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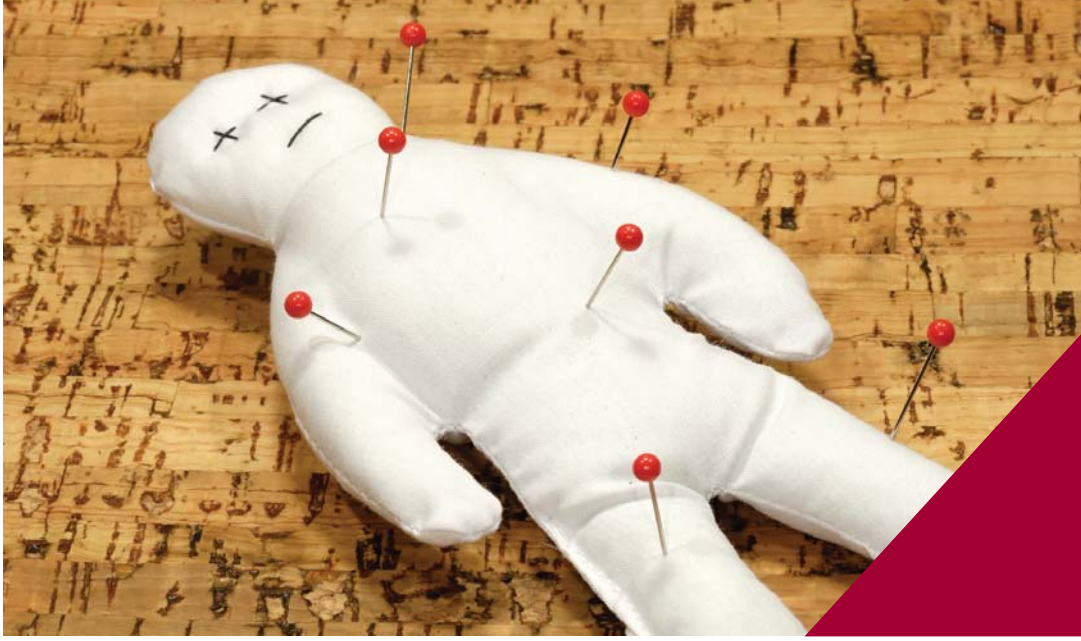

Relief from Retaliation Claims?

By: Marquetta J. Bryan

Most federal employment discrimination laws contain anti-retaliation provisions. Title VII of the Civil Rights Act of 1964, which protects employees against discrimination and harassment on the basis of race, color, religion, sex, and national origin, makes it illegal to retaliate against someone for complaining about discrimination or harassment, filing a charge alleging discrimination or harassment, or participating in an investigation or lawsuit involving alleged discrimination or harassment.

According to the United States Equal Employment Opportunity Commission (EEOC), retaliation claims are currently the most common type of employment law violation, and such claims have increased from 19,694 in 2000, to 37,836 in 2012.[1] However, a recent United States Supreme Court decision may provide some ready relief.

The number of claims filed with the EEOC each year alleging unlawful retaliation has increased from 19,694 in 2000 to 37,836 in 2012.

Retaliation claims are attractive to claimants for at least two reasons:

1. Evolving case law has broadened the scope of persons protected against retaliation and lowered the burden for establishing retaliation claims. For example:

   a. In *Robinson v. Shell Oil Co.*[2], it was held that the definition of "employee" under Title VII includes former employees.

Continued from page 1

b. In *Burlington Northern & Santa Fe Railway v. White*[3], it was held that a retaliatory "adverse action" need not be related to the terms and conditions of employment; rather, unlawful retaliation occurs whenever the adverse action would have the effect of discouraging a "reasonable employee" from making a discrimination complaint.

2. Retaliation claims have more jury appeal as compared to harassment and other forms of discrimination claims.

On June 24, 2013, the Supreme Court of the United States issued a decision that may offer employers some relief from retaliation claims brought pursuant to Title VII. In *University of Texas Southwestern Medical Center v. Nassar*[4], the Supreme Court held that in order to prevail on a Title VII retaliation claim, plaintiffs must prove that their protected activity was a "but-for" cause -- of the adverse employment action suffered by the employee, rather than simply a "motivating factor." The Court held that any lower causation standard could tempt poorly performing employees to file frivolous claims designed to interfere with the employer's lawful action.

Retaliation claims have more ***jury appeal*** *as compared to harassment and other forms of discrimination claims.*

Naiel Nassar, a doctor, worked as a member of the University's faculty and as a staff physician at Parkland Memorial Hospital. Dr. Nassar complained of alleged harassment based on religion and ethnic heritage by his colleague, Dr. Levine, and resigned from his University position. Dr. Nassar then applied for a vacant staff physician position at the Hospital. An offer was made, and then rescinded. Dr. Nassar was technically ineligible for the staff physician job because he had resigned from his teaching position, and the University's agreement with the Hospital required that such positions be offered to current faculty members. However, Dr. Levine's supervisor admittedly objected to the job offer, at least in part, because he wanted Dr. Levine "publicly exonerated" with respect to Dr. Nassar's allegations.

