IN THE SUPREME COURT OF GEORGIA

EARTHLINK, INC.; EARTHLINK LLC; DELTACOM, LLC; BUSINESS TELECOM, LLC; AND BELLSOUTH TELECOM. LLC d/b/a AT&T GEORGIA,	)	
Appellants	)	**Case No. S17C2011**
v.	)	
COBB COUNTY, GEORGIA, and GWINNETT COUNTY, GEORGIA,	)	
Appellees.	)	

BRIEF OF ASSOCIATION COUNTY COMMISSIONERS OF GEORGIA AND GEORGIA MUNICIPAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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I. INTRODUCTION

This case concerns the ability of local governments to recover from telephone service suppliers charges which such suppliers failed to collect and remit for purposes of funding 9-1-1 services, in violation of the duties imposed upon such suppliers by the Georgia Emergency Telephone 9-1-1 Service Act of 1977, O.C.G.A. § 46-5-120 *et seq.* ("the 9-1-1 Act"). In short, is the 9-1-1 funding mechanism for local governments unenforceable and meaningless such that telephone service suppliers may skirt an Act of the General Assembly at will and without consequence for themselves, at significant losses to local governments? The answer should be no.

If the answer is otherwise, then the duties imposed by law upon telephone service suppliers by the 9-1-1 Act are unenforceable, Appellees are without opportunity for recovery against telephone service suppliers such as Appellants, and there will be severe practical consequences for local governments. The 9-1-1 under-billing practices at issue over the three years preceding the filing of this action deprived the Cobb and Gwinnett County 9-1-1 Emergency Services of substantial amounts of funding in 9-1-1 fees, which those counties depend upon to provide crucial life-saving 9-1-1 emergency services to their respective residents. *On a statewide basis,* the 9-1-1 under-billing practices during the same three-year period have deprived Georgia local governments of an even more substantial

amount of funding in 9-1-1 fees—monies which local governments need and depend upon to fund 9-1-1 emergency services.

Due to the 9-1-1 funding shortfalls caused by Appellants' failures to collect and remit 9-1-1 charges as required by law, many local governments are unable to modernize their 9-1-1 services, and many have had to subsidize their 9-1-1 operations with general fund revenue that is otherwise needed for other crucial governmental functions. In short, nothing less than the provision and maintenance of critical 9-1-1 services by local governments, *as funded according to law*, is at stake in this case.

In the Georgia Supreme Court's order of April 16, 2018, which granted writ of certiorari in this case, the Court posed the following four questions of law:

1. Are the 911 charges imposed by the counties in this case under the Georgia Emergency Telephone 911 Service Act, O.C.G.A. § 46-5-120 et seq., more properly characterized as taxes or fees? See Fulton County v. T-Mobile South, LLC, 305 Ga. App. 466 (699 SE2d 802) (2010).
2. To what extent, if any can a county government be an "injured party" for purposes of O.C.G.A. § 51-1-6?
3. Is the collection of 911 charges due a county government under the Act a "private duty" for purposes of O.C.G.A. § 51-1-8?
4. Can a county government use O.C.G.A. § 51-1-6, O.C.G.A. § 51-1-8, or the common law as a vehicle for the recovery of unbilled 911 charges under the Act from telephone service suppliers?

Bellsouth Telecommunications LLC d/b/a AT&T Georgia v. Cobb County, No. S17C2011, order granting writ of certiorari (Ga. Supreme Ct., Apr. 16, 2018).

For the reasons set forth below, Association County Commissioners of Georgia ("ACCG") and the Georgia Municipal Association ("GMA"), as *amici curiae*, answer that: (1) the 9-1-1 charges at issue in this case are properly characterized as fees and not taxes; (2) a county government can be an injured party for purposes of O.C.G.A. § 51-1-6; (3) the collection of 9-1-1 charges due a county government under the Act is a private duty for purposes of O.C.G.A. § 51-1-8; and (4) a county government can use O.C.G.A. § 51-1-6, O.C.G.A. § 51-1-8, or the common law as a vehicle for the recovery of unbilled 9-1-1 charges under the Act from telephone service suppliers.

