Legal Backgrounder

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GEORGIA SUPREME COURT REJECTS CONSTITUTIONAL CHALLENGE TO EXPERT TESTIMONY LAW

by

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In 2005, the Georgia General Assembly enacted tort reform legislation that affected the state's existing laws on venue, medical malpractice claims, offers of judgment, and damage awards in certain civil actions. As part of Senate Bill 3, the General Assembly enacted O.C.G.A. section 24-9-67.1, which governs the admission of expert testimony in civil cases.[1] In *Mason v. Home Depot U.S.A., Inc. et al.*, 283 Ga. 271, 658 S.E.2d 603 (2008), the Supreme Court of Georgia upheld the constitutionality of the statute over challenges on several fronts. The decision in *Mason* provides for a uniform approach to the analysis of the admissibility of expert testimony in line with the Federal Rules of Evidence and also paves the way for Georgia's trial courts to require expert testimony to meet higher standards for admissibility than perhaps any other state in the nation.

Prior to the enactment of O.C.G.A. section 24-9-67.1, although moving towards an approach more consistent with the Federal Rules of Evidence, Georgia still employed the more traditional rule of prohibiting experts from basing opinions on facts "as proved by other witnesses" unless presented in the form of a hypothetical question.[2] Federal Rule of Evidence 703, however, permitted experts to testify about the underlying data upon which they relied without the necessity of an often confusing hypothetical.[3] O.C.G.A. section 24-9-67.1(a) is nearly identical to Federal Rule of Evidence 703. Although perhaps more permissive in terms of allowing experts to testify regarding facts not admissible in evidence, subsection (a) of Georgia's statute is tempered by subsection (b). Following the decision in *Mason* that struck one contradictory phrase, subsection (b) is also now virtually identical to Federal Rule of Evidence 702. It

[1]SB 3, as passed, 2005 Ga. Gen. Assem.

[2]Paul S. Milich, Georgia Rules of Evidence, § 15.5 (2d ed. 2002) (citing O.C.G.A. § 24-9-67; *Metropolitan Life Ins. Co. v. Saul*, 189 Ga. 1, 5 S.E.214, 219 (1939).

[3]*Id. See also* Federal Rule of Evidence 703.

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provides a framework for the admission of expert testimony and requires (1) the testimony to be based on sufficient facts or data; (2) the testimony to be the product of reliable principles and methods; and (3) the witness to have applied the principles and methods reliably to the facts of the case.[4] Another provision in the statute makes clear the legislature's intent that in applying the statute, Georgia's courts are to require high scientific standards from experts.

In 1997, the Masons sued The Home Depot and The Flecto Company, alleging that Arvin Mason was injured while using Varathane, a floor covering product manufactured by Flecto and sold by Home Depot.[5] Applying the newly enacted O.C.G.A. section 24-9-67.1, the trial court granted the defendants' motion to exclude the testimony of the Masons' chemical sensitivity and industrial hygiene and toxicology experts. In a direct appeal to the Georgia's high court, the Masons contended that the statute violated both the equal protection and due process clauses of the United States and Georgia constitutions, violated the constitutional prohibition against retroactive laws, and constituted an impermissible usurpation of judicial authority.[6]

Because section 24-9-67.1 was passed eight years after the Masons filed their civil action, they argued that the trial court's application of the statute to exclude two of their expert witnesses violated the state constitutional prohibition on retroactive application of laws.[7] But the Supreme Court of Georgia determined that the evidentiary rules at issue in the statute affected only the procedure and practice of the courts and distinguished between retroactive application of substantive versus procedural laws. The Masons argued that their years of preparation of their case, expenses in locating expert witnesses, and efforts to develop their testimony in line with the prior governing statute amounted to a vested right to use those experts. The Court concluded that parties could not have rights vested in evidentiary rules and even though the enactment and application of O.C.G.A. section 24-9-67.1 was disadvantageous to the Masons, retroactive application of the statute was permissible.[8]

The Georgia Supreme Court also rejected the Masons' argument that O.C.G.A. section 24-9-67.1 violated the equal protection guarantees of the United States and Georgia constitutions because the new statute imposed "more stringent requirements" in civil actions than criminal, placing them at a disadvantage compared to parties in criminal cases.[9] Prior to the tort reform provisions of Senate Bill 3, O.C.G.A. section 24-9-67 governed the admission of expert testimony. Applying to both civil and criminal cases, it stated that "[t]he opinions of experts on any question of science, skill, trade, or like questions shall always be admissible; and such opinions may be given on the facts as proved by other witnesses." The General Assembly amended section 24-9-67 to apply solely to criminal actions and enacted section 24-9-67.1 to govern the admissibility of expert opinions in civil actions.