Dr. Nassar filed suit claiming constructive discharge from the University and that Dr. Levine's supervisor's interference with the employment offer by the Hospital was in retaliation for complaining about Levine's harassment. A jury found for Dr. Nassar on both claims and awarded $400,000 in backpay and more than $3 million in compensatory damages (which was reduced to the $300,000 cap). The Fifth Circuit Court of Appeals vacated the judgment on the constructive discharge claim but affirmed on the retaliation claim, finding that even if the supervisor's conduct was motivated by the desire to adhere to the affiliation agreement, the evidence showed he was also partly motivated by the desire to retaliate against Dr. Nassar. The Fifth Circuit held that Title VII retaliation claims required only a showing of "mixed motives" or "motivating factor" causation rather than the more stringent standard of "but-for" causation. The Supreme Court vacated the Fifth Circuit's judgment and remanded the case to be decided by applying the appropriate, "but-for" standard of causation. In so holding, the Court rejected the "motivating factor" standard as a lesser causation standard. The "motivating factor" standard still applies to status-based discrimination claims, such as claims for race, sex or religious discrimination.

In the opinion, the Supreme Court recognized that its holding "is of particular significance because claims of retaliation are being made with ever-increasing frequency." Citing EEOC statistics, the Court added that the stricter causation standard could lead to less frivolous claims being filed and could make it easier for employers to dismiss "dubious" retaliation claims at the summary judgment stage.

While *Nassar* may show some promise for employers seeking early dismissals of retaliation claims under Title VII, only time will tell whether the number of claims begins to decrease or stabilize. Notwithstanding the pro-employer nature of the Supreme Court's decision, employers should note that even under the stricter "but-for" causation standard for retaliation claims, the implementation of sound policies prohibiting retaliation; consistent enforcement of those policies; proper training of managers and supervisors responsible for executing policies and documentation of employees' performance and misconduct all remain critical in defending against retaliation claims. While potential plaintiffs may have a more difficult burden to prove retaliation, retaliation claims are not going away.

Resources

1.http://www.eeoc.gov/eeoc/statistics/enforcement/retaliation.cfm.

2. Robinson v. Shell Oil Co., 519 U.S. 337 (1997).

3. Burlington Northern & Santa Fe Railway v. White, 548 U.S. 53 (2006).

4. University of Texas Southwestern Medical Center v. Nassar, 570 U.S. __ (2013).

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Spotlight on...

EMPLOYMENT LAW

Carlock Copeland attorneys strive to provide competent, practical and cost effective representation.

Our attorneys actively litigate and advise clients regarding state and federal employment law issues, including employment "at will", defamation, emotional distress, invasion of privacy, hiring, discipline, promotion, termination, discrimination, leave entitlements, workplace violence, sexual harassment, unemployment compensation, wage and hour issues, promotional opportunities, disability, accommodations, drugs and alcohol. Our experience in federal employment law, includes:

- Title VII
- Americans with Disabilities Act
- Family Medical Leave Act
- ERISA
- Age Discrimination in Employment Act

We also represent our public sector and private sector clients in all phases of employment discrimination claims including, state and local agency investigations and discrimination lawsuits on the basis of race, age, religion, national origin, disability and ancestry. We offer advice on employment contracts, employee handbooks and policies, hiring processes, training and evaluations, disciplinary actions and terminations as well as such matters as drug testing and employee background checks. In today's environment where prevention of all forms of discrimination and harassment is emphasized, our lawyers will review relevant personnel policies and practices on behalf of our clients such as employee handbooks, disciplinary policies, grievance programs and termination procedures.

Carlock Copeland's attorneys try to advise clients how to avoid trouble. When requested, we will assist with company and personnel training, and we will work with clients to implement our recommendations for a workplace with fewer EPL risks.

Interested in learning more? You can explore our representative cases on the Firm website, www.carlockcopeland.com, or for legal updates and resources on employment law, liability and litigation, visit us at www.yourEPLlawyer.com.

UPCOMING EMPLOYMENT LAW SEMINAR

October 8 Employment Law Beyond the Basics Seminar
Join Attorney Marquetta Bryan to earn CLE and explore emerging developments in employment law. Register at http://bit.ly/11RkkYl.

CONNECT WITH US

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on the Firm website:
Visit www.carlockcopeland.com

on our blog (pictured above) at:
www.YourEPLLawyer.com

Blog content is also available as a convenient once-monthly digest of posts. To subscribe, email mfry@carlockcopeland.com with "Subscribe to Your EPL Lawyer" as the subject.

Recent posts include:

Retaliation Claim Relief for Employers
The U.S. Supreme Court recently held that employees claiming Title VII retaliation must prove the retaliation was the "but-for" cause of the employment action, not merely a "motivating factor."

Fired for Being Too Pretty?
It's unfair, but it might not be illegal. According to the Iowa Supreme Court, firing an employee for being too attractive may not be gender discrimination.

