



Court of Appeals

Memorandum

To: All Judges

From: Chief Judge G. Alan Blackburn *GAB*

Subject: IOM Changes

Date: December 16, 2002

Please review the attached changes to the Internal Operations Manual (IOM) which will be discussed and voted on at the Banc Meeting tomorrow. The first two items, Donated Leave and Travel Policy, have been approved by earlier Court action and are presented for language approval only.

The other three items are presented for your approval as to a policy change or clarification. Transfer of Cases will simplify the transfer of cases for Technical Services and the Clerk's Office in situations where a judge is disqualified or recuses. Currently, cases in which there is a disqualification or recusal are assigned off panel, unless the cases have been argued or are to be argued. In assigning the case off panel, judge position one on panel one will go to judge position one on panel two. The proposed change would be to change judge position one on panel one to judge position two on panel one. Again, this will simplify the administrative process of transferring these cases. This will be for cases authored and to be voted on. This will not change the current reciprocation policy on transfers.

The fourth change effects the division macro on the Court's opinions when there is a transfer. The division header is a predetermined header which defaults to the judges on each division. However, if there has been a transfer, the judgment line may not agree with the division header. (See examples). This form change will require the administrative assistants to physically override the default header and reconcile the header with the judgment line. Some of you may be doing this now.

The last item for the IOM is the section dealing with overruling prior court decisions. The issue recently arose as to whether IOM Section XV.W.1. applies whenever a judge on this Court seeks to overrule a prior opinion in a dissent. Given the fact that the reason to have the entire Court review the matter is that the overruling of a prior opinion of this Court is at issue, it should not matter whether it is raised in the majority opinion or in a dissent thereto. I recommend the following change in the language of the IOM to clarify this issue, "when either a majority opinion or dissenting opinion is written seeking to overrule a prior decision of this court..." See proposed IOM change, page 23.

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IX. PERSONNEL

A. EQUAL OPPORTUNITY

It is the policy of the Court of Appeals of Georgia to provide equal opportunity for employment to all employees and applicants for employment on a non-discriminatory basis. No person shall, on the basis of race, color, religion, national origin, age, sex, or mental or physical handicap be excluded from employment by, participation in, be deprived of, or be subject to discrimination. It is the policy of the Court of Appeals of Georgia to provide equal opportunity for employment, compensation, promotion, training, and other conditions of employment, on the basis of assessed qualifications, responsibility level and demonstrated performance.

B. ANNUAL AND SICK LEAVE POLICY AND RECORDS

1. All staff will keep a record of the exact dates of any leave taken, on a form provided by the fiscal officer and approved by the Chief Judge. The form shall include the type of leave, and shall be submitted to the fiscal officer at the end of each month, signed by the employee and the judge. The form shall constitute the official public records for retirement and other official purposes. Accrued annual leave is the difference between how much annual leave a person was entitled to earn (Reg. B. Par. B201 governs, based on years of service) and the amount of time actually taken (depending on the Judge's policy) since the date of employment. (See Appendix 2.)
2. Allowing compensatory time to staff attorneys shall be up to the discretion of each judge, but it shall add no monetary cost to the court.
3. The period for computing vacation time runs from July 1 to June 30, beginning in 1986. Leave earned which is in excess of that allowed for actual vacation leave will carry over and accumulate up to a maximum of 45 days and be paid for when the employee leaves the court.
(Source: December 1997 Banc Meeting)

If an employee suffers a lengthy sickness and uses all accumulated sick leave, it is up to the discretion of the judge whether additional days be charged against excess annual leave or the 21-day actual yearly vacation leave. Also in the judge's discretion is when the employee takes the 21 days. (See Appendix 2.)

4. All employees of the Court of Appeals of Georgia will be subject to the Family Medical Leave Act and shall have the benefits thereof.

5. Eligible employees may donate or receive donated leave from other employees of the Court to be used in the place of sick leave. To be eligible to receive donated leave, the employee must: (1) have been employed for at least 12 months in a position entitled to earn leave, (2) have already used all of their sick, annual and forfeited leave, and have been on approved leave without pay for 80 hours. An employee may donate leave to an eligible employee if the donating employee: (1) has been employed for at least 12 months in a position entitled to earn leave, (2) is employed by this Court, (3) will have a balance of at least 60 hours of sick leave after donating sick leave and will have a balance of at least 60 hours of annual leave after donating annual leave. (See Appendix 13 for leave donation form). In accordance with 478-1-.30 of the rules and Regulations of the State of Georgia, no employee may receive more than 520 hours of donated annual and sick leave annually. (Source: May 14, 2001 Memorandum)

C. SALARIES

1. As determined by the court and legislature. Categories by experience are generally in line with the State Merit System. "Experience" means years since admission to any Bar together with active practice of law and service as staff attorneys of this Court or the Supreme Court. (Source of this sentence: Order of 9/30/64, as stated in Minute Book 15, p. 294) One-half of the salaries of the Reporter, Assistant Reporter, Assistant to the Reporter, and Reporter's Clerk, all as set by the Supreme Court, shall be paid by the Court of Appeals.

