IN THE SUPREME COURT OF GEORGIA

OGLETHORPE POWER CORPORATION, ET AL.,

Petitioners,

v.

ESTATE OF JAMES R. FORRISTER, ET AL.,

Respondents.

CASE NO. S15C1689

AMICUS CURIAE BRIEF OF GEORGIA CHAMBER OF COMMERCE

Josh Belinfante
Georgia Bar No. 047399
Alexander Denton
Georgia Bar No. 660632
ROBBINS ROSS ALLOY
BELINFANTE LITTLEFIELD LLC
999 Peachtree Street NE
Suite 1120
Atlanta, GA 30309

Attorneys for Amicus Curiae
Georgia Chamber of Commerce

AMICUS CURIAE BRIEF OF GEORGIA CHAMBER OF COMMERCE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 23 of the Georgia Supreme Court Rules, the Georgia Chamber of Commerce ("Georgia Chamber") files this brief in support of the Petitioners' Consolidated Petition for Writ of Certiorari urging review of the Court of Appeals' decision to, inter alia, allow limited liability companies to state claims for emotional damages.

In Oglethorpe Power Corporation v. Estate of James R. Forrister, Nos. A15A0376, A15A0377, and A15A0522 (Ga. App. Jul. 1, 2015) ("Forrister"), the Georgia Court of Appeals answered what it acknowledged was a "question of first impression": whether a limited liability company ("LLC") can recover "discomfort and annoyance" damages on a nuisance claim. (Op. at 25.) Incredibly, the Court of Appeals affirmatively answered that question and held, for the first time in Georgia history, that (1) a corporation can recover damages based on its emotional harm, and (2) the measure of those damages are limited only by the enlightened conscience of the jury. (Op. at 32-35.) In so holding, the Forrister decision allows the fantastically impossible to be measured by the completely unquantifiable. Consequently, the opinion represents bad law and bad policy for Georgia.

I. INTEREST OF AMICUS CURIAE

Established in 1915, the Georgia Chamber serves the unified interests of its thousands of members – ranging in size from small businesses to Fortune 500

corporations – that employ millions of Georgians in a diverse range of industries across all of Georgia's 159 counties. The Georgia Chamber is the State's largest business advocacy organization, and it is dedicated to representing the interests of Georgia businesses and citizens. The Georgia Chamber's primary mission is to retain and create jobs in Georgia, and it pursues this mission, in part, by aggressively advocating the business and industry viewpoint to all branches of government.

The Georgia Chamber is interested in this case because it believes the Court of Appeals decision in Forrister threatens to dramatically alter well-established principles of tort liability and corporate law. By establishing a new theory of damages, measured only by the enlightened conscience of a jury and by blurring the distinction between an LLC, its members, and the opinion represents a dramatic shift in nuisance and corporate jurisprudence. This change will doubtlessly impact not only public utilities, but other businesses across the State. The Georgia Chamber therefore has particular interest in assisting the Court with the issues presented.

II. FACTUAL BACKGROUND

The Georgia Chamber adopts the Statement of Facts and Procedural History set forth in Petitioners Oglethorpe Power Corporation's and Smarr EMC's Consolidated Petition for Writ of Certiorari ("Petition").

III. ARGUMENT & CITATION TO AUTHORITY

In what it acknowledges is a "question of first impression in Georgia", the Court of Appeals wrongly decided that (1) a LLC can recover damages for the emotions of "discomfort and annoyance," and (2) the measure of those damages are determined and limited only by the enlightened conscience of a jury. (Op. at 32-35.) This two-fold decision represents a significant expansion of liability for Georgia businesses: first, the Court of Appeals authorized a legal fiction to receive damages for subjective, emotional harm that a corporate entity cannot express, and second, the Forrister decision placed no limitation on those etherial damages. The Court of Appeals' foray into policymaking represents bad policy for the State of Georgia, its employers and its natural and corporate utility rate payers. It also upsets well-established precedent establishing that LLCs are distinct from their members.

A. CORPORATIONS CANNOT SUFFER DISCOMFORT AND ANNOYANCE.

Prior to the Court of Appeals decision in Forrister, it was largely understood that corporate entities cannot suffer discomfort or be annoyed. Accordingly, Georgia courts have long joined other jurisdictions in holding that this truism precluded corporations from recovering for claims of intentional or negligent infliction of emotional distress. See Ryckeley v. Callaway, 261 Ga. 828 (1992) (deciding that a claim for negligent infliction of emotional distress required

physical harm. Yarbray v. S. Bell Tel. & Tel. Co., 261 Ga. 703, 706 (1991) (concluding that claims for intentional infliction of emotional distress required a showing of emotional distress even without a physical injury).