EEOC Announces More Aggressive Game Plan
The EEOC has recently issued a new Strategic Enforcement Plan (SEP) for 2012 through 2016 which outlines six key priorities for the EEOC.

The Georgia Employment At-Will Doctrine Prevails – No Exceptions!
In *Poole v. In Home Health LLC*, the Georgia Court of Appeals upheld Georgia's strong employment at-will doctrine, even where the sympathies were with the employee.

Primer on Georgia's New Pre-Suit Time-Limited Demand Statute, O.C.G.A. § 9-11-67.1

By: Megan E. Boyd

On July 1, 2013, Georgia's new pre-suit time-limited demand statute, O.C.G.A. § 9-11-67.1, took effect. The new statute was enacted to address the plethora of bad-faith litigation over time-limited demands that has occurred since the Supreme Court of Georgia issued its opinion *Southern General v. Holt*.[1] In *Holt*, the Court held that an insurer may be liable for bad faith for failing to meet a time-limited demand within an arbitrary time set by the plaintiff's attorney if the verdict against the insured exceeds the insurer's policy limits.[2] The new statute sets out requirements for a pre-suit time-limited demand, outlines the ways in which the demand may be satisfied, and gives insurers the right to inquire about information not contained in the demand without creating a counteroffer.

Under O.C.G.A. § 9-11-67.1, any pre-suit time-limited demand must be in writing, sent by certified mail or statutory overnight mail return receipt requested, and contain the following:

(1) A 30-day time period from receipt of the offer for acceptance;
(2) The amount of the demand;
(3) The parties or parties to be released;
(4) The type of release that is acceptable; and
(5) The claims to be released.[3]

The 30-day time requirement is particularly important for insurers who, in the past, often faced time-limited demands of 7 to 10 days, a period too short for most insurers to gather factual information about the accident and injuries, evaluate the demand, and obtain approval to tender the policy limits.

Over the last 10 years, much of the time-limited demand litigation has centered on whether an insurer may ask certain questions or inquire about certain issues without making a counteroffer that constitutes a rejection of the demand.[4] In many of those cases, the insurer intended to accept the demand but was deemed to have made a counteroffer simply by inquiring about issues like medical liens that were germane to termination of the lawsuit.

The new statute attempts to address some of those issues by providing that the insurer "shall have the right to seek clarification regarding terms, liens, subrogation claims, standing to release claims, medical bills, medical records and other relevant facts" without any attempt to seek "reasonable clarification" being deemed a counteroffer and a rejection of the demand.[5] It is too early to tell if and to what extent O.C.G.A. § 9-11-67.1 will curb litigation over purported counteroffers, as the term "reasonable clarification" appears open to interpretation.

The new statute also permits an insurer to pay the time-limited demand by check, money order, wire transfer, cashier's check, draft, or electronic funds transfer or payment.[6] But, despite insurers' efforts, O.C.G.A. § 9-11-67.1 does not put any cap on bad faith penalties or attorney fees for an insurer's failure to respond to or accept a time-limited demand.

Importantly, the new statute only applies to

(1) pre-suit demands;
(2) made by attorneys;
(3) for personal injuries that occur after July 1, 2013;
(4) where the injuries arise out of motor vehicle accidents.[7]

The statute, therefore, has no applicability to time-limited demands sent after a suit has been filed or to demands for injuries not arising out of motor vehicle accidents. Additionally, O.C.G.A. § 9-11-67.1 does not apply to property damage claims arising from auto accidents.

This new pre-suit time-limited demand statute should not alter insurers' pre-established good practices for dealing with time-limited demands. As before, insurers should calendar response deadlines immediately, send copies of pre-suit time-limited demand to their insureds, evaluate the demands as soon as possible, and seek clarification early, requesting extensions of time to respond if necessary.

Resources

1. 262 Ga. 267, 416 S.E.2d 274 (1992).
2. Id. at 269, 416 S.E.2d at 276.
3. O.C.G.A. § 9-11-67.1(a).
4. Frickey v. Jones, 280 Ga. 573, 630 S.E.2d 374 (2006); Torres v. Elkin, 317 Ga.App. 135, 730 S.E.2d 518 (2012); Smith v. Hall, 311 Ga.App. 99, 714 S.E.2d 742 (2011); Mealer v. Kennedy, 290 Ga.App. 432, 659 S.E.2d 809 (2008); Wyatt v. House, 287 Ga.App. 739, 652 S.E.2d 627 (2007); Herring v. Dunning, 213 Ga.App. 695, 446 S.E.2d 199 (1994).
5. O.C.G.A. § 9-11-67.1(d).
6. O.C.G.A. § 9-11-67.1(f).
7. O.C.G.A. § 9-11-67.1(h).

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Updates from the...