The salaries of the staff attorneys and of the Deputy Clerk shall be the same as those respective positions in the Supreme Court insofar as possible. The salaries of Research Associates (summer interns) shall be set by the Court.

2. Employees are entitled to retain juror and witness fees earned by them and to take court leave for such service.

3. The following procedure shall be followed for any salary adjustment for Clerk's Office personnel and floating administrative assistants which is not a regular salary scale adjustment, a cost of living increase, merit increase or the like.

COURT OF APPEALS OF GEORGIA

DONATED LEAVE POLICY

An employee is eligible to receive donated leave if:

- 1 They have been employed for at least 12 months in a position entitled to earn leave.
- 2 They have used all of their sick, annual, and forfeited leave.
- 3 They have been on approved leave without pay for 80 hours.

An employee is eligible to donate leave if:

- 1 They have been employed for at least 12 months in a position entitled to earn leave.
- 2 They are employed in the same agency as the employee needing donated leave.
- 3 They will have a balance of at least 60 hours of sick leave after donating sick leave.
- 4 They will have a balance of at least 60 hours of annual leave after donating annual leave.

.....

DONATED LEAVE REQUEST

I _____ hereby request to donate sick leave
DONOR

to _____ of _____ Annual Leave Hours
DONEE _____ Sick Leave Hours

I understand that approval of this request is subject to both the donor and donee meeting the court policy listed above.

EMPLOYEE SIGNATURE

DATE

Rules & Regulations of the State of Georgia

Search By Keywords:

Section Number:

-or-



NOTE: The conversion of the Rules and Regulations of the State of Georgia from paper to an electronic medium that allows this information to be accessed on the Internet has been completed and is being made available as a public service by the Office of Secretary of State in conjunction with the GeorgiaNet Authority. In the preparation of this information every effort has been made to insure the accuracy of the converted chapters. However, if you discover any errors or omissions, we encourage you to report that information via e-mail at www.rulescorrect@sos.state.ga.us.

Although the provisions of O.C.G.A. Section 50-13-7 requires the Office of Secretary of State to compile and publish rules, the updating of the internet rules is the responsibility of the filing agency. As such, the rules of the Office of Secretary of State's, Examining Boards and the administratively attached agencies (Georgia Real Estate Commission and Ethics Commission) are current to date. For questions concerning the status or the text of rules of filing agencies other than the Secretary of State, contact the respective filing agency. We also urge you to refer to the printed compilations of the Rules and Regulations available in your local libraries or the appropriate State agency.

RULES WAIVER REGISTER



478-1-.30 LEAVE DONATION.

(01-25-96/02-07-96)

SECTION 30.100. GENERAL PROVISIONS.

PAR. 30.101. Definitions. (01-25-96/02-07-96)

For purposes of this rule: (01-25-96/02-07-96)

A. "Recipient" means an eligible employee who has been authorized to solicit donations of leave from other employees. (01-25-96/02-07-96)

B. "Donor" means an eligible employee who has elected to donate leave to another employee. (01-25-96/02-07-96)

PAR. 30.102. In accordance with the provisions of this rule, an appointing authority may adopt a policy to permit eligible employees to donate or receive leave from other employees of the same department. A leave donation policy shall specify criteria to be utilized in authorizing solicitations for donated leave and shall designate staff authorized to administer leave donations. Such policy shall be accessible for review by employees. (01-25-96/02-07-96)

PAR. 30.103. Leave donation shall be from employee to employee and shall be strictly voluntary. The identity of donors shall be confidential and shall not be provided to the recipient or to any other individual unless necessary to administer the donation or required by law. (01-25-96/02-07-96)

PAR. 30.104. Exclusions. An employee shall not be eligible to solicit leave donations for: (01-25-96/02-07-96)

A. Any occupationally related accident or illness which is compensable under Workers' Compensation benefits; or, (01-25-96/02-07-96)

B. Disability incurred in the course of committing a felony or assault. (01-25-96/02-07-96)

SECTION 30.200. APPROVAL AND SOLICITATION.

