Supreme Court of Georgia
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SUMMARIES OF OPINIONS

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TAYLOR, EXR. v. THE DEVEREUX FOUNDATION, INC. et al. (S22A1060)
THE DEVEREUX FOUNDATION, INC. et al. v. TAYLOR, EXR. (S22X1061)

The Supreme Court of Georgia has concluded that Georgia's statutory cap on punitive damages [Georgia Code § 51-12-5.1(g)] does not violate the plaintiff's constitutional right to a trial by jury in this case.

The Court has further concluded that the punitive damages cap does not violate the separation of powers or equal protection guarantees in the Georgia Constitution. Therefore, the Court has affirmed a **Cobb County** trial court's application of the statute to cap punitive damages in the underlying case.

The underlying case stems from the April 2012 sexual assault of a 15-year-old girl while she was living in a behavioral health treatment facility that was operated by the **Devereux Foundation**. The sexual assault was perpetrated by a Devereux employee who was charged with supervising the girl and others in a cottage where they lived at the Devereux facility. The girl's interests, in this case, are represented in this case by the executor of her estate, **Jo-Ann Taylor**.

Following the trial, a Cobb County jury returned a verdict for $10 million in compensatory damages, finding both Devereux and the employee who committed the assault at fault, and $50 million in punitive damages against Devereux. The trial court ultimately reduced the jury's punitive-damage award from $50 million to $250,000, consistent with the state's statutory cap on punitive damages [Georgia Code § 51-12-5.1(g)].

The resulting appeal and cross-appeal were argued before the Supreme Court on Oct. 5, 2022.

Today, the Court has applied the framework laid out in its 2010 decision in *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt,* which held that a statutory cap on non-economic damages for medical-malpractice claims violated the Georgia constitutional right to a jury trial. In so doing, the Court emphasized that "[t]he right to a jury trial has been understood as an important right in Georgia since the State's founding" and noted that for almost 175 years, it has pinpointed 1798 as the date it has used to evaluate the state Constitution's provision guaranteeing this right.

"[W]e conclude that although Taylor's claim for premises liability would have been available in Georgia in 1798, and although juries were authorized to award in certain instances damages to punish the defendant and not merely compensate the plaintiff, Taylor has failed to show that a Georgia jury in 1798 was authorized to award punitive damages for the kind of claim she brought in 2017," **Justice Sarah Hawkins Warren** writes in the majority opinion.

"Specifically, Taylor has failed to show that a jury would have been authorized to award punishment damages for a claim alleging that the defendant acted only with an 'entire want of care,' rather than for a claim alleging that the defendant engaged in intentional misconduct," Justice Warren further writes. "Thus, Taylor has failed to prove that the punitive damages she seeks are within the scope of her Georgia constitutional right to a jury trial."

While today's majority opinion rejects Taylor's challenges to Georgia's statutory cap on punitive damages, the Supreme Court also has rejected Devereux's arguments in its cross-appeal, instead concluding that there was evidence to support the awarding of both punitive damages and attorney fees and to support the amount of attorney fees awarded. The Supreme Court also has concluded that the trial court did not err in entering the judgments as to compensatory and punitive damages nunc pro tunc to the dates they were rendered by the jury and imposing post-judgment interest from those dates. (Nunc pro tunc is a Latin term meaning "now for then" and refers to a court's inherent power to give an order or judgment retroactive legal effect.)

In a specially concurring opinion, **Justice Verda M. Colvin** questions whether *Nestlehutt* was correctly decided and states that she instead believes this case should be decided through application of the 1979 case *Teasley v. Mathis* and the 1993 case *State v. Moseley*.

"Because neither party asks us to overrule *Teasley* or *Moseley*, and because I am unsure whether *Nestlehutt* was correctly decided, I would reject the challenge to the punitive-damages cap at issue here under *Teasley* and *Moseley* rather than extending *Nestlehutt* to do so," she writes.

Justice **John J. Ellington** has authored a partial dissent and partial special concurrence to the majority opinion. In his partial dissent, Justice Ellington rejects using 1798 as the key date for analyzing the constitutional right to trial by jury in Georgia under the *Nestlehutt* framework and argues that the relevant date is 1777, when the people of Georgia first enshrined in a constitution the inviolable right to trial by jury.

Justice Ellington also rejects the conclusion that common law juries awarded punitive damages only in cases involving intentional misconduct.