In response to the Masons' argument that the statute violated their right to equal protection, the Court noted that the legislature may "adopt one type of procedure for one class and a different type for another."[10] The Georgia Supreme Court previously held that, for purposes of an equal protection analysis, defendants in criminal cases are similarly situated only to others charged with the same crimes.[11] In *Mason*, the Court extended its analysis and concluded that "only those asserting or defending against the same cause

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[4]O.C.G.A. § 24-9-67.1(b).

[5]*Mason v. Home Depot U.S.A., Inc. et al.*, 283 Ga. 271, 658 S.E.2d 603, 605 (2008).

[6]*Id*. at 283 Ga. 273, 658 S.E.2d at 606.

[7]"No bill of attainder, ex post facto law, retroactive law, or laws impairing the obligation of contract or making irrevocable grant of special privileges or immunities shall be passed." GA. CONST. ART. 1, § 1, ¶ 10.

[8]*Mason*, 283 Ga. at 278-79, 658 S.E.2d at 609-10.

[9]*Id.* at 273, 658 S.E.2d at 606.

[10]*Id.* at 274, 658 S.E.2d at 607 (citing *Dohany v. Rogers*, 281 U.S. 362, 369 (1930)). A plaintiff alleging that a statute violates the guarantees of equal protection of the laws must first establish that he is similarly situated to members of the class who are treated differently. *Quarterman v. State*, 282 Ga. 383, 384, 651 S.E.2d 32, 34 (2007).

[11]*Woodard v. State*, 269 Ga. 317, 321-22, 496 S.E.2d 896, 900-01 (1998).

of action are similarly situated in the civil law arena, and the parties to civil cases are not similarly situated to those engaged in criminal prosecutions."[12] Because the Masons, as civil litigants, could not make the required showing that they were similarly situated to criminal defendants, their claim that O.C.G.A. section 24-9-67.1 violated their equal protection rights failed.[13]

The Masons also brought a due process challenge based on subsections (a) and (b)(1) of the statute, arguing that the entire statute should be stricken because of conflicting provisions in those subsections.[14] The conflict arose over text in subsection (a) stating that facts and data relied upon by experts need not be admissible while text in subsection (b) suggests that the expert may only offer testimony based on facts and data "which are or will be admitted into evidence at the hearing or trial."[15] The Georgia Supreme Court agreed with both the trial court and the Masons and held that the two provisions could not be harmonized and, as drafted, rendered the statute unconstitutionally vague. But instead of striking the entire statute, the Court upheld the trial court's decision to sever the offending portion and preserve the remaining sections.[16] In doing so, the trial court struck from subsection (b)(1) the phrase "which are or will be admitted into evidence at the hearing or trial." With this change, subsection (b) is now substantially identical to Federal Rule of Evidence 703.

The Masons attacked subsection (f) of O.C.G.A. section 24-9-67.1 on two fronts. First, they argued that subsection (f) was an unconstitutional delegation of legislative authority because its second sentence stated that "in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases."[17] The trial court agreed, struck the sentence as an unconstitutional usurpation of judicial authority, but went on to apply the surviving provisions and excluded the Masons' experts.[18]

The high court disagreed, and reinstated the full text of subsection (f). It determined that the legislature's suggestion that the courts "may" consider certain other judicial opinions did not "invade the province of the judiciary" because it was a permissive suggestion rather than a mandate.[19] The Court compared the language of O.C.G.A. section 24-9-67.1(f) to other situations where it has determined that it is both helpful and proper for Georgia's courts to consider federal court interpretations of statutes that are substantially similar to Georgia laws.[20]

Because it struck subsection (f) based on its second sentence, the trial court did not rule on the Masons' assertion that the first sentence was also unconstitutional. But the Georgia Supreme Court addressed the issue based on the arguments on appeal. The first sentence of subsection (f) expresses the legislature's intent that, "in all civil cases, the courts of the State of Georgia not be viewed as open to expert

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[12] *Mason v. Home Depot U.S.A., Inc. et al.*, 283 Ga. 271, 274, 658 S.E.2d 603, 607 (2008).

