


B&B BALCH & BINGHAM LLP

Appellate Monthly



Georgia Supreme Court

IN THIS ISSUE

DECISIONS ISSUED DURING JULY 2009

BALCH & BINGHAM APPELLATE VICTORIES

Bryant v. CEO DeKalb Co. Vernon Jones, No. 06-16591 (11th Cir.) [*Civil Rights and Qualified Immunity: County officials were not entitled to qualified immunity where they engaged in a systematic and intentional plan to eliminate white managers and replace them with African-Americans.*] (Tjoflat, 3-0).

GEORGIA COURT OF APPEALS

Adams v. Georgia Power Co., No. A09A0759 [*Trespass and Eminent Domain: Claims for trespass and inverse condemnation must be brought within four (4) year statute of limitation.*] (Doyle, 3-0).

Atlanta Women's Health Group, P.C. v. Clemons, No. A09A1287 [*Civil Practice: If the decision of an appellate court subsequently becomes incorrect because the law changes, either by subsequent case law or later-enacted statutes, it may not be binding precedent for other decisions, but it remains the law of the case between the original parties to the case.*] (Blackburn, 3-0).

Chandler v. Opensided MRI of Atlanta, LLC, No. A09A0445 [*Civil Practice: Failure to file an expert affidavit with a complaint renders the complaint voidable, not void, but does not preclude plaintiff from renewing dismissed complaint after expiration of statute of limitations if defendant fails to file a motion to dismiss contemporaneously with initial responsive pleading.*] (Adams, 8-4).

Chatham County Board of Tax Assessors v. Bock, No. A09A1274 [*Property Tax: Owner of historical property can benefit from both the RHPPA and the Stephens-Day homestead exemption because nothing in the statutes precludes the simultaneous application of both acts.*] (Blackburn, 3-0).

Community Newspaper Holdings, Inc. v. King, No. A09A1329 [*Libel: No libel action will lie where newspaper fairly, accurately, and honestly reflects statements received from law enforcement, even if statements are false.*] (Mikell, 3-0).

Coosa Valley Technical College v. West, No. A09A0761 [*Sovereign Immunity: Course instructors at a state-operated technical college did not waive the State's sovereign immunity*

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from liability for the negligent conduct of an independent contractor where the state employees did not have control over and did not supervise the independent contractor.] (Miller, 4-2).

Jordan Jones & Goulding, Inc. v. Newell Recycling of Atlanta, Inc., No. A09A1397 [*Statute of Limitations: The four-year statute of limitation in O.C.G.A. § 9-3-25 applies to all professional malpractice claims including those where a written contract exists.*] (Blackburn, 3-0).

Longleaf Energy Associates, LLC v. Friends of Chattahoochee, Inc., Nos. A09A0387, A09A0388 [*Environmental Law: The air quality permit issued by the Georgia EPD was not required to include a CO2 emission limitation because neither the Federal Clean Air Act nor the Georgia Air Quality Act contain regulations controlling CO2 emissions.*] (Andrews, 3-0).

CASE SUMMARIES

Bryant v. CEO DeKalb Co. Vernon Jones, No. 06-16591 (11th Cir., July 31, 2009). The Eleventh Circuit Court of Appeals affirmed the denial of summary judgment to Defendants, DeKalb County, Georgia officials, in their official and individual capacities regarding Plaintiffs' 42 U.S.C. § 1981 racial harassment and retaliation claims. The Eleventh Circuit found that Defendants had engaged in a systematic and intentional plan to eliminate white managers and officials throughout DeKalb County and to replace them with African-Americans. Specifically, the Eleventh Circuit found that three former DeKalb County Parks Department employees had been subject to intentional racial discrimination and harassment and that their job duties had been illegally transferred to African-Americans solely on racial grounds. The Eleventh Circuit explicitly found that the pattern of harassment and discrimination was "overt and unabashed." The Eleventh Circuit further found that an African-American plaintiff could proceed to trial on his claims that he was terminated for refusing to participate in the aforementioned discrimination in violation of § 1981. Plaintiffs were represented by **Balch & Bingham attorneys Michael J. Bowers, Christopher S. Anulewicz, James L. Hollis, Alex Khoury and Jeremy Gregory**.