"Georgia constitutionally guaranteed the right to trial by jury at a time when a jury had the authority to award additional, exemplary damages for whatever conduct the jury found egregious enough to warrant such damages," he writes. "Having a jury determine the amount of punitive damages, unfettered by legislative acts, was an essential element of the right to trial by jury as it existed at common law and as it continued to be protected in Georgia at the date of the adoption of our earliest Constitution. Thus, even under the *Nestlehutt* framework, the right to a jury trial in Georgia inheres in awards for punitive damages generally, including for cases involving an entire want of care," and the punitive damages cap in Georgia Code § 51-12-5.1(g) is unconstitutional.

In his partial special concurrence, Justice Ellington contends that the 2014 case *Ga. Dept. of Corrections v. Couch* does not apply to the determination of an award of attorney fees under Georgia Code § 13-6-11, the text of which does not require that only "reasonable" fees be awarded.

Justice Charlie Bethel, in a separate concurring opinion joined by Justice Shawn Ellen LaGrua, agrees fully with the majority opinion but also expresses his view that cases from other states decided prior to 1798 are of "limited value" generally and of no value in the Court's analysis in this case.

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THE STATE et al. v. SASS GROUP, LLC et al. (S22A1243, S22A1244)

Because the plaintiffs failed to comply with the procedural requirements found in the Georgia Constitution, the Supreme Court has vacated a **Fulton County** trial court's grant of an injunction, preventing the Gwinnett County District Attorney from taking criminal enforcement action or pursuing civil asset forfeiture against businesses that sell products containing cannabinoids.

The state's highest appellate court also reversed the trial court's denial of the State's motion to dismiss a lawsuit filed against it by two businesses that sell such products and have sent the case back to the trial court to be dismissed.

In 2018, the United States Congress enacted the Agriculture Improvement Act, which legalized the possession and distribution of hemp and hemp extracts. Several states, including Georgia, followed this congressional action by enacting legislation distinguishing hemp as a non-controlled substance. Then in 2019, the Georgia General Assembly passed the Georgia Hemp Farming Act, which further permitted the cultivation and sale of hemp and hemp products under certain circumstances. Meanwhile, THC remains classified as a Schedule I substance under the Federal Controlled Substance Act. But, those matters are not addressed by the Supreme Court because the plaintiffs pursued their case employing an unauthorized procedure.

In January 2022, the Gwinnett County District Attorney issued a press release essentially stating that her office would pursue the prosecution of individuals and businesses who sell products containing cannabinoids, including Delta-8 THC and Delta-10 THC.

Afterward, two businesses—**SASS Group, LLC and Great Vape, LLC**—filed a lawsuit in Fulton County Superior Court against **the State of Georgia and the Gwinnett County District Attorney** in her individual capacity. The businesses sought a declaration against the State that commercial products containing hemp-derived cannabinoids, including Delta-8 THC and Delta-10 THC, may be lawfully possessed and sold throughout Georgia. They also sought a temporary restraining order and an interlocutory injunction against the district attorney.

The trial court granted the businesses' request for a temporary restraining order and interlocutory injunction and denied the State's motion to dismiss the lawsuit, rejecting the State's argument that the claims against it were barred by sovereign immunity. (Sovereign immunity is the legal doctrine that bars lawsuits against the state government without the state's consent.)

The State then filed two appeals—one regarding the trial court's denial of its motion to dismiss and the other regarding the trial court's grant of an interlocutory injunction.

In today's unanimous opinion, authored by **Justice Charlie Bethel**, the Supreme Court has concluded that the Georgia Constitution—specifically Article I, Section II, Paragraph V—allows for an exemption to the general rule of sovereign immunity only for lawsuits brought exclusively against the State. Because the underlying lawsuit in this case also named the Gwinnett County District Attorney, a defendant for whom a waiver of sovereign immunity is not provided by Paragraph V, the Constitution requires the suit to be dismissed.

"The crux of the dispute between the parties in this matter is the meaning of the word 'action' as used in this constitutional provision," Justice Bethel writes. "Plaintiffs [SASS Group LLC, et al.] argue that 'action' as used here means a claim or cause of action, rather than an entire lawsuit. Under that view, they say, courts determine whether the exclusivity provision is met on a claim-by-claim basis. If a claim relies on the waiver provided by Paragraph V—such as a claim for declaratory relief from the acts of a state agency—the claim must comply with the exclusivity provision or the claim is subject to dismissal. But a different claim within the same lawsuit that does not rely on Paragraph V's waiver would not implicate the exclusivity provision. In other words, Plaintiffs say that a lawsuit can include all kinds of claims against all kinds of defendants, and the exclusivity provision requires dismissal only of claims within the lawsuit that both attempt to avail themselves of Paragraph V's waiver *and* name in that same claim a defendant other than the State (or the local government at issue)."

