



**THE PREDICTABLE
UNPREDICTABILITY
OF THE GEORGIA
SUPREME COURT**

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By Robert Barker, Holly A. Pierson & W. Ryan Teague*

Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.¹

National awareness of the debate surrounding the proper role of judges in interpreting and applying the law has been heightened of late. From the prominent controversy surrounding the federal judicial confirmation

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process to state-wide races for judicial seats, increased attention is being given to the competing views on judicial philosophy. The State of Georgia is no exception.

Commenting on a particular court (such as the Georgia Supreme Court) as a whole is a difficult and imperfect business. Generally, observers and scholars have noted that the judicial philosophy of the Georgia Supreme Court has varied over time. In the 1970s, for example, the court had been characterized as more activist.² In contrast, the court was described as swinging toward a more restrained judicial approach in the 1980s and early 1990s.³ In its most recent decade, the court has been described as trending back toward the activism prevalent in the 1970s, but this trend is more of a broken and uneven line. The court's current jurisprudence cannot be fairly characterized as either uniformly activist or restrained.

However, the Georgia Supreme Court's recent decisions in strategic areas of the law—i.e., tort and strict liability, criminal law, and constitutional protections—provide at least some insight into the majority's judicial philosophy. This paper examines several of those decisions in order to foster greater dialogue about the proper role of the judiciary and whether the Georgia Supreme Court has respected its limited constitutional role.

RECENT DECISIONS FROM THE GEORGIA SUPREME COURT

In several of the Georgia Supreme Court's notable recent decisions in the product liability and tort arenas, the court has expanded liability.⁴ A number of recent decisions also evidence the expansion of constitutional rights and protections by the court.

Tort and Product Liability

In *Crister v. McFadden*, the Georgia Supreme Court reversed a jury verdict in favor of a physician in a medical malpractice case because the court determined that the jury instructions were unfavorable to the plaintiff.⁵

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The patient in the case had brought suit against the physician for alleged negligence in performing spinal injections. The jury returned a verdict for the physician, and the court of appeals affirmed the jury's verdict.⁶

The Georgia Supreme Court reversed the decision, determining, in essence, that the jury instructions constituted reversible error because they failed to instruct the jury that any bad outcome is evidence of negligence. In response to the majority's approach, the dissent stated: "[I]n reality, it is implicit in the majority approach that the fact that a plaintiff had a less-than-satisfactory outcome following medical treatment establishes professional negligence. . . ."⁷ The majority and dissent disagreed as to whether the ruling of the court created a direct conflict between *Crister* and a long line of previous decisions in which the court had required that medical negligence be judged not on the outcome alone, but rather on whether the physician deviated from the relevant standard of care.⁸ In short, the court in *Crister* reversed both a jury verdict and the court of appeals and, in so doing, may have expanded negligence liability in medical malpractice cases.

² In *Robinson v. Kroger Co.*, the Georgia Supreme Court expanded tort liability in slip and fall cases creating a methodology to make it easier for plaintiffs to avoid dismissal on summary judgment grounds.⁹ The plaintiff in *Robinson* was injured when she slipped on a foreign substance on the store's floor and fell.¹⁰ The trial court granted summary judgment to Kroger, ruling that the proximate cause of the accident was the plaintiff's failure to exercise ordinary care for her personal safety. (It was undisputed that the plaintiff had not been looking where she placed her foot at the time that she stepped into the foreign substance and slipped.)¹¹ The court of appeals affirmed the grant of summary judgment to Kroger.¹²

The Georgia Supreme Court, however, reversed. It determined that the plaintiff's admitted failure to observe where she was going at the time she slipped and fell was insufficient to establish as a matter of law that she had failed to exercise ordinary care for her own personal safety.¹³ The court acknowledged its prior precedent in *Alterman Foods v. Ligon*, in which it limited slip-and-fall liability precisely because it had noticed a tendency in the Georgia courts "to drift toward a jury issue in every 'slip and fall' case."¹⁴ Despite its recognition of the *Alterman* decision, the *Robinson* court decided that the

results had simply been too favorable to defendants: "Weighted down by the conjunctive *Alterman* analysis, the pendulum made a dramatic swing in the other direction as it became the rare case which escaped summary adjudication."¹⁵