PAR. 30.201. The appointing authority shall have the discretion to approve all requests for solicitation of leave donations prior to the circulation of such solicitation. (01-25-96/02-07-96)

PAR. 30.202. Following approval of a request to solicit leave donations, the appointing authority shall designate staff to assist the recipient in developing a solicitation announcement. The recipient or the recipient's designee shall agree, in writing, that the announcement is satisfactory prior to any circulation of such announcement. (01-25-96/02-07-96)

PAR. 30.203. Solicitation announcements shall be circulated to the extent necessary in order to encourage donations. (01-25-96/02-07-96)

PAR. 30.204. The appointing authority shall determine the scope and duration of solicitation announcements; provided, however, solicitation announcements shall be posted for not less than ten (10) work days. (01-25-96/02-07-96)

SECTION 30.300. DONOR.

PAR. 30.301. To be eligible to donate leave a donor must: (01-25-96/02-07-96)

A. Have been continuously employed for not less than twelve (12) months by a state agency in a position(s) entitled to earn leave; (03-26-98/04-02-98)

A. Have been continuously employed for not less than twelve (12) months in an agency covered by the Merit System ; (01-25-96/02-07-96)

B. Be an employee of the same department as the recipient; (01-25-96/02-07-96)

C. If donating annual leave, have a balance of not less than sixty (60) hours of annual leave after donation; and, (01-25-96/02-07-96)

D. If donating sick leave, have a balance of not less than sixty (60) hours of sick leave after donation. (01-25-96/02-07-96)

PAR. 30.302. A donor may donate any amount of annual leave or personal leave and not more than one hundred and twenty (120) hours of sick leave in a calendar year. A donation may not be made from a forfeited leave balance. The appointing authority may determine a minimum donation amount; provided, however, all donations shall be in increments of whole hours. (01-25-96/02-07-96)

PAR. 30.303. A donor shall authorize in writing the identity of the recipient and the type and amount of leave being donated. Such authorization shall specify that the donor surrenders any claim to any donated leave credited to the recipient. (01-25-96/02-07-96)

PAR. 30.304. Leave may not be donated to any recipient that has not been authorized by the appointing authority to receive such donations. (01-25-96/02-07-96)

SECTION 30.400. RECIPIENT.

PAR. 30.401. To be eligible to use donated leave a recipient must: (01-25-96/02-07-96)

A. Be employed in a position entitled to earn and use leave; (01-25-96/02-07-96)

B. Have been continuously employed for not less than twelve (12) months by a state agency in a position(s) entitled to earn leave ; (03-26-98/04-02-98)

B. Have been continuously employed for not less than twelve (12) months in an agency covered by the Merit System ; (01-

25-96/02-07-96)

C. Have met criteria established by the appointing authority; (01-25-96/02-07-96)

D. Have exhausted all accrued and forfeited leave and all available compensatory time; and, (01-25-96/02-07-96)

E. Have been on authorized leave without pay for eighty (80) consecutive hours. (01-25-96/02-07-96)

PAR. 30.402. No more than forty (40) days prior to going into leave without pay status, a recipient may request solicitation of donated leave. (01-25-96/02-07-96)

PAR. 30.403. The recipient shall request solicitation of donated leave in the form and manner specified by the appointing authority and shall provided such documentation as the appointing authority may deem appropriate. (01-25-96/02-07-96)

PAR. 30.404. Donations and Credits. (09-25-97/09-25-97)

PAR. 30.404. Donations, not to exceed five hundred and twenty (520) hours shall be credited to a recipient in the order they are received. Donations received after the maximum has been reached shall not be accepted and shall be returned to the appropriate donor. (01-25-96/02-07-96)

PAR. 30.404.1. Donations, not to exceed five hundred and twenty (520) hours, shall be credited to a recipient in a manner determined by the appointing authority; provided, however, that donations received after the maximum has been reached shall not be accepted and shall be returned to the appropriate donor. (09-25-97/09-25-97)

PAR. 30.404.2. Donations accepted but not used by the recipient may, if authorized by agency policy, be returned to the appropriate donor(s) in the manner specified by such policy. (09-25-97/09-25-97)

PAR. 30.404.3. Once a recipient has returned to duty, not more than forty (40) hours of previously donated leave may be retained for the recipient's use. (09-25-97/09-25-97)

PAR. 30.405. Multiple donations shall be permitted for the same recipient; provided, however, no recipient shall be credited with more than one thousand forty (1040) hours of donated leave in any consecutive two calendar year period. (01-25-96/02-07-96)

PAR. 30.406. The recipient may use donated leave for any purpose authorized under the provisions of Par. 18.303. (01-25-96/02-07-96)

SECTION 30.500. PROHIBITION/PENALTY.