The reasoning behind that rule applies equally to the nuisance damages of "discomfort and annoyance," because both theories seek to compensate for past emotional and psychological harm that only natural persons can experience. Several other jurisdictions reached the same conclusion. For example, dicta from the United States Supreme Court said: "As a corporation cannot be said to have life or health or senses, the only ground on which it can obtain either damages or an injunction, under these provisions, is injury to its property." N. Pac. R. Co. v. Whalen, 149 U.S. 157, 163, 13 S. Ct. 822, 824, 37 L. Ed. 686 (1893).

Other state and federal courts have also rejected corporate claims for emotional distress. See, e.g., See Dynamic Image Technologies, Inc. v. United States, 221 F.3d 34, 37 (1st Cir. 2000) (applying Puerto Rican law to conclude that corporate entities cannot seek damages for emotional distress) (citing FDIC v. Hulsey, 22 F.3d 1472, 1489 (10th Cir.1994) (applying Oklahoma law); Lampliter Dinner Theater, Inc. v. Liberty Mut. Ins. Co., 792 F.2d 1036, 1040 (11th Cir. 1986) (applying Alabama law) ("corporations cannot experience emotional distress and cannot therefore maintain a suit for outrageous conduct"); Gurman v. Metro Hous. & Redevelopment Auth., 884 F. Supp. 2d 895, 902 (D. Minn. 2012); HM Hotel

Props. v. Peerless Indem. Ins. Co., No. 12–548, 2012 WL 2300615, at *3 (D. Ariz. June 18, 2012) ("[A] corporate plaintiff cannot suffer emotional distress because 'a corporation lacks the cognizant ability to experience emotions.'"); Earth Scientists Ltd. v. U.S. Fidelity & Guar. Co., 619 F.Supp. 1465, 1474 (D.Kan.1985); Barreca v. Nickolas, 683 N.W.2d 111, 124 (Iowa 2004) (deciding that allowing a corporation to claim emotional damages "stretch[es] the bounds of the legal fiction of corporate personhood too far").

The reasoning from these cases is applicable here, because nuisance damages for "discomfort and annoyance," have similarly been described as being based on emotive qualities of "discomfort[,] loss of peace of mind, unhappiness and annoyance." City of Columbus v. Myszka, 246 Ga. 571, 573 (1980) (citation and internal quotation marks omitted). Prior to Forrister, the Court of Appeals adopted the same reasoning and described nuisance damages for "discomfort" as being measured by the degree of the plaintiff's "unhappiness." Weller v. Blake, 315 Ga. App. 214, 217 (2012) (citations omitted).[1]

Here, the Court of Appeals applied none of this authority when it decided that "discomfort and annoyance" damages are dissimilar from those of emotional distress. Instead, the Forrister court misplaced its reliance on the Restatement of

[1] Tellingly, the Weller decision also described a nuisance itself in physical terms, specifically as something that causes "physical discomfort". 315 Ga. App. at 220 (emphasis added).

Torts (2d), Section 929 ("Second Restatement"). The text of the Second Restatement, however, describes "discomfort and annoyance" damages as being available to a natural person, or "him as an occupant." (Op. at *29 (emphasis added).) The Comment to the Second Restatement confirms that "discomfort and annoyance" damages are limited to natural persons to compensate them for "sickness or other substantial bodily harm." (Id. (emphasis added).) Whatever damages an LLC may suffer, sickness and bodily harm cannot be among them.

Finally, the Court of Appeals' citation to Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U.S. 317, 329 (1883), is misplaced. First, that opinion involved federal common law, as the petitioner there was a church organization in Washington, D.C. Id. at 318. Second, the Forrister court cites language from the Fifth Baptist Church decision that appeared in the context of determining what constitutes nuisance, not whether a corporation can recover for its members' annoyance. (Op. at 33-34 (citing Fifth Baptist Church, 108 U.S. at 329.) The preceding paragraph to the one cited states:

> That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrong-doer, and when the cause of the annoyance and discomfort are continuous, courts of equity will interfere and restrain the nuisance.

Fifth Baptist Church, 108 U.S. at 329.