In *Fortner v. Town of Register*, the widow of a man killed at a railroad crossing brought action against the town and the railroad, alleging the defendants failed to keep the railroad right-of-way clear of visual obstructions caused by overgrown vegetation planted by the town.¹⁶ The trial court denied the defendants' motion for summary judgment, but the court of appeals reversed. The intermediate appellate court determined that summary judgment in favor of the defendants was the appropriate remedy for essentially two reasons: (1) the allegedly vision-obstructing vegetation was not "unauthorized" under OCGA § 32-6-51(b)(3), because there was no evidence that it was planted or maintained in violation of any statute, code, or local ordinance; and (2) the Georgia Code of Public Transportation (GCPT) pre-empted a common law action.¹⁷

The Georgia Supreme Court reversed the appellate court's decision, finding instead that (1) the GCPT does not preempt the common-law duty of railroads to initiate and authorize the installation of protective devices at grade crossings on public roads;¹⁸ (2) the common law duty of railroads to prevent vegetation from obstructing vision at railroad crossings remains in effect post-enactment of the GCPT;¹⁹ (3) vegetation which is purposely planted may constitute a "structure" as used in the statute prohibiting the creation or maintenance of structures that distract or obstruct views of drivers on public roads;²⁰ and (4) "unauthorized," as used in statutes prohibiting the erection of structures that distract or obstruct views of drivers on public roads except "as authorized," includes those which lack any governmental authorization.²¹ In reaching its decision on both the pre-emption point and the definition of "unauthorized," the majority of the Georgia Supreme Court explicitly overruled lines of court of appeals decisions that had long held to the contrary.

The dissent criticized the court's ruling as follows:

By holding that "unauthorized" means not only those structures prohibited by law, but also those not formally authorized by governmental

action, the majority essentially re-writes the statute to altogether remove the requirement that the structure be “unauthorized.” In outlawing any vegetation on private property that does not have the official stamp of governmental approval, the majority improperly overturns years of consistent interpretation of this statute by the Court of Appeals. Again, the majority’s frolic into the legislative arena does great disservice to the law and to all owners of private property that abut public roads.²²

In *Jones v. NordicTrack Inc.*, the Georgia Supreme Court determined that a manufacturer could be sued under theories of strict liability, negligence, or failure to warn, in a situation where the plaintiff was not using the product at the time of the injury, but rather had walked into the product (a piece of exercise equipment) as she was crossing the room and fell on it.²³ The court in this case read the strict liability statute to extend product liability to cases where a plaintiff is not using or affected by the use of a product, but rather is simply affected by the existence of the product.

In *Carringer v. Rodgers*, the Georgia Supreme Court permitted a murder victim’s mother to bring a wrongful death claim, though the Wrongful Death Act specifically prohibited such a suit when the deceased person had a surviving spouse or child.²⁴ In this case, it was undisputed that the deceased woman had a surviving spouse, and the plain language of the Wrongful Death Act included no exceptions to its provisions.²⁵ The court reached their decision because, in this case, the surviving spouse was the person responsible for the victim’s wrongful death. The court thereby created an exception to the statute that allowed parents to bring such suits when the surviving spouse was the person responsible for the victim’s wrongful death.²⁶

The dissent challenged the majority’s decision as inconsistent with the statute and with prior precedent:

Because the plain language of the wrongful death statute clearly precludes the plaintiff’s claim, I dissent. . . . Since the legislature enacted the wrongful death statute in derogation of the common law, this Court must

strictly construe it. When the statutory language is clear and unambiguous, we apply the plain meaning to the words of the statute to carry out the legislature’s intention. . . . Following this rule of statutory construction, this Court has repeatedly limited the scope of the Wrongful Death Act to its express terms, even when it means denying a person the right to recover.²⁷