PAR. 30.501. No employee shall threaten, coerce or attempt to threaten or coerce another employee for the purpose of interfering with rights involving the donation, receipt or use of leave. Such prohibited acts shall include, but not be limited to, promising to confer or conferring a benefit such as appointment, promotion or salary increase, or making a threat to engage in, or engaging in an act of retaliation against an employee. (01-25-96/02-07-96)

PAR. 30.502. Any violation of Par. 30.501 shall be considered to be misconduct and shall be subject to disciplinary action up to and including dismissal. (01-25-96/02-07-96)

Authority O.C.G.A. 45-20-3; 45-20-3.1; 45-20-4.

◀ PREVIOUS

NEXT ▶

XIII. TRAVEL/DUES POLICY

A. Judges will be reimbursed for court related travel expenses ~~for court related travel~~ in accordance with state-wide travel regulations, except as O.C.G.A. § 45-7-20 may otherwise control. The court recognizes there is a need for continuing judicial education and the court has a requirement that each judge of the court receive 12 hours of mandatory continuing judicial education each year. To that end, judges should actively participate as members of professional organizations, lecturers, writers, and students and contribute, wherever possible, to the improvements of the legal profession and the administration of justice through independent and bar related conferences and associations.

1. ~~The court's travel budget shall be divided into 15 equal shares by the fiscal officer as soon as practicable after the beginning of the new fiscal year. The Chief Judge shall be entitled to two shares of the travel budget and each other judge shall be entitled to one share of the travel budget. At the beginning of a new fiscal year, each judge shall be allocated \$4,000 from the Court's annual travel budget for court related travel in or out of the state and for dues to professional organizations. The Chief Judge, in light of the that judge's additional administrative duties, shall be allocated \$6,000 from the annual travel budget. The remainder~~ Two shares of the travel budget shall be reserved for the general travel fund. (Source: May 8, 2001 Memorandum)
2. Each judge may use his/her share of the court's travel budget for dues of professional organizations at the discretion of such judge. ~~for court related travel in or out of the state.~~
3. Any judge who wishes to utilize travel funds in excess of his/her share must request additional monies from the general travel fund. Such request must be made to the Executive Council and the Executive Council may approve or disapprove such request.
4. Any travel funds not utilized by an individual judge shall lapse into the general travel fund. Any judge may direct all or part of his/her share of the travel funds to the general travel fund.

All employees and court personnel, other than judges, shall be subject to the state-wide travel regulations. Any approved travel for non-judicial personnel of the court shall be reimbursed out of the general travel fund. Judges shall be subject to state travel regulations except they may claim actual expenses for meal and lodging reimbursements in accordance with O.C.G.A. § 45-7-20.



Court of Appeals

Memorandum

To: Jan Kelley
From: Chief Judge Blackburn *AAB*
Subject: Travel/Dues Allocation
Date: May 8, 2001

The court has authorized an increase in the travel/dues allocation for the next budget

submitted to the legislature to the following levels:

\$4,000 per Judge
\$6,000 for the Chief Judge
\$10,000 other court personnel total

cc: All Judges
Bill Martin



Court of Appeals

Memorandum

To: Chief Judge Blackburn

From: Jan Kelley, ^{JK} Director of Fiscal Services

Subject: Proposed Increase in Travel Funds

Date: April 18, 2001

According to Court policy our travel budget is split into 15 parts. Each Judge receives one part, the Chief Judge receives two parts, and two parts are reserved for other staff travel. Our travel budget has been \$38,250 or \$2,550 for each part. In July, 1999 the policy was changed slightly for each Judge to have an allotment that would be used for travel and/or dues that were court-related based on the Judge's discretion. The allotment for travel/dues was increased to \$3,000.

Analysis of expenses from 1999 to current indicate that our travel budget may need to be increased. While we have not exceeded our overall travel budget during these years, the portion reserved for other staff travel has always exceeded the two portions allocated. Other staff travel for FY 1999 was \$8,629 or \$3,529 above budget. During FY 2000 we expended

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Memo to Chief Judge Blackburn

April 18, 2001

\$6,659 in other staff travel funds which exceeded the budget by \$1,559. It is projected that other travel expenses for FY 2001 will exceed \$7,000.

It is essential that our staff receive training on new technology, fiscal policies and regulations and legal requirements. We simply cannot meet all of the travel needs of the general staff (Clerk's office, Fiscal office, Information Technology, Reporter's Office [Scott Henwood- we pay 1/2 of expenses] and parking only for law assistants) without an increase in the allocation. I recommend that we increase the travel budget by one part and allocate it to other staff travel. This should allow us to meet our current anticipated expenditures.