Adams v. Georgia Power Co., No. A09A0759 (July 10, 2009). Ronald Adams appealed the grant of Georgia Power Company's motion for summary judgment. Mr. Adams brought the original suit seeking damages for trespass, a declaratory judgment that Georgia Power lacked rights to occupy or enter his property, and an injunction to prevent Georgia Power from occupying or entering his property in the future. Ronald Adams purchased the subject property in 1999. Before Adams owned the property, in 1953, Georgia Power executed a 25-year lease agreement with Adams' predecessor to allow for the installation, maintenance and operation of power lines on the property. Georgia Power operated power lines on the property since at least 1991, and through 2002. In 2006 Georgia Power offered to pay Adams to update the easement over the property, but no agreement was reached.

The Georgia Court of Appeals granted Georgia Power's motion for summary judgment on the grounds that Adams' claim was time-barred. The earlier lease on the property was recorded, giving Adams notice that Georgia Power had made its initial entry on to the property at the time he purchased it. Claims for both trespass and inverse condemnation must be brought within four (4) years pursuant to OCGA § 9-3-30. Therefore, to the extent that Adams had a cognizable claim as to Georgia Power's actions on his property, it expired when the statute of limitation ran four (4) years after he purchased the property in 1999.

Atlanta Women's Health Group, P.C. v. Clemons, No. A09A1287 (July 14, 2009). Plaintiffs sued the Atlanta Women's Health Group for injuries suffered by their minor daughter. Plaintiffs did not file an expert affidavit with the complaint, which must be filed in a suit against a licensed professional or licensed healthcare facility. Atlanta Women's Health Group filed a motion to dismiss for the failure to file the affidavit. The trial court denied the motion since it could not tell whether the complaint alleged ordinary or professional negligence. Atlanta Women's Health Group appealed, and the Court of Appeals held that an expert affidavit is required if the issue involves a medical question, but plaintiffs could still bring an ordinary negligence claim. In a motion for reconsideration, plaintiffs acknowledged that they were alleging professional negligence and requested that the Court specifically state that an expert affidavit was not required. The Court of Appeals refused.

Upon return to the trial court, the Atlanta Women's Health Group filed a second motion to dismiss for plaintiffs' failure to file an expert affidavit. The trial court denied this motion, reasoning that a new

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[HOME PAGE](#)

amendment to the statute showed that an expert affidavit was only required if a licensed professional or licensed health care entity is sued. Once again, Atlanta Women's Health Group appealed.

On appeal, the Court of Appeals reiterated its holding from the first appeal, that an expert affidavit is required if the suit is based on a medical question. The Court of Appeals then stated that regardless of the statute, the issue of whether plaintiffs could bring a medical malpractice claim without an expert affidavit was already answered in the negative as to plaintiffs. According to the court, "If the decision of an appellate court thereafter becomes 'incorrect' because the law changes--either because of subsequent case law or because of later-enacted statutes--it may not be binding precedent for other situations. However, between the parties to the original decision it remains the law of the case."