The decision of a superior court should be upheld if it is right for any reason. *Lee v. Porter*, 63 Ga. 345, 346 (1879) (the "tipsy coachman" doctrine); *Precise v. Rossville*, 261 Ga. 210, 211(3) (1991). In accordance with the forgoing answers to the Court's questions of law, the order of the Superior Court of Gwinnett County denying Defendant's (herein Appellant's) Motion to Dismiss First Amended Complaint should be upheld.[1]

II. STATEMENT OF INTEREST

ACCG is a nonprofit instrumentality of Georgia's county governments formed in 1914 with 19 county members and now serving as the consensus-

[1] *Cobb County, et al. v. Bellsouth Telecommunications LLC d/b/a AT&T Georgia*, Civil Action No. 15-A-12873-4, order denying Defendant's Motion to Dismiss First Amended Complaint (Gwinnett County Superior Court, July 15, 2016).

building, training, and legislative organization for all 159 county governments in Georgia. The constituency of ACCG includes more than 800 county commissioners; more than 420 appointed county clerks, managers, administrators, and attorneys; and almost 81,000 full-time and part-time employees. ACCG works to ensure that counties can provide the necessary leadership, services, and programs to meet the health, safety, and welfare needs of Georgia citizens through education and technical assistance with the objective of promoting more effective and efficient county government. The member counties of ACCG all either provide 9-1-1 services themselves or receive 9-1-1 services through regional or multi-jurisdictional public safety answering points (PSAPs) consisting of approximately 136 county-run PSAPs, which includes 8 county-based regional centers.

GMA is a nonprofit corporation created for the purpose of improving municipal government in the State of Georgia. Its membership is comprised of Georgia municipalities and consolidated governments that, by action of the governing bodies, choose to become members. GMA's membership includes approximately 521 municipal corporations in which more than 99% of the State's municipal population resides and in which approximately 43% of the State's total population resides. GMA currently has twenty-two member cities which operate PSAPs and thus are responsible for providing 9-1-1 service, but all of GMA's

members either provide 9-1-1 services themselves or receive 9-1-1 services through multi-jurisdictional or county-based PSAPs.

As part of our missions, ACCG and GMA periodically file *amicus curiae* briefs on matters which have statewide significance to counties and cities and the people they serve. In this case, ACCG and GMA do not seek to speak solely for Appellees, the position of which has been presented thoroughly in Appellees' Brief. However, this case presents questions of law which are exceptionally important to all of ACCG's and GMA's members. The financial ramifications of not upholding the Superior Court's order denying Appellant's motion to dismiss are grave on a statewide basis. Because of ACCG's and GMA's roles in advancing the interests of counties and cities in matters having state-wide ramifications, it has a direct and significant interest in the questions of law raised by the Court.

III. STATEMENT OF FACTS

Amici concur in the Background Facts, Argument and Citation of Authorities, and Conclusion set forth in Appellees' Brief filed with this Court in response to the Court's four questions of law and hereby incorporates those items by reference the same as if set forth fully herein.

IV. ARGUMENT AND CITATION OF AUTHORITY

A. Section 4-1(b) of HB 751 answers simultaneously and conclusively all four of the Georgia Supreme Court's questions of law and resolves the matter in favor of Appellees.

When the 9-1-1 Act was amended in 2018 by enactment of HB 751 to streamline the remittance of 9-1-1 charges owed to local governments throughout Georgia, the amending legislation *expressly preserved the local governments' right to bring suit to enforce the duties imposed by law, and to recover the fees owed for the three years preceding the filing of the suits*:

> (b) The provisions of this Act shall not in any manner diminish, extinguish, reduce, or affect any cause of action for audits, services, or the recovery of funds from service providers which may have existed prior to January 1, 2019. *Any such cause of action is expressly preserved.*

Ga. L. 2018, p. ___, Act No. 436, HB 751, Section 4-1(b) (approved May 7, 2018) (emphasis added).

"[W]here the language of an Act is plain and unequivocal, judicial construction is not only unnecessary but is forbidden." *Jesup v. Bennett*, 226 Ga. 606, 609 (1970). By its plain language, the 9-1-1 Act created a means of funding for local governments to provide 9-1-1 call services. Although the 9-1-1 Act does not expressly provide a cause of action for local governments to recover uncollected and unremitted charges from telephone service suppliers, the plain

language of Section 4-1(b) of HB 751 *does* expressly *preserve* such causes of actions for recovery of uncollected and unremitted charges from telephone service providers. In doing so, that amendment recognized that such causes of action *were already authorized* under the existing condition of the law. One cannot "*preserve*" that which does not already *exist*. The language of HB 751 means nothing less than what it says precisely: Such causes of action can exist prior to January 1, 2019, and such existing causes of action are expressly preserved.