Also, we may want to increase the allocation amounts for travel. While we have not exceeded our overall travel funds in the last few years, several judges traveling out-of-state have exceeded their allocation portions while numerous others have expended just below their \$3,000 travel/dues allocation. The budget was not exceeded only because some judges did not travel. I recommend that we increase each allocation to \$3,500 for travel/dues and \$3,000 for travel only (other staff).

Thank you for consideration of this request.

XXXIII. PROTOCOL ON DISQUALIFICATION AND RECUSAL OF JUDGES

A. DISQUALIFICATIONS

Whenever a case is assigned to a judge to author or to vote on and that judge is disqualified, that judge shall notify the Clerk's Office by memorandum that that judge is disqualified of the disqualification and that the case is to be transferred to another judge.

1. ~~If the case to be transferred is set for oral argument or the case has previously been orally argued, the~~ Whenever a case is assigned to a judge to author who is disqualified, the Clerk's Office will reassign the case to the next judge on the disqualified transferring judge's panel. The judges on each panel shall be numbered one, two and three by the Clerk's Office. If judge one is disqualified, then the case goes to judge two, judge two to judge three and judge three to judge one.
2. ~~After the case has been assigned to the next judge on the panel, the Clerk's Office will assign another judge to that panel from the next panel for voting purposes. Each judge on each panel will be assigned to the next panel in the same judge order. Judge one on panel one will be assigned to fill in for judge one on panel two; judge one on panel two will be assigned to fill in for judge one on panel three. Judge one on panel three will be assigned to fill in for judge one on panel four, and so forth. (Source: September 1999 Banc Meeting.)~~
3. ~~If the case in which a judge is disqualified has not been orally argued or has not been set for oral argument, then the case shall be assigned off-panel. The case shall be assigned to the judge in the same position on the next panel.~~
4. If a judge is sitting on a panel, but is not assigned to author the case, and that judge is disqualified, then the corresponding judge on the next panel will be assigned to that panel for purposes of voting on the opinion. Judge one on panel two will be assigned to fill in for judge one on panel one; judge one on panel three will be assigned to fill in for judge one on panel two. Judge one on panel four will be assigned to fill in for judge one on panel three, and so forth.
5. If the case is to be reassigned, all records, transcripts, exhibits, briefs, motions, etc. are to be attached and given to the Clerk, Administrative Assistant to the Clerk or the Docket Clerk for reassignment.
6. If the case is to be reassigned, the Clerk shall reassign the case, according to the judge position and panel number; notify all judges' offices involved in the transfer by memorandum; change the judge and color code on the record; and deliver the record, transcript, exhibits, motions, briefs etc. to the newly assigned judge.

7. If, the case to be reassigned is a previous year's case; and the year's docket year has closed, there will be no out-of-term assignment back to even the wheel. If the case to be reassigned is in the current docket year, the Court's docketing system will automatically even out the case assignments among the judges.
8. ~~If upon reassignment to the next judge on the panel or the corresponding judge on the next panel, that next judge is also disqualified, then the assignment will be to the judge on the third panel in the corresponding slot. Should that judge also be disqualified, the Clerk shall comprise a panel of judges to hear the case. For the purpose of reassignment of a case to a judge to author, if all three judges on a panel are disqualified, the case will be reassigned to the next panel. The next case docketed on the wheel will be assigned by the computer to the initially disqualified judge in order to keep the wheel in balance and assign cases equally, unless the previous year's docket has closed, and in such case there will be no out-of-term assignment back to even the wheel.~~
(Source: Minutes, November 1995 Banc meeting).

B. RECUSALS

When a motion to recuse a judge from a particular case is filed, the following protocol shall be used.

1. Whenever a judge is presented with a motion to recuse or disqualify, accompanied by an affidavit, the judge shall immediately determine the timeliness of the motion and the legal sufficiency of the affidavit, and make a determination, assuming the facts in the affidavit are true, whether recusal is warranted.
2. If it is found that the motion is timely, the affidavit sufficient and the recusal would be authorized if some or all of the facts set forth in the affidavit are true, the judge shall report that fact to the Chief Judge, who shall assign another judge to pass on the motion to recuse.
3. If the assigned judge finds that sufficient facts are presented which would authorize the recusal of the judge from the case, the assigned judge shall so notify, by memorandum, the Chief Judge and the judge against whom the motion was filed.
4. In the event of recusal, the Chief Judge shall notify the Clerk's Office, and the clerk shall assign another judge to the matter according to the protocol on disqualification of judges.