Chandler v. Opensided MRI of Atlanta, LLC, No. A09A0445 (July 15, 2009). In a re-filed civil action, plaintiffs Ollie Mae and Grady Chandler sued Opensided MRI of Atlanta, LLC, Opensided Management, LLC, and MMR Holdings, Inc., alleging Mrs. Chandler was injured after falling from an MRI table on May 18, 2005. On April 11, 2007, nearly one month before expiration of the statute of limitations, the Chandlers filed suit alleging the defendants caused Mrs. Chandler's fall by negligently failing to lower the MRI table or assist Mrs. Chandler from the table. After the statute of limitations had run, the defendants filed their answers, including defenses that the complaint failed to state a claim and that it did not comply with the affidavit requirement. Five months later, defendants filed a motion to dismiss for failure to file an expert affidavit. In June 2007, the Chandlers voluntarily dismissed their complaint without prejudice. On December 12, 2007, the Chandlers re-filed the complaint and attached an affidavit of a radiology technician, which alleged that the failure to lower the MRI table and assist Mrs. Chandler breached the standard of care for radiological technicians. Shortly thereafter, defendants re-filed their motion to dismiss. The trial court granted defendant's motion to dismiss on the ground that the Chandlers failed to file an expert affidavit with their original complaint in accordance with O.C.G.A. § 9-11-9(a). On appeal, the Court of Appeals reversed the trial court and found there was not enough information in the record to determine whether the original complaint alleged only professional malpractice. The Court of Appeals found that the defendants waived their ability to prevent a plaintiff from filing a renewal action after the running of the statute of limitations because the plain language of § 9-11-9.1(f) provides that a defendant must file a motion to dismiss contemporaneously with the answer in order to enforce that limitation. The Court of Appeals stated that it would be unfair to ignore the obligations imposed on defendants when such heavy obligations are placed on plaintiffs in professional negligence actions. Thus, because the defendants failed to move to dismiss plaintiffs' original complaint contemporaneously with their initial responsive pleading, plaintiffs were authorized to renew their complaint after the running of the statute of limitations even though they did not have an affidavit at the time of the original complaint.

Chatham County Board of Tax Assessors v. Bock, No. A09A1274 (July 17, 2009). In 1997, Bock purchased historic property in Savannah, Georgia that qualified for favorable property tax status under O.C.G.A. § 48-5-7.2(a). The law requires the Board of Assessors to fix the fair market value of qualifying property at the higher of the purchase price or the fair market value for eight years. Bock's preferential assessment expired on January 1, 2007. All Chatham County residents qualify for a homestead exemption from county ad valorem taxes in an amount equal to the assessed value of their home. The homestead exemption became effective on January 1, 2001, when Bock's assessment was frozen under the historical property tax statute. In 2008, the Board of Assessors based Bock's homestead exemption on the fair market value of the property after the expiration of the preferential assessment rather than as of the effective date of the homestead exemption. The Board of Assessors' position was that Bock cannot benefit from both statutes. Bock sued and asked the trial court for a declaratory judgment that she can benefit from both the preferential assessment and the homestead exemption. The Court of Appeals held that the plain and unambiguous language of the two laws does not preclude the simultaneous application of both acts.

Coosa Valley Technical College v. West, No. A09A0761 (July 15, 2009). Plaintiffs in this case sued the defendants for burns their son sustained when he spilled on himself a corrosive artificial fingernail primer solution his mother had obtained from a guest speaker in her cosmetology class at Coosa Valley Technical College. The course instructors invited the guest speaker, a cosmetology vendor, to give a presentation on applying artificial fingernails. As part of the presentation, the students in the cosmetology course were advised to buy a "nail kit" containing various supplies, including chemicals, necessary in the application of artificial nails. The students could, but were not required to, obtain a nail kit from the guest speaker, whose kit contained a nail primer solution made up of methacrylic acid, which is corrosive to human tissue. The guest speaker bottled her nail primer solution in small bottles without a warning label indicating the hazard presented by the methacrylic acid.

The State Defendants in the case moved to have the case dismissed on the grounds of sovereign immunity. The trial court treated the State Defendants' motion as a motion to dismiss under O.C.G.A. § 9-11-12(b)(6) and denied the motion under the "failure to state a claim" standard of review. The Court of Appeals held that a motion to dismiss on the grounds of sovereign immunity is a motion to dismiss for lack of subject matter jurisdiction under O.C.G.A. § 9-11-12(b)(1), and accordingly, the trial court erred by applying the wrong standard of review. Under the 12(b)(1) standard of review, plaintiffs bore the burden of showing that the State Defendants had waived their sovereign immunity. The Court of Appeals held that plaintiffs failed to satisfy that burden for three reasons: (1) plaintiffs did not allege in their complaint any independent acts of negligence on the part of the State Defendants (as opposed to the

guest speaker, who was an independent contractor); (2) evidence showed that the guest speaker, not the school, was the seller of the nail kits, thus the school did not have a duty to inspect the nail kits or warn about the dangerous chemicals contained therein; and (3) there was no evidence in the record that the school had control over the guest speaker's presentation. Therefore, the school did not have a duty to supervise the guest speaker's presentation. Accordingly, the Court of Appeals held that the State Defendants had not waived their sovereign immunity and reversed the trial court's denial of the motion to dismiss.