"The Defendants, by contrast, argue that 'action' as used in this Paragraph means the entire case or lawsuit," Bethel further explains. "Under this view, courts determine whether the exclusivity provision is met by looking at the lawsuit as a whole. If the plaintiffs in the lawsuit try to avail themselves of Paragraph V's waiver of sovereign immunity in any way—i.e., even for one claim—then it is an '[a]ction filed pursuant to' that Paragraph and the lawsuit must be brought 'exclusively against the state and in the name of the State of Georgia' (or against the relevant local government as may be the case). If a lawsuit does not comply, then the entire lawsuit must be dismissed, even if some claims within the lawsuit could have otherwise been brought on their own without relying on Paragraph V's waiver."

Today's opinion states the Court agrees that "action" as it is used in the state constitutional provision refers to an entire case or lawsuit, and therefore the Court reverses the trial court's denial of the State's motion to dismiss and its grant of the plaintiffs' interlocutory injunction.

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JOHNSON v. THE STATE (S22A0964)

The Supreme Court of Georgia has concluded that a filing made "pro se" by a defendant who is represented by counsel is not always a legal nullity.

Instead, the Court has held, courts have the discretion to recognize such filings, including when they would preserve a defendant's right of appeal that would otherwise be lost because his trial counsel failed to act. The Court has overruled past decisions that applied an "absolute" rule against recognizing such filings.

"Although a defendant does not have a constitutional or statutory right to represent himself while he is also represented by counsel, nothing in our Constitution or Code prohibits such 'hybrid representation,' either," **Justice Andrew A. Pinson** writes in today's unanimous opinion.

The underlying case involves **Garry Deyon Johnson**, who was convicted of malice murder and robbery in connection with the killing of Irene Shields. The **Burke County** trial court sentenced Johnson in November 2000 to serve life in prison without the possibility of parole plus a consecutive 20-year term.

Following Johnson's conviction and sentencing, Johnson's lead trial counsel withdrew from the case; Johnson's other appointed attorney did not withdraw. Johnson then filed a pro se (a Latin-derived term meaning "on one's own behalf") "extraordinary" motion asking for a new trial. But the trial court never ruled on the motion, and years went by with little activity in the case.

In December 2017, Johnson's current appellate counsel entered an appearance in his case, and the trial court named a special master to reconstruct Johnson's case file. A year later, the trial court allowed Johnson to file an "out-of-time" motion for a new trial, but eventually denied the motion in January 2022.

Johnson appealed to the Supreme Court, which initially dismissed his case, relying in part on past case law in which the Court had concluded that a pro se filing made by a defendant who was represented by counsel was, by definition, a legal nullity. But upon reconsideration, the Court reinstated Johnson's appeal to address whether "a pro se filing made by a defendant who is actually or presumptively represented by counsel [is] always a nullity."

Today, the Supreme Court has affirmed that, while there is no right to hybrid representation found in the Georgia Constitution or in state laws, there is also no prohibition against it.

"Some of our decisions have recognized this distinction," Justice Pinson writes. "Soon after we first recognized that the right to hybrid representation had been eliminated from the current Georgia Constitution, we made clear that this change did not affect trial counsel's discretion to *allow* hybrid representation."

But in later cases, the Court began imposing "an absolute rule that pro se filings made while a defendant is represented by counsel are 'invalid.'"

This absolute rule "has no basis in either Constitution or statute, and it is virtually unreasoned, in conflict with our own decisions, and potentially destructive of the appeal rights of criminal defendants," Justice Pinson writes. Thus, although courts ordinarily are bound under the principle of "stare decisis" to adhere to previous decisions, this principle "does not require us to perpetuate a legal rule that is so obviously and harmfully wrong, and so we overrule our past decisions to the extent that they held that a pro se filing by a counseled defendant is *always* a legal nullity."

Today's opinion also states that the recognition of pro se filings by counseled defendants is within the court's "sole discretion," and that the Court expects decisions to recognize such filings will be "the exception and not the rule." Unless the court record indicates that the trial court recognized such a filing, it will be presumed that the trial court did not do so. And today's Supreme Court decision does not undo decisions in any cases involving pro se filings by counseled defendants that have already been adjudicated through direct appeal.

In today's decision, the Court does not decide the merits of Johnson's appeal. Instead, the Court vacates the Burke County trial court's January 2022 order denying Johnson's motion for a new trial and sends the case back for that court to determine whether to recognize and rule on Johnson's pro se post-conviction motions.

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IN JUDICIAL DISCIPLINARY MATTERS, the Georgia Supreme Court has **remanded** the following case back to the hearing panel to clarify its findings consistent with the opinion of the Court:

* Judge Christian Coomer — **INQUIRY CONCERNING JUDGE CHRISTIAN COOMER (S21Z0595)**