Constitutional Protections

Other contemporary decisions by the Georgia Supreme Court have demonstrated the court’s willingness to recognize new rights or prohibitions in the Georgia Constitution. The court held in 2001 that death by electrocution—which had been the method of execution in Georgia since 1924—was a cruel and unusual punishment that violated the State Constitution. In *Dawson v. State*, the majority of the court opined that the meaning of “cruel and unusual” changes with “the evolving standards of decency that mark the progress of a maturing society.”²⁸ Based heavily on the legislature’s recent enactment of a statute designating lethal injection as the manner of execution for capital crimes committed after the statute’s effective date, the court concluded that a societal consensus had emerged that death by electrocution is “cruel and unusual.”²⁹

The dissenting opinion argued that the very statute to which the court pointed as evidence of a societal consensus against death by electrocution expressly preserved electrocution as the manner of execution for capital crimes committed before its enactment.³⁰ The dissent took the position that the majority substituted its own judgment for that of the legislature:

Today, a majority of this Court has decided that lethal injection will be the method of execution for all condemned inmates in this state. For those who view appellate courts as a means of achieving desired policy goals and especially this desired policy goal, the majority’s opinion will be considered a victory. For those who understand that it is the role of the courts to interpret the laws and not to make them, the effect will be the opposite, regardless of

the merits of electrocution versus lethal injection....

Our task here, as must so frequently be emphasized and re-emphasized, is to pass upon the constitutionality of legislation that has been enacted and that is challenged. This is the sole task for judges. We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great.³¹

The dissent also questioned the majority's reliance on the newly revised statute as evidence of a "societal consensus":

Based on a new interpretation of the Georgia Constitution, the majority has determined that the legislature really meant to abolish execution by electrocution for all condemned prisoners. . . .

This argument is illogical and ironic. If the General Assembly sought to abolish electrocution as a method of execution, *it could have done so*. It could have established lethal injection as the sole means of execution for all condemned inmates in this state, *but it did not*. The language of this provision in the statute does indeed make a point, but not the one the majority wishes to make. The General Assembly simply planned for the possibility that this Court may step in and re-write the law in this area. Rather than signal a change in the societal consensus on electrocution, it seems that the legislature simply understood the nature of judicial power and its attendant temptations.³²

Summarizing the disagreement with the majority's approach, the dissent concluded:

The people, through their elected

representatives in the General Assembly, specifically retained state imposed electrocution for all death-sentenced inmates who committed capital crimes before May 1, 2000. . . . If I were the General Assembly, I might make a different law. "But, while we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators." *Gregg*, 428 U.S. at 174-175, 96 S. Ct. 2909. However tempted, however much they may dislike a law, courts should not use judicial power to transform their preferences into constitutional mandates. Because today's decision reflects not the evolving standards of decency of the people of Georgia, but the evolving opinions of the majority members of this Court, I dissent.³³

In another, less controversial capital case, the Georgia Supreme Court determined that the practice of permitting the use of Biblical references in closing arguments in death penalty cases violated the defendant's right to due process.³⁴ In so holding, the court acknowledged that many of its prior rulings permitted religious references in closing arguments, and that it was "difficult to draw a precise line between religious arguments that are acceptable and those that are objectionable."³⁵ Observing, however, that "[t]his Court has noted its concern about the use of biblical authority during closing arguments in death penalty trials,"³⁶ and that "at least one state supreme court has adopted a rule prohibiting prosecutors from relying on any religious writing to support the death penalty during closing argument,"³⁷ the court concluded that "the assistant district attorney in this case overstepped the line in directly quoting religious authority as mandating a death sentence." Summing up its analysis, the court concluded: "Language of command and obligation from a source other than Georgia law should not be presented to a jury."³⁸

The dissent took issue with both the majority's legal analysis and the application of that analysis to the facts of the case:

I believe that the reversal of the death sentence

in this case constitutes an unjustified deviation from controlling precedent. The trial court properly relied upon the previous pronouncements of this Court. . . . In my opinion, either Carruthers' death sentence should be affirmed or the precedent which compels that result should be overruled. Because the majority does neither, I respectfully dissent to the reversal of the sentence.³⁹

Addressing directly the majority's reliance on another jurisdiction's ban on religious references in death penalty sentencings, the dissent noted that "regardless of the rule in other jurisdictions, '[i]t is not and has never been the law of this state that religion may play no part in the sentencing phase of a death-penalty trial.'"⁴⁰

The dissent then rejected the majority's assertion that the line between appropriate and inappropriate religious references was difficult to draw:

To the contrary, I submit that the dividing line has long been recognized in this state, and heretofore applied with little or no difficulty. In *Hill v. State*, 263 Ga. 37, 46(19), 427 S.E.2d 770 (1993), this Court clearly held that, in Georgia, while it is improper to urge imposition of the death penalty based upon the defendant's religious beliefs or to argue that the teachings of a particular religion mandate the imposition of that sentence, the prosecutor nevertheless " "may allude to such principles of divine law relating to transactions of men as may be appropriate to the case." (Cit.)' [Cit.]"⁴¹

Turning to the majority's factual analysis, the dissent disputed the majority's conclusion that the prosecutor in this case had crossed the line: "The portions of the State's closing argument quoted by the majority clearly show that the prosecutor did not make any prejudicial reference to the Bible as a separate and independent source of authority for returning a death sentence against Carruthers."⁴² The dissent concluded:

Simply put, the majority reverses Carruthers'

death penalty because the Assistant District Attorney made a passionate, but proper, argument and was successful in obtaining the maximum punishment for the murder of which Carruthers was convicted in this case.⁴³

The Georgia Supreme Court's expansion of constitutional protections is not limited, however, to death penalty jurisprudence. Since 1998, the court has also significantly expanded the right of privacy that it has said is embodied in the Georgia Constitution.

In *Powell v. State*, for example, the court held that the statute criminalizing sodomy—which predated the current state constitution by a century—infringed unconstitutionally on the privacy rights of consenting adults to engage in non-commercial sodomy in a private home.⁴⁴ Although the court acknowledged that the state constitution permits the legislature to exercise police powers to serve a public purpose, the court concluded that the sodomy statute served no public purpose because it only regulated "the private conduct of consenting adults."⁴⁵

Putting aside whether consensual sodomy should be decriminalized, the dissent asserted that the *Powell* court usurped the legislature's authority and allowed the Georgia Supreme Court, rather than the elected members of the General Assembly, to make policy choices for the state. The dissent went on to predict the impact the *Powell* precedent would have on certain other criminal cases:

By equating the general constitutional guarantee of "liberty" to all Georgia citizens with the right of each individual citizen to engage in self-indulgent but self-contained acts of permissiveness, it appears that the majority has now called into constitutional question any criminal statute which proscribes an act that, at least to the satisfaction of a majority of this Court, does not cause sufficient harm to anyone other than the actual participants. Thus, to give but one example, the constitutionality of criminal laws which forbid the possession and use of certain drugs has suddenly become questionable.⁴⁶

The Georgia Supreme Court has, in fact, extended

their holding in *Powell* to other criminal cases. *In re J.M.* is one such case where a 16 year-old defendant was adjudicated delinquent for violating Georgia's fornication statute by having sex with his 16 year-old girlfriend in her bedroom in her parent's home.⁴⁷ The defendant appealed, arguing that his constitutional right to privacy prohibits the state from criminalizing his conduct.

Relying on *Powell*'s holding—that the “Georgia Constitution protects from criminal sanction private, unforced, non-commercial acts of sexual intimacy between persons legally able to consent”—the Georgia Supreme Court reversed the defendant's conviction.⁴⁸ As *In re J.M.* demonstrates, the sweeping language regarding the scope of protected privacy rights under the Georgia Constitution in *Powell* lends itself to broad application, and it is difficult to discern where the court might decide to draw this line.