Insurance Coverage Corner

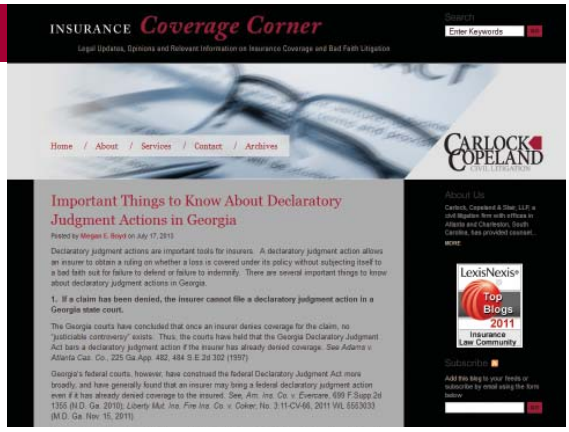
Firm attorneys regularly post information and resources on Coverage and Bad Faith on the practice group blog, www.InsuranceCoverageCorner.com. Blog content is also available as a convenient once-monthly digest of posts. To subscribe, email mfry@carlockcopeland.com with "Subscribe to ICC" in the subject line. Recent posts include:

Georgia Uninsured Motorist Law Governs UM Claim And UM Benefits Awarded Under Umbrella Policy Issued in Indiana

The Georgia Court of Appeals recently held that the Georgia Uninsured Motorist Statute applied to an insurance policy that was issued and delivered in Indiana. In *St. Paul Fire & Marine Ins. Co. v. Hughes*, Appellant St. Paul Fire & Marine Ins. Co. issued a commercial umbrella policy to Townsend Tree Service Co., Inc. (Townsend). One of Townsend's employees, Appellee Wallace Hughes, was injured in a motor vehicle accident in August 2005; he sought uninsured/underinsured benefits under the St. Paul umbrella policy...

Important Things to Know About Declaratory Judgment Actions in Georgia

Declaratory judgment actions are important tools for insurers. A declaratory judgment action allows an insurer to obtain a ruling on whether a loss is covered under its policy without subjecting itself to a bad faith suit for failure to defend or failure to indemnify. There are several important things to know about declaratory judgment actions in Georgia...



You're invited to the:

September 19 DAY OF DISCOVERY

Complimentary

Insurance Coverage and Bad Faith Seminar

Join us at the Atlanta Botanical Garden for five hours of continuing education and the opportunity to explore the Gardens. Topics will include: insurance coverage and bad faith litigation; coverage in construction defect claims; first party claims; excess carrier involvement in excess exposure cases; and the ethics of using social media in claims investigations. Register at www.ccsrsvp.com.

Publications & Presentations

Carlock Copeland attorneys frequently write and present on topics and trends for a variety of clients, organizations and publications. To request a presentation or article for your organization, contact Michelle Fry, at 404.221.2268 or mfry@carlockcopeland.com.

- Kent Stair and Paul Sperry presented **"Risk Management for Design Professionals"**, an annual Firm-hosted seminar, to engineering and architecture professionals.

- More than 100 claims professionals attended the Firm's annual **General Liability and Workers' Compensation Seminar** at Turner Field. An afternoon of seminars were led by several guests and the following Firm attorneys: Marquetta Bryan, Jason Hammer, Laura Paton, Fred Valz, Ryan Wilhelm, Dave Root, Scott Huray, Heather Miller, Lee Weatherly, Chris Whitlock, Lynn Olmert and Karisa Klee.

- Joe Kingma co-presented on **Risk Management for Managing Partners** to the Managing Partners Committee of the Atlanta Bar Association.

- Gary Lovell and Kristen Kelley authored the two-part article **"Evidence-Based Medicine in Medical Malpractice Litigation"** and "**Evidence-Based Medicine in the Courtroom"** for the April/May 2013 issue of Medical Malpractice Law & Strategy, an ALM publication.

- Brent Meyer presented **"Evaluating Property Loss: Measurement of Damages under Georgia Law"** to claim adjusters handling various third party claims.

- Cheryl Shaw presented **"Settlement Demands (Offer and Acceptance): Where Are We Now?"** to a panel of claim representatives handling various third party claims.

- Joe Hoffman and Charlie McDaniel presented at a National Business Institutes' seminar, **"The Rules of Evidence: A Practical Toolkit."**

- Andy Countryman and Kristen Kelley presented **"Managing Risk and Medical Malpractice Basics"** to surgical residents at the Medical University of South Carolina.

Contribution, Indemnification and Apportionment in Georgia: An Ever-Changing Landscape

By: Joseph Hoffman

"If you can't find an appellate decision in your favor, just keep looking." This common saying among Georgia lawyers is the result of a history of inconsistent opinions, or at least the appearance of inconsistent opinions, at the appellate level on intricate legal issues. Unfortunately, this circumstance now applies when advising a client on the current state of liability among multiple tortfeasors.

"If you can't find an appellate decision in your favor, just keep looking."