Even if one looks beyond the plain language of Section 4-1(b) of HB 751 to engage in statutory construction, the result is yet the same. When construing a statute, the judiciary must search for statutory meaning as manifested by the context and considered with reference to the subject matter to which the statute relates. *See Thomas v. MacNeill*, 200 Ga. 418, 424 (1946). "All statutes are presumed to be enacted by the General Assembly with full knowledge of the existing condition of the law and with reference to it. They are therefore to be construed in connection and in harmony with the existing law, and their meaning and effect are to be determined in connection, not only with the common law and the Constitution, but also with reference to other statutes and the decisions of the courts." *Allison v. Domain*, 158 Ga. App. 542, 544 (1981) (citations omitted). Furthermore, construction of a statute cannot render a statute meaningless. *State v. Free At Last Bail Bonds*, 285 Ga. App. 734, 737-738 (2007). "That construction

which will uphold a statute in whole and in every part is to be preferred." *Exum v. Valdosta*, 246 Ga. 169, 170 (1980).

Thus, the General Assembly enacted Section 4-1(b) of HB 751 in 2018 with presumed full knowledge of O.C.G.A. §§ 51-1-6 and 51-1-8 and the decisions in *McLeod v. Columbia County*, 278 Ga. 242 (2004) (setting forth three-part test for determining whether a charge is a "tax" or a "fee") and *Unified Gov't of Athens-Clarke County v. Homewood Village LLC*, 292 Ga. 514 (confirming test set forth in *McLeod, supra*). Likewise, this litigation commenced prior to enactment of HB 751. If favorable answers to any of the four questions posed by the Court are necessary predicates for a cause of action by a local government, then how could there be an existing cause of action to be preserved—as the General Assembly expressly provided in Section 4-1(b) of HB 751—unless those answers were indeed already favorable to local governments under the existing state of the law? The very enactment of Section 4-1(b) of HB 751 confirms this result. Furthermore, if Section 4-1(b) of HB 751 conflicted with any other existing statutory provision, then, as the latest expression of the General Assembly, Section 4-1(b) of HB 751 controls. O.C.G.A. § 28-9-5(b); *see GeorgiaCarry.Org v. Code Revision Commission*, 299 Ga. 896, 898 (2016).

To construe the 9-1-1 Act as *not* allowing local governments recourse to the courts to seek recovery of charges from telephone service suppliers which failed to

collect and remit the same in violation of the 9-1-1 Act would ignore Section 4-1(b) of HB 751 and "blue-pencil" it out of existence. The effect would be to render the billing, collection, and remittance requirements of the 9-1-1 Act, along with the "cause-of-action-preservation" provision of Section 4-1(b) of HB 751, unenforceable—*meaningless*—contrary to the rules of statutory construction set forth above.

Accordingly, Appellees *had* and *still have* a cause of action for recovery from telephone service suppliers of those fees which such suppliers failed to collect and remit as required by the 9-1-1 Act.

B. Even if Section 4-1(b) of HB 751 does not alone resolve the matter in favor of Appellees, then separate answers to each of the four questions posed by the Supreme Court do.

Amici concur in Appellees' answers and arguments in support thereof as to each of the four questions posed by the Court and incorporates those answers and supporting arguments by reference as if set forth fully herein. Those answers resolve the matter in favor of Appellees. The State of Georgia does not have to expressly give itself the power to enforce its own laws. Surely then, local governments, as political subdivisions of the State, have legal recourse to redress the billing and remitting shortfalls caused by the failure to comply with the 9-1-1 Act.

Finally, *Amici* submit additional argument below as to Question 1 posed by the Court, showing that the 9-1-1 charges at issue in this case are fees and not taxes.

As shown by Appellees, the three-part test for determining whether a charge is a "tax" or a "fee," set forth initially by the Georgia Supreme Court in *McLeod, supra,* and confirmed later in *Homewood Village*, 292 Ga. at 515(1), controls the analysis in this case, and application of that three-part test establishes that the 9-1-1 charges at issue here are fees and not taxes.

There is yet other significant authority which reaches the same result. Local governments abide by governmental accounting standards promulgated by the Governmental Accounting Standards Board.[2] Particularly, the requirements set forth in GASB, *Statement No. 6 of the Governmental Accounting Standards Board: Financial Reporting for Special Assessments* (Jan. 1987) ("GASBS 6")[3] treat the 9-1-1 charges as fees.