Third, to the extent that Fifth Baptist Church has been cited in Georgia, it is not for the proposition that a corporate entity is entitled to recover damages based on its members' feelings. Specifically, this Court cited Fifth Baptist Church for the purpose of describing activity that could constitute a nuisance. See Warren Co. v. Dickson, 185 Ga. 481, 483 (1938). This Court and the Court of Appeals cited Fifth Baptist Church in the context of assessing a natural person's damages for "discomfort and annoyance." Swift v. Broyles, 115 Ga. 885 (1902); City Council of Augusta v. Boyd, 70 Ga. App. 686, 689-90 (1944). Finally, Court of Appeals Judges Hall and Stolz cited the decision in a dissenting opinion in a case on notes. Thomas v. Campbell, 126 Ga. App. 675, 678 (1972). (Hall, J., dissenting.)

The Court of Appeals expansion of nuisance law, therefore, is not compelled by precedent and should at least be reviewed by this Court.

B. CORPORATE DAMAGES FOR "DISCOMFORT AND ANNOYANCE" CANNOT BE REASONABLY QUANTIFIED.

If Forrister is allowed to stand without correction from this Court, juries will be tasked with deciding the value of fictitious LLC emotions. That intellectual exercise is further made more difficult by the fact that juries will be tasked with assigning the monetary value without any guidance or evidence beyond the jurors' enlightened conscience. (Op. at 32.) The Court of Appeals previously recognized the vagaries such an instruction imposes:

> no precise rule for ascertaining the damage can be given, as, in the very nature of things, the subject-matter affected is not susceptible of exact measurement; therefore the jury are left to say what, in their judgment, the plaintiff ought to have in money, and what the defendant ought to pay, in view of the discomfort or annoyance to which the plaintiff and his family have been subjected by the nuisance.

Swift, 115 Ga. at 885 (emphasis added). This second aspect of the Forrister decision exposes Chamber members to damage awards based on nothing but creative advocacy and hyperbole, not legally admissible evidence.

C. FORRISTER'S NEW CAUSE OF ACTION IS BAD POLICY FOR GEORGIA.

Forrister establishes three new threats to Georgia businesses and utility ratepayers: (1) a new class of plaintiffs with unintelligible damages; (2) juries determining the amount of those phantom damages from thin air; and (3) the weakening of the separate identities of LLCs and their members. The combination of each will almost assuredly result in increased utility rates and other business expenses that will be passed onto natural and corporate consumers.

On the first point, the Forrister decision expands significantly the number of potential plaintiffs throughout Georgia. Where corporations previously lacked standing to seek damages based on the emotions of their members, partners, or shareholders, that bright line now is so blurred that corporate entities theoretically

could assert claims for emotional distress, loss of consortium, wrongful death, and the like.

On the second, damages for corporate plaintiffs in nuisance cases heretofore were limited to economic damages, which could be established through actual evidence. This generally predictable and objective standard allowed utilities and other employers to reasonably prepare litigation contingencies, and it incented settlement given a largely quantifiable damage theory. After Forrister, though, juries will be left with no guidance when undertaking the impossible task of assigning a value to corporate feelings. This doubtlessly will increase litigation costs and impact not just utilities, but also the businesses and individuals they serve.

Finally, the Forrister decision sets a dangerous precedent that weakens the critical doctrine of the distinction of corporate identities. LLC members long have been deemed separate and apart from the LLCs themselves. See generally Primary Invs., LLC v. Wee Tender Care III, Inc., 323 Ga. App. 196, 199 (2014). Forrister, however, significantly blurs those lines and allows members of LLCs to shield personal liability and claim damages to personalty through the LLC. This reasoning could be applied in reverse and weaken the benefit of establishing corporate entities, and the Chamber opposes any policy that weakens the distinctions between corporations and their members, shareholders, or partners.

IV. CONCLUSION

For these critically and fundamentally important reasons, the Georgia Chamber urges this Court to grant Petitioners' Petition for Writ of Certiorari.

Respectfully submitted, this _____ day of August, 2015.

/s/ Josh Belinfante
Josh Belinfante
Georgia Bar No. 047399
Alexander Denton
Georgia Bar No. 660632
ROBBINS ROSS ALLOY BELINFANTE LITTLEFIELD LLC
999 Peachtree Street NE
Suite 1120
Atlanta, Georgia 30309
678-701-9381 (T)
404-856-3250 (F)

Attorneys for Amicus Curiae
Georgia Chamber of Commerce