Historically, Georgia law authorized a claim for contribution between joint tortfeasors where payment by one accounted for more than his fair share of the liability.[1] Additionally, Georgia law permitted a claim for *equitable* indemnification when the negligence of one joint tortfeasor was "imputed" to another through *respondeat superior*, vicarious liability or principal and agent.[2] Since the enactment of a new apportionment scheme in 2005, the Georgia appellate courts have struggled to establish if and when claims for contribution or indemnification still exist and, if so, under what circumstances.

Most recently, this ever-shifting landscape was highlighted in a series of appellate decisions that now support a range of possible arguments. If you seek to assert a claim for equitable indemnification, then cite *Murray v. Patel*,[3] which held that a claim for equitable indemnification between two negligent drivers could be sufficiently pled to survive a motion to dismiss. If you seek to dismiss a claim for contribution, then cite *McReynolds v. Krebs*,[4] which held that the trial court properly dismissed a cross-claim for contribution because the party's relief was through apportioning fault rather than for contribution. If your client settles, but feels as though it paid too much, then cite *Zurich American Ins. Co. v. Heard*,[5] which held that a settling party could seek contribution because a factfinder had not apportioned damages.

Perhaps recognizing the growing confusion, the Court of Appeals' recent decision in *District Owners Association, Inc. v. AMEC Environmental & Infrastructure, Inc.*[6] attempts to provide some clarity. In *District Owners,* the plaintiff was injured while jogging when he jumped over a 3-foot wall that concealed a 33-foot drop on the other side. The plaintiff brought suit against the landowner, and the landowner brought a third-party claim against the designer and builder of the wall for equitable indemnification. The trial court granted the third-party defendants' motion to dismiss, finding that the apportionment statute barred the equitable indemnification claim.

In affirming the dismissal, the Court of Appeals briefly addressed the current state of contribution by noting that, based on *McReynolds*, "apportioned damages 'shall not be subject to any right of contribution'" and that "damages shall not be a joint liability among the persons liable." The Court also recognized that the Supreme Court in *McReynolds* determined that the apportionment statue "supplanted claims for common-law contribution," implying, without expressly stating, that contribution claims may be on their last leg.

In addressing equitable indemnification, the Court only focused on the landowner's allegations in the third-party complaint. It noted that the landowner failed make any "allegations of imputed negligence or vicarious liability" necessary to state a claim for equitable indemnification. On this basis, the Court affirmed the dismissal of the equitable indemnification claim. As a side note, the Court also called into question the "precedential value" of *Murray*, which allowed a negligent driver to assert an equitable indemnification claim against another driver, given the more recent Supreme Court decisions interpreting the apportionment statute (i.e. *McReynolds* and *Couch v. Red Roof Inns, Inc.*[7]).

So where are we now? Aside from the situation in *Zurich*, where a settling party brings a claim for contribution against a non-settling party, *District Owners* and *McReynolds* appear to have nearly closed the door on contribution claims in Georgia. With regard to equitable indemnification, it appears that the proper allegations will be sufficient to survive a challenge at the early stages of litigation. Whether the claimant will actually be able to prove the "imputed negligence" necessary to survive summary judgment, however, remains to be seen.

Resources

1. O.C.G.A. § 51-12-32; Tenneco Oil Co. v. Templin, 201 Ga.App. 30, 34 (1991) ("Contribution among joint tortfeasors is enforceable where one joint tortfeasor has paid 'more than his share of the common burden which all are equally bound to bear").

2. Nguyen v. Lumbermens Mutual Casualty Company, 261 Ga.App. 553, 556 (2003); City of College Park v. Fortenberry, 271 Ga.App. 446 (2005) (explaining that Georgia law recognizes "two broad categories of indemnity: as created by contract, as between a surety and a debtor; and under the common law of vicarious liability, as between principals and agents.").

3. 304 Ga.App. 253 (2010).

4. 290 Ga. 850 (2012).

5. 740 S.E.2d 429 (2013).

6. A13A0621, 2013 WL 3369165 (Ga. Ct. App. July 8, 2013).

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Firm News & Notes

CARLOCK HONORED AS 2013 STATE BAR OF GEORGIA "TRADITION OF EXCELLENCE" AWARD RECIPIENT

Congratulations to firm founder and partner, **Tom Carlock,** for being honored with the 2013 "Tradition of Excellence" Award by the General Practice and Trial Section of the State Bar of Georgia. The "Tradition of Excellence" Award has become one of the most prestigious honors a lawyer or judge can receive. Recipients are recognized for exceptional legal and personal characteristics, including at least 20 years of outstanding achievement as a trial lawyer, general practitioner or judge; a significant contribution to continuing legal education or bar activities; a record of community service and a personal commitment to excellence.

Pictured from left-to-right, the 2013 Tradition of Excellence recipients: Section Chair Laura Austin, Tom Carlock (defense), Mary A. Prebula (general practice), Judge William McMurray, Jr. (judicial) and Eugene "Bo" Chambers, Jr. (plaintiff).

LOVELL APPOINTED TO INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL TRANSPORTATION COMMITTEE

Gary Lovell has been appointed to serve as Vice Chair of Programs and Vice Chair of Corporate Counsel and Insurance Executives for the International Association of Defense Counsel (IADC) Transportation Committee for the 2013-2014 term.