The Georgia statutory scheme sets the stage for the part played here by GASBS 6. To recap: The 9-1-1 Act authorizes a local government to pay for the 9-1-1 services it provides by imposing a monthly 9-1-1 charge upon each telephone

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[2] The Governmental Accounting Standards Board (GASB) establishes accounting and financial reporting standards for U.S. state and local governments that follow Generally Accepted Accounting Principles (GAAP).

[3] The full text of GASBS 6 is available online at: https://www.gasb.org/jsp/GASB/Document_C/DocumentPage?cid=1176160030426&acceptedDisclaimer=true

service that is or would be served by the local government. O.C.G.A. § 46-5-133(a). To implement the charge provided for in O.C.G.A. § 46-5-133(a), the 9-1-1 Act requires telephone service suppliers to collect a “monthly 9-1-1 charge" from each subscriber "per telephone service provided." O.C.G.A. §§ 46-5-122(16) & 46-5-134(a)(l)(A). Telephone service suppliers are required to remit the service charges (less a specified administrative fee) to the local governments that actually provide a 9-1-1 service to their citizens. O.C.G.A. § 46-5-134(d)(l).

The 9-1-1 Act mandates that all such monies "be deposited and accounted for in a separate restricted revenue fund known as the Emergency Telephone System Fund maintained by the local government." O.C.G.A. § 46-5-134(d)(2).[4] Monies from such restricted accounts must be used *only for those specific purposes listed in O.C.G.A. §§ 46-5-134(f)*. Local governments must annually audit and certify that their 9-1-1 service expenditures comply with the Act. O.C.G.A. § 46-5-134(m)(l).

Such an arrangement for special-assessment funding dedicated to restricted types of public services is a significant scenario under GASBS 6 standards. *See* GASBS6 at i. As in this case, under GASBS 6, such special assessment projects are for operating activities and not for purchase or construction of fixed assets. *Id.*

[4] In contrast, “[a]ll *taxes* levied for county purposes … shall be collected by the tax commissioner or tax collector. After collection, the tax commissioner or tax collector shall pay the taxes to the county treasurer.” O.C.G.A. § 48-5-233 (emphasis added).

at 1. Such "*[s]ervice-type special assessment revenues are to be treated [by governments] like user fees.*" *Id.* at 5 (emphasis added). The statutory requirements for imposition and use of the 9-1-1 charges here establish a service-type special assessment akin to those described by the Governmental Accounting Standards Board. *See id.* Thus, GASBS 6 leads counties to treat the 9-1-1 charges as fees.

Consequently, application of both the precedent of *McCleod* and the supporting authority of GASBS 6 leads to the same result: The 9-1-1 charges at issue here are characterized properly as fees and not taxes.[5] That answer to Question 1, combined with the favorable answers to each of Questions 2, 3, and 4 as submitted by Appellees, shows that the order of the superior court below should be upheld.

V. CONCLUSION

For the reasons set forth above and in the Brief of Appellees submitted to this Court, *Amici* submit that the Georgia Supreme Court should issue an opinion holding: (1) The 9-1-1 charges at issue in this case are properly characterized as fees and not taxes; (2) a county government can be an injured party for purposes of O.C.G.A. § 51-1-6; (3) the collection of 9-1-1 charges due a county government

[5] "Legal requirements, if any, to account for special assessment transactions in accounts or funds separate from other accounts or funds of the government can usually be satisfied by maintaining separate special revenue . . . funds for individual special assessment projects . . . ." GASB Statement at 5.

under the Act is a private duty for purposes of O.C.G.A. § 51-1-8; and (4) a county government can use O.C.G.A. § 51-1-6, O.C.G.A. § 51-1-8, or the common law as a vehicle for the recovery of unbilled 9-1-1 charges under the Act from telephone service suppliers. The order of the Superior Court of Gwinnett County denying Defendant's (herein Appellant's) Motion to Dismiss First Amended Complaint should be upheld.

This 17th day of July, 2018.

Submitted respectfully,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing **BRIEF OF ASSOCIATION COUNTY COMMISSIONERS OF GEORGIA AND THE GEORGIA MUNICIPAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEES** upon the following parties by email and depositing a copy of same in the United States first class mail in a properly addressed envelope with adequate postage affixed thereon addressed to:

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