5. If the assigned judge finds there are insufficient facts before the court to authorize a recusal of the judge against whom the motion is filed, that fact shall be made known to the Chief Judge by memorandum with a copy to the judge against whom the motion to recuse was filed.
6. Whether the judge against whom the motion was filed is recused or is not recused, an order shall issue from the Clerk's Office granting or denying the motion to recuse, as appropriate.
7. If the Chief Judge is the judge against whom the motion to recuse is filed, then the judge next in line for Chief Judge shall make the assignment.

XXII. B.

7. Opinion and Assigned Division

Each opinion shall be marked with the Division number and the names of the judges serving on the panel that decided the case. In the event that a judge assigned to a case is disqualified or recused, than the opinion will be made to reflect the panel of judges which actually decided the case including the judge assigned to the case to replace the disqualified or recused judge.

**FOURTH DIVISION
SMITH, P. J.,
ELDRIDGE and ELLINGTON, JJ.**

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed. (Court of Appeals Rules 4 and 37, December 14, 2000)
<http://www.appeals.courts.state.ga.us/rules.html>

June 10, 2002

In the Court of Appeals of Georgia

A02A0076. JACKSON v. NORFOLK SOUTHERN RAILROAD. SM-004

SMITH, Presiding Judge.

After Norfolk Southern Railroad closed a railroad crossing leading to his house, William Forrest Jackson, Jr. brought suit claiming interference by the railroad with his easement rights. Jackson sought to compel the railroad to replace the crossing it had removed. The case proceeded to trial, and a jury returned a verdict in Jackson's favor. Subsequently, the trial court granted Norfolk Southern's motion for judgment notwithstanding the verdict. In this appeal, Jackson claims that the record contains evidence to support each of the elements required to obtain an easement by prescription. We find otherwise and affirm.

This litigation arose after Norfolk Southern removed an existing crossing over its railroad tracks in an area in front of Jackson's house in Johnson County. As part

using [the crossing] though, with the permission of the railroad?" Jackson responded, "I'd have to say that I was using it with their permission because they knew I was crossing it to get to my house." But mere use of a roadway is not enough to acquire prescriptive rights. *Trammell v. Whetstone*, 250 Ga. App. 503, 505-506 (1) (552 SE2d 485) (2001). "An owner's acquiescence in the mere use of his road establishes, at most, a revocable license [Cit.]." *Eileen B. White & Assoc. v. Gunnells*, 263 Ga. 360, 362 (434 SE2d 477) (1993). Moreover, the record is devoid of any evidence that Jackson did any maintenance or repairs to the crossing during the seven year prescriptive period. Compare *Trammell*, supra at 506 (1). Because Jackson did not establish all of the elements required for a prescriptive easement, the trial court properly entered judgment in favor of Norfolk Southern. See *Lopez v. Walker*, 250 Ga. App. 706, 708 (1) (551 SE2d 745) (2001).

Judgment affirmed. Eldridge and Barnes, JJ., concur. Ellington, J., disqualified.

(Statute) Disqualified
(Code Conduct) Recusal
See *Time/Kanner case*



Court of Appeals

Memorandum

To: All Judges

From: Judge Phipps *HEP*

Subject: Circulation of A02A1388. OMAR GAY v. THE STATE.

Date: November 14, 2002

In response to that portion of Judge Barnes's memo which objects to twelve-judge circulation of this case, I offer the following explanation.

This case was assigned to me to author, and Judge Mikell dissented, seeking to overrule an earlier opinion of this court.

IOM Section XV, Paragraph W, Subparagraph 1 says that "when an opinion seeks to overrule a prior decision, the author of the opinion overruling the prior decision should attach a memo so stating, showing the panel members of the case being overruled. If a Judge who participated in that opinion is still on the Court, the overruling opinion should be circulated first to the author of that opinion, and then to the other Judges on the panel of the case being overruled, if they are still on the Court, even before the opinion goes to the overruling author's panel members."

The question is whether a dissenting opinion seeking to overrule a prior decision constitutes an opinion which must be circulated to all twelve judges.

Paragraph W of IOM Section XV sets forth two situations in which questions are presented to all members of the court. Presumably under the principle of stare decisis, the court has said that, in any case where an earlier decision is challenged, all judges of the court should participate in the decision. The author of the case under challenge, assumed to be that case's strongest advocate, is afforded the first opportunity to respond to the challenge, and the ordinary course of circulation is set aside. The second opportunity for twelve-judge decision afforded by Paragraph W (Subparagraph 6) is when a panel majority agrees that some other question should be passed upon by all members of the court, and in that case a majority of the court must agree that all members should hear the case. In promulgating Subparagraphs 1 through 5 the court apparently decided that the issue of overruling a prior case is a question always so important that it should be submitted to all members of the court.