Founded in 1920, IADC is a professional association for corporate and insurance defense lawyers around the world. The organization is best known for founding the Defense Research Institute (DRI) in the 1960s, which provides broad-based support and education for the defense bar.

BRYAN INVITED TO JOIN CLAIMS AND LITIGATION MANAGEMENT ALLIANCE

Marquetta Bryan has accepted a nomination to join the prestigious Claims and Litigation Management Alliance (CLM). CLM is an alliance of insurance companies, corporations, corporate counsel, litigation and risk managers, claims professionals and attorneys. CLM's goal is to promote and further the highest standards of litigation management in pursuit of client defense. Attorneys and law firms are extended membership by invitation only based on nominations from CLM Fellows, in-house claims professionals.

EMGE, JOWERS AND WERDESHEIM RECEIVE AV PREEMINENT RATING

Congratulations to **N. Keith "Chip" Emge, Beth Jowers** and **Pete Werdesheim** for receiving an AV Preeminent Rating from Martindale-Hubble. Martindale-Hubbell® Peer Review Ratings™ reflect a combination of achieving a Very High General Ethical Standards rating and a Legal Ability numerical rating.

EXPERIENCED ASSOCIATES ADDED TO BOTH OFFICES

Robert B. Hawk joins Charleston's general liability and construction practice groups. He represents insurance companies, general contractors, construction design professionals, small business owners and others in insurance coverage and civil tort litigation.

Robert was recently selected as a member of the Charleston Metro Chamber of Commerce's Leadership Charleston Class of 2012 and is currently serving on the South Carolina Bar Young Lawyers Habitat for Humanity Wills Committee.

Meredith A. Bryant joins the Atlanta Workers' Comp team.

She graduated from Vanderbilt University in 2006 with a B.A. in American History and English. She received her Juris Doctorate from the University of Mississippi in 2009 and spent her third year of law school as a visiting student at Georgetown University Law Center. She is an avid volunteer at the Shepherd Center.

William K. Owens, Jr. joins Atlanta's general liability and insurance coverage and bad faith litigation practice groups. Before joining Carlock Copeland, Will worked for an Atlanta area firm representing parties in a wide variety of matters, including personal injury, workers' compensation, and criminal cases.

Will graduated cum laude from Washington and Lee University in Lexington, Virginia in 2008 with a B.A. in Politics. In 2011, Will received his Juris Doctor, cum laude, from the University of Georgia School of Law.

Know Your Privileges:
Keeping Adjusters' Claims Files Out of Court

By: Laura Paris Paton

In South Carolina, plaintiffs have been testing the limits of discovery by trying to secure adjuster claim files. These files generally contain the adjuster's investigation into the claim, information as to the adjuster's opinions on liability and what an adjuster might pay for settlement of the matter. In a number of cases, courts have ordered the production of the claim files. Therefore, it is more important than ever for adjusters and attorneys to understand what privileges attach to adjuster's file materials -- and when those privileges attach -- so that they can work together to keep adjuster claim file material out of the discovery process.

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."[1] Thus, as an initial matter, a subpoena or written discovery request for adjuster claim file material is, absent an exception to the general broad rule, discoverable. However, there are two privileges that counsel can assert to protect these materials: work product privilege and attorney client privilege.

Privleged or not?
Who gets access to claim files and why

Attorney Work Product Privilege

The attorney work product doctrine protects from discovery documents prepared *in anticipation of litigation*, unless a substantial need can be shown by the requesting party.[2] The work product privilege encompasses documents obtained by any representative of the insured, including an attorney, consultant, surety, indemnitor, insurer, or agent. Materials that might fall into this category include witness, consultant reports, internal memoranda, emails, notes and impressions of conversations, photographs, and, potentially, private investigator's surveillance materials. However, it is essential to remember that unless the materials were prepared "in anticipation of litigation," they are not protected. Generally, the court does not consider the typical investigation into a claim as "in anticipation of litigation." Further, while the attorney work product privilege provides a shield to disclosure, a plaintiff may still be able to convince a court to force disclosure of these materials if he can show:

1) he has a "substantial need" for the materials in the preparation of his or her case, and

2) he will be unable to obtain the substantial equivalent of the materials without undue hardship.[3]

Thus, if a plaintiff demonstrates that a witness is unable to clearly remember events relevant to the case given a long passage of time, he may have good cause to obtain notes regarding a witness's prior statement.[4]

Attorney Client Privilege

In addition to the work product privilege, the attorney client privilege can protect adjuster file materials from disclosure to plaintiffs. The attorney client privilege attaches where legal advice of any kind is sought from a professional legal adviser in his capacity as such, and the communications relating to that purpose made in confidence by the client, are at this instance permanently protected from disclosure by himself or by the legal adviser, except the protection may be waived.[5] Unlike the work product privilege, the attorney client privilege may be asserted whether or not the document was obtained in anticipation of litigation. While South Carolina has not directly decided this issue, the attorney client privilege probably applies to statements made by the insured to an adjuster even though the adjuster is not a licensed attorney. Further, the attorney client privilege is much narrower than the work-product privilege. It only applies to those conversations between the adjuster and the client, and it does not apply to interviews of third-party witnesses or an adjuster's informal consultation with an expert.[6] However, unlike the work product privilege, the attorney client privilege will provide a shield without the caveat that materials are "in anticipation of litigation."

