

TITLE

On February 13, 2006, the Georgia Supreme Court issued its opinion in Alexander Properties Group, Inc. v. Doe, et al., 280 Ga. 306, 626 S.E.2d 497 (2006). Doe addressed the ability of a civil defendant to obtain evidence for use in its defense of a premises liability lawsuit, which otherwise would be considered illegal child pornography. In Doe, the Plaintiffs alleged that Jane Doe, who was 13 years old at the time, was the victim of a “gang rape/sexual molestation” on the premises of the Forrest Creek Crossing Apartments in Marietta, Georgia. Defendant Alexander Properties Group (“APG”) managed the Forrest Creek Crossing Apartments at the time of the alleged sexual assaults. The Plaintiffs brought suit against APG, as well as the owner of the premises, Charleston Trace, LP, alleging that both were liable to Jane Doe under a negligent security/premises liability theory.

During the investigation of the criminal acts, a videotape made by some of the perpetrators was discovered by the Cobb County Police Department. The Police Department seized the videotape and it was used in the prosecution of the criminal matters. The tape was maintained by the Cobb County District Attorney, Patrick Head. After the filing of the civil lawsuit, APG attempted to obtain a copy of the videotape, first by obtaining the consent of the Plaintiff’s counsel for the trial court to enter a consent order ordering the Cobb District Attorney to turn over the tape. Later, the Plaintiff reneged on that agreement and subsequently fought APG’s attempts to obtain the tape. Additionally, APG served upon the Cobb County District Attorney requests pursuant to the Georgia Open Records Act, and subsequently served a non-party request for production of documents pursuant to O.C.G.A. § 9-11-34.

While the District Attorney made the videotape available for viewing by counsel for both the Plaintiffs and the Defendants in his office, and with one of his staff members present, he refused to produce the videotape in any form or fashion pursuant to any of the requests or the court order. The District Attorney ultimately filed a motion for a protective order seeking to be excused from producing the videotape. The District Attorney argued, among other things, that giving the tape to counsel for APG would amount to felonious conduct under O.C.G.A. § 16-12-100(b)(5) and the possession of the videotape by counsel for APG would be a felony under O.C.G.A. § 16-12-100(b)(8). The State Court of DeKalb County, the trial court, held a lengthy hearing on the motion for protective order and ultimately issued an order granting that motion, stating that to require the District Attorney to “produce” the videotape pursuant to the non-party request for production, would require that the District Attorney commit a felony by turning the tape over. APG sought a Certificate of Immediate Review, which was granted, and because constitutional challenges had been made against the statutes at issue, sought an interlocutory review before the Georgia Supreme Court, which was granted.

In arguing against the entry of the motion for protective order, APG first argued that the statute was inapplicable to the conduct at issue, namely the “production” of the evidence pursuant to a lawful discovery request issued pursuant to the Georgia Civil Practice Act. Additionally, APG argued that if the statute was applicable to the conduct at issue, then the statute was unconstitutionally overbroad and infringed upon a number of constitutionally-protected rights.

In its order, the Georgia Supreme Court agreed the first argument put forth by APG, and held that “O.C.G.A. § 16-12-100(b)(5) does not make criminal the act of

producing the videotape in response to a court order or a request for discovery.” Doe, 280 Ga. at 308. The Court reasoned that “while the statute expressly prohibits one from creating, reproducing, publishing, promoting, selling, distributing, giving, exhibiting, or possessing with the intent to sell or distribute the videotape at issue, one who receives a request for discovery is asked to *produce* documents or things, an action not listed in O.C.G.A. § 16-12-100(b)(5).” Id. According to the Court, because of the express mention of a series of prohibited acts, it was assumed that the legislature did not include those acts which were not expressly listed. Because the word “produce” has “distinct meaning in judicial and *quasi* judicial proceedings that the General Assembly has repeatedly recognized” the Court reasoned that the failure of the General Assembly to include that term in the criminal statute meant that the act of producing evidence pursuant to a lawsuit court order or discovery request was not conduct that was subject to criminal liability. In so ruling, the Court relied upon two principals of statutory construction, “Expressum Facit Cessare Tacitum” (if some things are expressly mentioned, the inference is stronger that those omitted were intended to be excluded), and “Expressio Unius Est Exclusio Alterius” (the express mention of one thing implies the exclusion of another), and held that the omission of the word “produce” from O.C.G.A. § 16-12-100(b)(5) was to be “regarded by the courts as deliberate.” Id.

Ultimately, the Georgia Supreme Court held that the trial court abused its discretion in granting the motion for protective order under the reasoning that O.C.G.A. § 16-12-100(b)(5) prohibited the District Attorney from producing the tape, and remanded the matter for further consideration under its holding. While it is not reported in the Supreme Court’s Order, the State Court of DeKalb County, after another set of motions to compel and motions for protective order by the Defendants and the Cobb

County District Attorney, ultimately ordered that the Cobb County District Attorney had to produce the videotape to the Court, where it is to be held by the trial judge and made available to the litigants for use in their preparation of their respective cases.

While the Doe case arises from a regrettable and extreme set of facts, the holding remains important for all civil litigants. The holding in Doe maintains the status quo established by the Georgia Civil Practice Act, which envisions broad and liberal discovery, and allows litigants access to what otherwise might be considered illegal or contraband evidence. In holding that the criminal statutes at issue had to be narrowly construed, the Georgia Supreme Court maintained the default presumption that relevant evidence remains discoverable under Georgia law. While this is said, it is undisputed that the trial courts still retain a great level of autonomy to determine how and if this otherwise discoverable evidence will be used in trial proceeding before them.

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