "The mere assertion of one defense cannot be considered the waiver of other defenses, absent some statement or conduct *showing an intent to waive,*" the dissent says. And Maxum "explicitly stated that *it did not intend to waive its notice provision."* Therefore, the evidence raises a question of fact as to whether Maxum actually waived its defense. And because of that, there is a also a question of fact and law as to whether Maxum breached its duty to defend the water company. "If the notice defense was not waived, Maxum would not have a duty to defend," the dissent says. "If the notice defense was waived, it may have." Joining the special concurrence and dissent are Justices P. Harris Hines and David Nahmias.

Attorneys for Appellant (Hoover): Lance Cooper, Mathew Nasrallah
Attorneys for Appellee (Maxum): Philip Savrin, Joshua Portnoy

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IN OTHER CASES, the Supreme Court of Georgia has upheld **murder** convictions and life prison sentences for:

* Tunde Alatise (Gwinnett Co.)	**ALATISE V. THE STATE (S12A0024)**
* Rick Ray Breedlove (Newton Co.)	**BREEDLOVE V. THE STATE (S12A0885)**
* Christopher D. Chance (Burke Co.)	**CHANCE V. THE STATE (S12A0684)** (While the Court has upheld Chance's murder conviction and life prison sentence, it has thrown out his conviction and sentence for criminal attempt to possess cocaine because that was the underlying felony for his felony murder conviction.)

IN DISCIPLINARY MATTERS, the Court has **disbarred** attorney:

* John Lee Scott **IN THE MATTER OF: JOHN LEE SCOTT (S12Y1468)**

The Court has accepted a petition for **voluntary surrender of license** – tantamount to disbarment – from attorney:

* Steven Hyman Hurwitz **IN THE MATTER OF: STEVEN HYMAN HURWITZ (S12Y1412)**

The Court has **rejected a petition for voluntary discipline** from attorney:

* John Floyd Woodham **IN THE MATTER OF: JOHN FLOYD WOODHAM (S12Y0425)**
(The Court finds that a review panel reprimand, as requested by Woodham, would be "inappropriate" in this case and states that the State Bar, which did not object to the petition, "focused its review too narrowly, giving too little weight to the seriousness of the many allegations that remain. As a result, we reject Woodham's Petition for Voluntary Discipline, and we direct the State Bar to consider the full array of ethical violations at play in this matter.")

The Court has accepted a petition for voluntary discipline and ordered a **review panel reprimand with conditions** of attorney:

* Ted H. Reed **IN THE MATTER OF: TED H. REED (S12Y1337)**