How Adjusters Can Protect their Files

Document, document, document! The work product privilege is generally a stronger argument in court. But, in order for the work product privilege to apply, the materials must be prepared "in anticipation of litigation." Therefore, it

is essential that adjusters include in their file any information that might prove that they anticipated litigation. This could come in the form of a demanding e-mail or conversation, the rejection of a settlement offer, or the date on which a claimant's attorney contacts the adjuster. Finally, adjusters should consider carefully when and how they use independent adjusters and investigators, always keeping in mind that the information that they provide could later prove difficult to keep out of court. If it is well documented that the front-end communication related to a potential claim is conducted due to concerns about anticipated litigation, the adjuster's files are much more likely to remain protected from production.

Resources

1. Rule 26, SCRCP.
2. Rule 26(b)(3), SCRCP; Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947) (emphasis added).
3. Rule 26(b)(3), SCRCP.
4. See generally Phillips v. Dallas Carriers Corp., 133 F.R.D. 475 (M.D.N.C. 1999); McMillan v. GM Corp., 179 S.E.2d 99 (Ga. App. 1979).
5. Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 293, 692 S.E.2d 526, 530 (2010).
6. Marshall v. Marshall, 230 S.E. 2d 44, 47 (S.C.App. 1984).

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Carlock Copeland in the Community

JUNIOR LEAGUE OF ATLANTA RECOGNIZES MARQUETTA J. BRYAN

At the Junior League of Atlanta (JLA) General Membership Meeting and Awards Banquet, **Marquetta Bryan** (pictured, far right) was recently recognized with the JLA Membership Award for Committee of the Year, Community: Kids in the Kitchen. Marquetta served as the 2012 Chair of Kids in the Kitchen and has been invited to serve as the 2013 Chair of Learn and Serve Events for the League which coordinates all of the JLA education and service committees.

HOFFMAN CO-CHAIRS ANNUAL COMMUNITY SERVICE DAY FOR SERVICEJURIS 2013

Joe Hoffman co-chaired the annual day of community service for ServiceJuris in partnership with Hands on Atlanta. CCS Attorneys Katherine Holley and Andrew Bagley also assisted in rallying volunteers from within CCS ranks and raising donations for the project. More than 350 legal professionals came out for this year's event assisting in eight homeless shelters across Atlanta in support of Mayor Kasim Reed's Unsheltered No More initiative. Mayor Reed issued a letter thanking ServiceJuris for its accomplishments.

From Left: CCS Attorneys Joe Hoffman; Angela Forstie, daughter Tabatha Smith and husband Michael Stubbs; Brent Meyer; Neil Edwards; Andrew Bagley and wife Rachael Bagley.

OVERSTREET NAMED PRESIDENT OF HALOS CHARLESTON

David Overstreet is honored to be named the 2013-2014 president of HALOS of Charleston, a non-profit organization dedicated to providing necessary help and services to abused and neglected kids and their caregivers in Charleston who have fallen through the cracks. HALOS has been a passion of David's for many years, and he and his colleagues have served the organization through both volunteering and donations. Most recently, **Doug Mackelcan** and **Andrew Countryman** (in red) participated in the HALOS annual golf tournament.

JONES SELECTED FOR TWO LEADERSHIP POSITIONS

In 2012, **Bill Jones** was selected to participate in Catholic Charities Atlanta's Leadership Class, and upon his recent graduation, he was chosen to serve on the Advisory Board for the same. This program works to empower Catholic professionals who seek to become servant leaders in the business community through professional development, education and mentoring.

Bill was also recently asked to lead by his alma mater, South Dakota School of Mines, to serve on its Alumni Association Board. The Alumni Association promotes communication and interaction among alumni, students, faculty, and administration at the School of Mines with the objective of strengthening the school's academic, research and service roles.

"It is an honor and a privilege to have the opportunity to give back to those who have helped me to develop professionally and spiritually. I look forward to working with these organizations to assist with furthering their missions."

We're in this to win.

Settlement Successfully Negotiated in Multi-Million Dollar Construction Defect Case

Sarah Wetmore successfully negotiated and settled on behalf of her subcontractor client in a complex, multi-million dollar construction defect case involving facilities at a local hospital. Pending motions filed on behalf of her client regarding statute of limitations and statute of repose defenses, and strong expert witness support played a role in reaching a resolution.