[13] *Id.*

[14] *Id.* at 275, 658 S.E.2d at 607.

[15] *Id. See also* O.C.G.A. § 24-9-67.1(b).

[16] *Mason*, 283 Ga. at 276, 658 S.E.2d at 608.

[17] *Mason v. Home Depot U.S.A., Inc. et al.*, 283 Ga. 271, 275, 658 S.E.2d 603, 608 (2008) (citing O.C.G.A. § 24-9-67.1(f)).

[18] For the second time, the trial court applied the statute's severability clause and struck only the offending language while leaving the rest of the statute intact.

[19] *Mason*, 283 at 276-77, 658 S.E.2d at 608-09.

[20] *Id.* (citing *Barnum v. Coastal Health Svcs., Inc.*, 288 Ga. App. 209, 215, 653 S.E.2d 816, 822 (2007) (noting similarity between the Georgia Civil Practice Act and Federal Rules of Civil Procedure and concluding that it is proper to "consider and give weight to constructions placed on the federal rules by federal courts").

evidence that would not be admissible in other states."[21] The Masons argue that this language violated their due process guarantees because it potentially delegates to other states the authority to proscribe rules of evidence applicable in Georgia. Additionally, the Masons contended the language would function as a "command to the courts of Georgia to rewrite Georgia's law anytime any other jurisdiction announces a more strict standard for the admission of expert testimony."[22]

On appeal, the Court unequivocally stated that the first sentence of subsection (f) was nothing more than an "explication by the legislature of its goal in enacting the statute."[23] Such a statement, contained with the statute itself, can be helpful to courts in carrying out their duty to always "ascertain and give full effect to the legislative intent."[24] The effect of the Court's decision has yet to play out, but it suggests that in construing O.C.G.A. section 24-9-67.1, trial courts can—and perhaps should—seek the strictest possible application of the statute designed to require the highest level of reliability, principles and methods, and scientific data from expert witnesses.

Finally, after upholding the constitutionality of O.C.G.A. section 24-9-67.1 (with the contradictory phrase removed from section (b)(1)), the Georgia Supreme Court reviewed—and upheld—the trial court's exclusion of the Masons' two expert witnesses. In doing so, the Court approved of the trial court's reliance on *Daubert* and other federal decisions in applying the statute. The trial court excluded one of the Masons' experts because her methods were based solely on her own experience and opinions that had never been tested or published in any scientific journal.[25] On appeal, the Georgia Supreme Court upheld the exclusion of the expert, noting that the expert's use of differential diagnosis, to be admissible, should have been based on "scientifically valid decisions."[26] It also upheld the trial court's exclusion of the Masons' second expert after finding that he based his opinions on toxicity data concerning the chemical at issue on data he obtained from the Internet and from the Masons' own attorneys, and gave his opinion without regard to the quantity of the chemical present and its rates of evaporation.[27]

The decision in *Mason*, both in terms of the constitutionality of the statute following a multi-faceted attack and the rigor with which the trial court applied the statute suggests that Georgia courts will construe O.C.G.A. section 24-9-67.1 to allow juries to hear helpful testimony from an expert without the traditional, formulaic constraint of a hypothetical question, while requiring experts—if their testimony is to be admissible—to base their opinions on sound, reliable principles and methods.

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[21] O.C.G.A. § 24-9-67.1(f).
[22] *Mason*, 283 Ga. at 277, 658 S.E.2d at 609.
[23] *Id.*
[24] *Id.* (quoting *Moore v. Robinson*, 206 Ga. 27, 28, 55 S.E.2d 711, 714 (1949).
[25] *Mason*, 283 Ga. at 279, 658 S.E.2d at 610.
[26] *Id*. at 280, 658 S.E.2d at 610-11.
[27] *Id.*