Although we commonly use only the word, "dissent," to refer to a dissenting opinion, a dissent is still an opinion.¹ Although the IOM does not mention dissenting - or specially

¹"A dissent . . . refers to a dissenting judicial opinion." A Dictionary of Modern Legal Usage, Bryan A. Garner (1987); "Dissenting Opinion: The opinion in which a judge announces his dissent from the conclusion held by the majority of the court, and expounds his own views." Black's Law Dictionary, Revised Fourth Edition.

concurring - opinions² in Paragraph W of Section XV, it seems to me that we can infer that the court's respect for the doctrine of precedent extends to all opinions.

Under IOM Section XV, Paragraph W, a case is circulated to all twelve judges whenever an opinion *seeks to* overrule an earlier case, not when a panel has already decided to overrule a case. The current procedure does not require the majority of a three-judge or seven-judge panel to agree on overruling before the case circulates to all judges for consideration. But Judge Barnes suggests that this case should be circulated first to a seven-judge panel to rule on Judge Mikell's dissent (a panel which would not include Judge Barnes, the author of the challenged opinion), and only thereafter, if Judge Mikell's dissenting opinion prevails, circulated to all twelve judges. It is hard to see how the interest of judicial economy would be served if seven judges must vote twice on this case, first on the judgment and later on whether to overrule. Nor can I envision how a seven-judge panel could vote on Judge Mikell's dissenting opinion without also considering its essential intent to overrule the earlier case - an issue which we have already said should be decided by all twelve judges. Judge Mikell's dissenting opinion may never become the majority opinion in this case, but the issue he raises of overruling an earlier decision should be addressed by all twelve judges. Where there is disagreement about whether to overrule an earlier decision, a preliminary vote cannot determine which position will prevail. Garnering four votes from the first panel does

² "Write specially = to concur in a separate opinion." *A Dictionary of Modern Legal Usage*, Bryan A. Garner (1987).

not guarantee either position a majority of the eventual twelve-judge vote. Until Judge Mikell's dissenting opinion, which relies solely on overruling an earlier case, is considered by the whole court, there is no way of knowing whether it will become the majority opinion.

As our rules now stand, "one judge," to whom a case has been randomly assigned, can cause a case to go to all twelve judges at any time by suggesting we overrule an earlier case. I am in no way disturbed by the idea that one other judge, who did not win the lottery of case assignment, has that same opportunity. A judge writes not just for himself, but for the entire court. Interpretation of the IOM to require consideration of this dissenting opinion by the entire court would help preserve the integrity of this court's decisions. My purpose in circulating this case to all judges is only to provide full consideration of an issue I understand the court to hold very important. I wholeheartedly apologize for any inconvenience to any judge.

Perhaps this section of the IOM would be a good topic for discussion at our next banc meeting.

cc: Bill Martin



Court of Appeals

Memorandum

To: THE CHIEF JUDGE AND ALL JUDGES OF THE COURT OF APPEALS

From: JUDGE BARNES *ARMS*

Subject: A02A1388. GAY v. THE STATE.

Date: November 14, 2002

1. I have concurred with Judge Phipps' opinion, both on the merits of this appeal and on overruling *Ayiteyfo*. (For one thing, it's a little difficult to admit that my earlier opinion defies logic!) *Ayiteyfo* simply involves the time-honored rule of applying apples to apples, and oranges to oranges. Thus, when the trial judge says that he finds discriminatory intent because a black juror with a relative in law enforcement remained seated while a white juror with a relative in law enforcement, *in addition to other factors*, was struck, he is comparing an apple to an orange. Therefore, the trial judge's conclusion based on this obvious error was clearly erroneous. The trial judge in *Ayiteyfo* did not base his conclusion on the totality of the circumstances; he based it on his erroneous determination that the two jurors were similarly situated when they were not.

The dissent reads *Ayiteyfi* too broadly. Nothing in *Ayiteyfi* establishes a per se rule or limits a trial judge's discretion to accept, reject, or infer that any of the reasons proffered in support of a strike were or were not racially motivated. The case merely holds that when the trial court bases its finding on nothing more than a misapprehension of the facts, the finding will be held to be clearly erroneous.

2. Additionally, I object to this case going whole court on overruling *Ayiteyfi v. State* at this time. My understanding is that paragraph W, Section XV of our IOM is implicated when the author of an opinion proposes to overrule a case. Conversely, my understanding is that when a dissenting judge wishes to overrule a case, paragraph W is not implicated unless the dissent becomes the majority opinion. At that time, the case would circulate under paragraph W.