Community Newspaper Holdings, Inc. v. King, No. A09A1329 (July 17, 2009). King was an employee of Central State Hospital in Milledgeville. King was accused of helping two Baldwin County prisoners escape from custody while at the hospital. A reporter wrote two articles decrying King's actions that were published in local newspapers. The charges against King were ultimately dismissed, and he filed a libel action against the reporter and the newspapers. The reporter and newspapers moved for summary judgment, contending that truthful reports of information received from any arresting officer or police authorities are conditionally privileged under O.C.G.A. 51-5-7(8). The reporter's affidavit in support of the motion for summary judgment reflected that statements in both articles were derived from an interview with the Sheriff, and a report issued by hospital police. Because the reporter accurately reported statements contained in the police report and made to her by the Sheriff, and because the newspaper fairly, accurately, honestly and with substantial accuracy reflected those statements, the newspapers and the reporter were entitled to summary judgment on King's libel claims.

Jordan Jones & Goulding, Inc. v. Newell Recycling of Atlanta, Inc., No. A09A1397 (July 21, 2009). Defendant Jordan Jones & Goulding, Inc. ("JJ&G"), a professional engineering firm, appealed from the trial court's denial of its motion for summary judgment on a breach of contract claim asserted by Plaintiff Newell Recycling of Atlanta, Inc. ("Newell"). JJ&G argued that Newell's breach of contract claim was subject to the four-year statute of limitation applicable to professional malpractice claims as Newell's contract claim alleged that JG&G failed to provide competent, professional design and engineering services. The trial court denied JG&G's summary judgment motion holding, in part, that the four-year statute of limitation applied to claims for *legal* malpractice based upon a written contract for legal services, but that other professional malpractice claims based on a written contract were subject to the six-year statute of limitation found in O.C.G.A. § 9-3-24. The Georgia Court of Appeals reversed the trial court and held that the four-year statute of limitation in O.C.G.A. § 9-3-25 applies to all professional malpractice claims including those where a written contract exists, stating that an express contractual duty was not at issue, but rather the implied legal obligation to perform services contracted for in conformity with the professional standard of care.

Longleaf Energy Associates, LLC v. Friends of Chattahoochee, Inc., Nos. A09A0387, A09A0388 (July 7, 2009). Plaintiffs Friends of Chattahoochee, Inc. and the Sierra Club brought this action to challenge the air quality permit issued by the Environmental Protection Division ("EPD") of the Georgia Department of Natural Resources to Longleaf Energy Associates, LLC, for the construction of a pulverized coal-fired electric power plant. Plaintiffs sought to block the plant's construction based on the U.S. Supreme Court's ruling in *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007) allowing greenhouse gases to be regulated under the Clean Air Act. In the underlying action, the Administrative Law Judge ("ALJ") affirmed the issuance of the permit, and the Superior Court of Fulton County invalidated the permit. The Court of Appeals reversed and remanded the case to the ALJ for a de novo hearing.

The primary decisions of the Court of Appeals involved regulation of CO₂, reliance on the best available control technology ("BACT"), and the standard of review required by the ALJ in reviewing an EPD permitting decision. The Court held the EPD was not required to include a CO₂ emission limitation in the air quality permit because neither the Federal Clean Air Act nor the Georgia Air Quality Act control or limit CO₂. Such a ruling, the Court noted, would lead to "a regulatory burden on Georgia never imposed elsewhere." As to the BACT analysis, the Court found the EPD was not required to consider alternative control technology that would constitute a redesign of the plant if applied. In reaching its decision, the Court agreed with the Superior Court only on the evaluation of the ALJ of the EPD permit. Rather than showing deference to the EPD's decision, the ALJ was required to conduct a de novo review and render an independent determination related to the issuance of the permit.