CONCLUSION

6 Can a roadmap to the Georgia Supreme Court's future jurisprudence be discerned from the cases analyzed herein? Are the justices substituting their judgment for that of the legislature? It is difficult to say with any certainty. The court's overall substantive jurisprudence is not capable of being characterized as either overwhelmingly activist or restrained.

The majority of decisions catalogued in this paper had one common feature—a split decision with an often forceful dissent. While this may seem unremarkable, there are, in fact, many state supreme courts where such pronounced splits do not exist. Much like its current work, the Georgia Supreme Court's future decision-making likely will be shaped by important differences among the justices on the rules of statutory interpretation, the scope of judicial review, and the proper level of deference accorded to the political branches of government. And in a state such as Georgia where the people are empowered to participate in judicial selection directly, it is therefore essential that these broad issues of judicial philosophy are better appreciated and debated in the public square.

ENDNOTES

¹ *Gregg v. Georgia*, 428 U.S. 153, 175 (1976), (quoting *Dennis v. United States*, 341 U.S. 494, 525 (1951)) (Frankfurter, J., concurring in affirmance of judgment).

² See, e.g., Craig M. Bradley, *Are State Courts Enforcing The Fourth Amendment? A Preliminary Study*, 77 GEO. L.J. 251, 263 (Dec. 1988) (discussing the Georgia courts as more liberal in the 1970s and more conservative in the 1980s).

³ *Id.*; see also Roy H. Schwartz, *Right To Privacy—A 165-Year Old Georgia Statute That Prohibits Certain Sexual Acts Violates The Right To Privacy As Guaranteed By The Georgia Constitution's Due Process Clause*, 31 RUTGERS L.J. 1137 (“Many legal scholars and practicing attorneys believe that the once-conservative Georgia Supreme Court has shifted more towards the center.” (citing *Georgia Supreme Court: A Shift In Philosophy*, ATLANTA J. CONST. (May 19, 1998)); cf. *Robinson v. Kroger Co.*, 268 Ga. 735, 736-737 (1997) (describing the pendulum-like shift in the Georgia Supreme Court's jurisprudence in slip and fall cases from more plaintiff-friendly in the pre-1980s to the more pro-defense in the 1980s and returning to more pro-plaintiff in the 1990s)).

⁴ It bears noting that the Georgia General Assembly passed a tort reform package, known as Senate Bill 3, in February 2005 and it included such measures as (1) caps on non-economic damages in medical malpractice cases; (2) enhanced pleading requirements for medical malpractice cases; (3) an offer of judgment provision; and (4) a requirement that a medical malpractice plaintiff provide a release of his or her medical records as a condition to filing a lawsuit in state court. Senate Bill 3 has fared poorly in Georgia's courts. A trial court struck the offer of judgment rule. *Muenster v. Suh*, No. Civ. A. 03-A-01873-4, 2005 WL 2476223 (DeKalb County Superior Court, Sept. 22, 2005). The Georgia Court of Appeals struck the provision regarding the medical records release as preempted by HIPAA. *Northlake Med. Ctr., LLC v. Queen*, No. A06A0540, 2006 WL 1914716 at *1 (Ga. Ct. App. Jul. 13, 2006). And the Supreme Court invalidated new venue provisions. *EHCA Cartersville, LLC v. Turner*, 280 Ga. 333 (2006). It remains to be seen whether the courts will uphold the remaining provisions of Senate Bill 3 and the additional tort reform legislation

enacted by the 2006 session of the Georgia General Assembly.

⁵ 277 Ga. 653 (2004).

⁶ *Id.* at 653-54.

⁷ *Id.* at 657 (Fletcher, C.J., dissenting).

⁸ *Id.* at 658 (Fletcher, C.J., dissenting) (“The majority states that its holding does not conflict with the well-settled principle that the doctrine of *res ipsa loquitur* [i.e., the injury speaks for itself] is not applicable in medical malpractice cases. But of course it does.”).