Adopting the procedure being used in this case will involve all twelve judges, perhaps unnecessarily, before we know that the dissent will become the majority. Moreover, this procedure would allow one judge to cause a case to go to all twelve judges at any time without regard to OCGA § 15-3-1 (c) (2), which sets out the rules for going to a 12 judge court, or subparagraph W. 6. of our IOM.

W. OVERRULING PRIOR CASES

1. When an opinion either a majority opinion or dissenting opinion is written seeking seeks to overrule a prior decision of the Court, the author of the opinion overruling the prior decision should attach a memo so stating, showing the panel members of the case being overruled. If a Judge who participated in that opinion is still on the Court, the overruling opinion should be circulated first to the author of that opinion, and then to the other Judges on the panel of the case being overruled, if they are still on the Court, even before the opinion goes to the overruling author's panel members.
2. After the opinion has been circulated to the author of the opinion being overruled, and the other members of the panel, if the author of the overruling opinion holds to his/her decision to overrule a prior decision, the case shall be circulated, first to the overruling Judge's panel and then to all Judges on the Court.
3. If a Senior Judge is serving on the panel which is overruling a prior decision, and the Judge from whom the case was assigned to the Senior Judge is a Judge who sat on the panel of the case being overruled, then the case shall circulate to that Judge and the Judge junior most in time of service as a Judge of the Court of Appeals of Georgia on the panel next in succession to the panel overruling the prior decision, shall not participate in the decision, unless that Judge also sat on the panel of the case being overruled, in which case the junior most Judge on the Court, who is not on the panel overruling the prior case and who did not participate in the case being overruled, shall not participate in the decision.
4. In no event shall a case be voted on by more than 12 judges of the Court.
(Source: September 1999 Banc Meeting.)
5. This procedure should be used whenever the opinion uses the words "overrule," "disapprove," "disavow," and/or "reject."
6. In all cases which involve one or more questions which, in an opinion of the majority of the judges of the division or of the two divisions plus a seventh judge to which a case is assigned, should be passed upon by all members of the Court, the questions may be presented to all members of the Court; if a majority of all the members of the Court decide that the question or questions involved should, in their judgment and discretion, be decided by all the members of the Court, the case shall be passed upon by all members of the Court, provided that a majority of the judges passing upon the case concur in the judgment.
7. When the Court has elected to have a case passed upon by all twelve (12) members of the Court under OCGA §15-3-1(c)(2), the author of the majority opinion shall circulate the opinion along with the dissent and any memoranda of the majority and/or dissent to all members of the Court immediately. The case shall then circulate to the five (5) judges who do not initially vote on the case in order of seniority.
(Source: November 2000 Banc Meeting.)

IN A CASE WHERE A DIRECT APPEAL
IS AUTHORIZED UNDER LAW AND AN
INTERLOCUTORY OR DISCRETIONARY
APPLICATION IS FILED INSTEAD OF
A DIRECT APPEAL,
On

To: All Judges
From: Chief Judge Blackburn *AKB*
Subject: Direct Appeals Filed as Interlocutory Appeals.
Date: October 15, 2002

Chuck Williams has brought to our attention problems with interlocutory appeals applications being filed where the applicant is entitled to a direct appeal. See attached memo. We could follow the Supreme Court's policy and simply deal with such applications as direct appeals. I have discussed this matter with several judges who are in agreement with the following policy. Please indicate your vote on the adoption of this policy.

~~In situations where a case which is suitable for a direct appeal pursuant to OCGA § 5-6-34 (a) is filed as an application for interlocutory appeal pursuant to OCGA § 5-6-34 (b), we should treat the case by its underlying nature, namely a direct appeal. To that end, we should issue an order that states we are proceeding in the matter as if the prospective appellant has filed a direct appeal with this court, pointing out the specific statutory provision which characterizes the issue as one which is subject to direct appeal. In this instance, the best solution is the simplest one. A direct appeal remains a direct appeal, regardless of the appellant's misnomer, and, once we have the direct appeal before us, we should go ahead and decide it.~~

APPROVE

DISAPPROVE

DATE

JUDGE



Court of Appeals

Memorandum

To: Chief Judge G. Alan Blackburn
From: William L. Martin, III
Subject: February Banc Meeting
Date: February 4, 2002

Presiding Judge Johnson asked that I request be placed on the February Banc Meeting Agenda, as a discussion item, remand orders from this Court and what language, if any, should be contained in the order regarding the re-initiation of the appeal after remand.

Thank you.

/ld

cc: Presiding Judge Edward H. Johnson