

DAILY REPORT

A SMART READ FOR SMART READERS

Justices hear 'explosive' debate

CASE TURNS ON WHETHER school board's policy on goggles applied to plastic bottle rocket experiment

ALYSON M. PALMER
apalmer@alm.com

CONTINUING THEIR struggle with how much protection school employees should have from lawsuits, justices of the Supreme Court of Georgia on Monday engaged in a lively debate over the meaning of the term "explosive."

In June, the justices split 6-1 in favor of a mother who sued a school secretary who had let the plaintiff's daughter leave school with her father, who didn't have custody and wasn't supposed to pick up the child. On Monday, the defendant was a Forsyth County eighth-grade science teacher, Patricia Grammens, whose student, David Dollar, was injured in a classroom experiment.

According to the Court of Appeals decision that favored the student's father in part, the experiment was supposed to simulate a rocket through the use of a two-liter soda bottle, water and an air compressor. When Dollar was called on to launch the rocket, a metal pin involved in the experiment struck and injured his eye. According to his lawyer, Dollar has gone through four surgeries and is essentially blind.



JOHN DISNEY

Matthew Moffett represented the teacher who has been sued.

Dollar's father filed suit, pointing to a Forsyth County Board of Education policy that required anyone participating in instruction involving "[c]austic or explosive materials" to wear protective eye gear. None of the students was wearing eye protection when the bottle rocket experiment was conducted, according to the Court of Appeals decision. Grammens tried to defend herself by submitting the affidavit of a mechanical engineer who testified that the experiment "did not involve explosive materials or an explosion but rather was a controlled venting of pressure."

A state constitutional provision gives immunity to some public officials and employees for actions that fall within their discretion. Forsyth County State

Court Judge Philip C. Smith relied on that provision to grant summary judgment to Grammens, as well as a principal and school superintendent whom Dollar's father had sued.

A Court of Appeals panel—then-Chief Judge Anne Elizabeth Barnes, Presiding Judge Edward H. Johnson and Judge Herbert E. Phipps—agreed with Smith as to the principal and superintendent, but ruled that the case against Grammens should go forward. In October, the state Supreme Court agreed to take another look at the case, over the objection of Presiding Justice George H. Carley and Justices Hugh P. Thompson and P. Harris Hines.

Atlanta lawyer Matthew G. Moffett

See *Explosive*, page 5

Justices hear 'explosive' debate over suing teacher

Explosive, from page 1

appeared for the teacher Monday, arguing that she was entitled to summary judgment. At the outset, Carley asked Moffett whether the court would have to overrule last year's decision in the school secretary case, *McDowell v. Smith*, 285 Ga. 592, to rule the teacher's way.

No, responded Moffett, arguing that the two cases were different. The student release policy allegedly violated by the school secretary was simple and direct, argued Moffett, while the eye-protection policy essentially directed teachers to use their best judgment.

Justice David E. Nahmias asked Moffett whether teacher discretion still would be involved if the eye-protection policy clearly applied, such as where hydrochloric acid were being used. Moffett responded that his client had required eyewear in a situation like that. When pressed further by Nahmias, Moffett allowed that the eye-protection policy would constitute a simple and definite directive in that situation, more akin to the policy at issue in the *McDowell* case.

But several justices sounded dubious that the bottle rocket experiment didn't clearly fall within the county policy's dictate that eye protection be worn when using "explosive materials."

"If it could explode," asked Thompson, "it is explosive material, isn't it?"

Not according to the scientific record in the case, Moffett responded. Justice Harold D. Melton pressed him to explain.

"This was a controlled venting of pressure," Moffett explained. "This is a plastic two-liter Coke bottle. ... It's not dynamite. It's not gunpowder."

Justice Robert Benham, the lone dissenter in favor of the school secretary in the *McDowell* case, tried to help Moffett, noting a balloon could explode while being filled with air.

Moffett responded that was a good

point, arguing that a teacher wouldn't require goggles for that. Nahmias, who was honored in a national science talent search in high school and went on to investigate the Atlanta Centennial Olympic Park bomber as a federal prosecutor, added helpfully that even though one might say a balloon explodes, that's really "popping and venting."

Atlanta lawyer James D. Blitch IV, who appeared for the plaintiffs, tried to use Grammens' deposition testimony against her. "She said she knew the experiment could explode," Blitch told the justices.

That did not seem to convince Nahmias. He asked Blitch if the lawyer had any dictionary, expert or even lay person saying there were explosive materials involved in the bottle rocket experiment.

Blitch implied that wasn't necessary. "It is plain; it is simple," said Blitch, suggesting an exploding tire was an example of something that would fall under the policy.

Nahmias seemed incredulous that the plaintiffs could find a scientist to say a tire contained explosive material, suggesting that the court couldn't stretch the meaning of the word "explosive" too far. Nahmias noted he could slam the table in front of him and someone might say it sounded like an explosion.

If the Legislature wanted a narrower definition, such as "rapid chemical change," responded Blitch, it could have said so.

But if there's some dispute about the meaning of "explosive," challenged Nahmias, and the plaintiffs need to point to a simple, absolute and definite policy that was violated to avoid a dismissal on immunity grounds, why shouldn't the plaintiffs lose?

In order to give weight to the opinion of Grammens' expert, responded Blitch, the case must go to a jury. "You cannot rely only on an expert opinion for the granting of summary judgment," he said.

Nahmias pointed to another part of the eyewear policy about cutting into solid materials, wondering if that would

require elementary students cutting paper with scissors to wear eye goggles.

"You would need to wear goggles," Blitch surmised.

When Nahmias suggested that might mean liability for a teacher whose student poked another kid in the eye with a pair of scissors, Blitch tried to bring the argument around to the dangers of stretching immunity for teachers too far.

"You will tell the good teachers of this state ... 'well, with teachers, it's different. They're not going to have to abide by the rules.'"

The school case is *Grammens v. Dollar*, No. S09G0510.

In other certiorari cases heard by the state high court on Monday, the justices took in argument in a class action over natural gas bills and a car wreck case that could shape the law on the rules about expert witnesses.

In the gas bill case, *SouthStar Energy Services v. Ellison*, No. S09G1664, customers are suing Georgia Natural Gas over alleged overpayments. The gas company is seeking reversal of a 4-3 decision by the Court of Appeals that said the "voluntary payment doctrine," which forbids the recovery of certain payments, did not apply.

The case over expert testimony was brought by Garden City lawyer L. Nicole Hamilton after she and one of her brothers were injured and another brother was killed by another vehicle after the three exited their own vehicle after it was involved in a previous accident. The family sued a designer and general contractor involved with an ongoing project to widen the bridge on which they were traveling. The defendants in *HNTB Georgia v. Hamilton-King*, No. S09G1219, and *Plant Improvement Co. v. Hamilton-King*, No. S09G1224, are seeking reversal of a Court of Appeals panel decision that said the trial judge abused his discretion when he excluded the testimony of the plaintiff's expert, who said the collision probably would not have occurred had shoulders or lighting been provided as part of the design process. ☞