⁹ 268 Ga. 735 (1997).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 743.

¹⁴ 246 Ga. 620, 736 (1980) (quoting *Alterman*, 246 Ga. at 623).

¹⁵ *Id.*

¹⁶ 278 Ga. 625 (2004).

¹⁷ *Id.*

¹⁸ *Id.* at 626-27.

¹⁹ *Id.*

²⁰ *Id.* at 628.

²¹ *Id.*

²² *Id.* at 629.

²³ 274 Ga. 115, 118 (2001). This decision was rendered in response to a certified question to the Georgia Supreme Court from the United States Court of Appeals for the Eleventh Circuit.

²⁴ 276 Ga. 359 (2003).

²⁵ *Id.* at 360.

²⁶ *Id.* at 365.

²⁷ *Id.* at 366 (Fletcher, C.J., dissenting) (emphasis added).

²⁸ 274 Ga. 327, 329 (2001).

²⁹ *Id.* at 335.

³⁰ The court declined to enforce the death penalty in non-constitutional cases. For example, in *Henry v. State*, 278 Ga. 617 (2004), the court reversed a death sentence imposed on the basis of future dangerousness. There, the court determined that the “future dangerousness” prong

could only be satisfied by evidence that the defendant would be dangerous *in prison*, and that evidence of the defendant’s dangerous behavior outside of prison was *irrelevant* to whether the defendant would be a danger in the prison system. Thus, the court determined that the prosecutor’s evidence of dangerousness—that the defendant had gained access to a vulnerable victim’s home by impersonating an FBI agent, that he had held the victim’s daughter as a hostage to force the victim to open a safe at her place of business, that he had strangled the daughter to death, that he had likely counseled his accomplice to strangle the victim, and that he had fled to another state where he robbed a bank—was irrelevant to whether the defendant would be a significant danger to prison personnel and other inmates. A minority of the court issued a strongly worded dissent:

Wholly disregarding all applicable court rules and controlling case law, the majority . . . reverses the valid death sentence imposed in this case in which the appellant pled guilty to the malice murder of Regina Dates. . . . Because I cannot countenance such a misuse of appellate authority, I am compelled to dissent....

[T]he majority does not even acknowledge, much less apply, existing relevant case law in its analysis of the State’s argument that Henry would represent a danger to others in prison [T]he only authority cited for [the majority’s position that the DA’s argument was improper] is a special concurrence by a single Justice. *Pye v. State*, 269 Ga. 779, 789-791, 505 S.E.2d 4 (1998) (Fletcher, P.J., concurring specially). The new rule which the Court now creates directly contradicts the actual holding of the *majority* opinion in *Pye*, even though, until today, we have followed that holding in subsequent cases.

Id. at 622-24 (Carley, J., dissenting) (additional citations omitted).

³¹ *Id.* at 337 (Thompson, J., dissenting) (citations omitted).

³² *Id.* at 338-39 (emphasis in the original).

³³ *Id.* at 34.

³⁴ *See Carruthers v. State*, 272 Ga. 306 (2000).

³⁵ *Id.* at 310.

³⁶ *Id.* at 311. The court cited dissents in several cases involving Biblical references to support the view that prosecutors have been repeatedly warned about this practice. *See id.* at 311 n. 12.

³⁷ *Id.* at 311.

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- ³⁸ *Id.*
- ³⁹ *Id.* at 318 (Carley, J., dissenting).
- ⁴⁰ *Id.* (citations omitted).
- ⁴¹ *Id.* (additional citations omitted).
- ⁴² *Id.* at 319.
- ⁴³ *Id.*
- ⁴⁴ 270 Ga. 327 (1998).
- ⁴⁵ *Id.* at 334.
- ⁴⁶ *Id.* at 343 (Carley, J., dissenting).
- ⁴⁷ 276 Ga. 88 (2003).
- ⁴⁸ *Id.*



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