Federal Court Dismisses Case Against Manufacturer/Broker in Maritime Action

Mike Ethridge and **Jack Daniel** prevailed in a maritime action in Federal Court on behalf of a business involved in brokerage and manufacturing. The business represented by the firm was a third party defendant being sued for goods it sold as broker. The goods at issue were shipped to South Carolina and ultimately to Brazil by other parties. The plaintiff, a large shipping company, has sought over $1.4 million in damages to compensate it for customs fines levied against it by the Brazilian government in connection with the shipment. Although one of the primary defenses was the goods being acceptable as sold, the client prevailed based on a more fundamental argument. The Federal Court dismissed the case against the client's business based on lack of personal jurisdiction. The hearing on the jurisdictional issue was argued by Jack Daniel in Federal Court.

Second Motion for Summary Judgment Defeats Remaining Claims Against Employment Lawyer

Michele Jones and **Joe Kingma** represent a lawyer who allegedly gave faulty employment law advice to a manager of a large company based in Japan. The manager claimed he was discriminated against based on his ethnicity and had to quit his job. Michele and Joe's original summary judgment motion was granted in large part, dismissing most of the plaintiff's claims. The Court of Appeals of Georgia affirmed, and Michele and Joe filed a second motion for summary judgment, arguing that the remaining claims were or could have been brought by the plaintiff in his lawsuit against his former employer. Thus the plaintiff could not show any damages proximately caused by the defendant lawyer's advice. The state court granted the second motion, striking the plaintiff's remaining claims.

Construction Defect Claims Against Inspection Service Dismissed

Laura Paton secured Voluntary Dismissal of Plaintiff's third party claims against her client, an engineering inspection service corporation, in a construction defects claim.

Court Finds Insurer Did Not Act in Bad Faith in Denying Coverage for Claim of Negligent Entrustment Against Excluded Driver's Parents

Fred Valz and **Megan Boyd** obtained a grant of summary judgment for their insurer client on the issue of whether the insurer acted in bad faith in denying coverage for a negligent entrustment claim filed against the parents of an excluded driver. The policy excluded coverage for "any claim" arising from an accident involving a vehicle operated by the excluded driver, including any claim for vicarious liability.

The plaintiff claimed the exclusion was ambiguous because the "any claim" language was limited only to vicarious liability claims as a result of the language immediately following it. The United States District Court for the Middle District of Georgia disagreed, finding the exclusion was not ambiguous. The "including" language did not limit the "any claim" provision, but merely provided an example of one type of claim—of many—that would not be covered if an excluded driver was operating the vehicle.

Summary Judgment in Negligent Inspection Case

Cheryl Shaw obtained summary judgment for her client, a local building inspection company, in a case involving allegations of negligence, breach of contract, and breach of fiduciary duty. Plaintiff claimed that the company, who was hired by a national lender to conduct limited inspections during construction of the subject home, negligently performed its services and breached various duties owed to the plaintiff. Cheryl argued, inter alia, that the plaintiff failed to prove its case and that no such duties were owed. The Superior Court of Putman County agreed, entering summary judgment for Cheryl's client on all six counts and dismissing the plaintiff's case in its entirety.

Receiver Wins on Motion to Dismiss

Joe Hoffman, **Brian Spitler** and **Joe Kingma** obtained dismissal for their client, an accountant and his firm, on claims brought by the principals of a company in receivership. The motion to dismiss successfully argued that the accountant and his firm were immune from liability based on their official capacity as court-appointed receivers. After a drawn out fight, which included the filing and refiling of lawsuits and a visit to the appellate court, the trial court dismissed the case in its entirety bringing resolution to the case prior to any formal discovery. Order is subject to further appeal.

Defense Award in Workers' Compensation Case

Brooke Payne recently defended a work-related slip and fall claim against a large corporate client. The Claimant alleged that he slipped on debris on the floor of the cooler in a retail store. Brooke offered the testimony of an employer witness and photographs of the accident scene, indicating that the cooler floor was clear and uncluttered at the time of the alleged accident. The Claimant alleged neck and back injuries as a result of the fall and denied any history of significant prior neck and back issues. However, the Employer/Insurer offered documentation proving that the Claimant had undergone extensive prior medical treatment for his back and neck. Although the Claimant offered a narrative report from one of the treating physicians indicating that he needed surgery, and that the need for surgery was related to the alleged work accident, the administrative law judge found that the claim was not compensable. In the decision, the Judge relied on FMLA and SSD forms tendered by the Employer/Self-Insurer, which indicated that the Claimant had already applied for medical leave and disability benefits due to bulging discs in his lumbar spine prior to the incident in question.

Eleventh Circuit Affirms Summary Judgment on Failed Business's Claims

John Bunyan and **Joe Kingma** won 11th Circuit affirmance of summary judgment for a law firm that had represented the plaintiff and his retail corporation in bankruptcy. Plaintiff claimed that the law firm breached its duties in advising him to sign a personal guaranty of one of his store's debts to avoid the appointment of a trustee and allowing a suit filed by his creditor to enforce the guaranty to go into default after he fled the country. In affirming summary judgment for the law firm, the 11th Circuit agreed with John and Joe's arguments that the law firm's advice to sign the guaranty was an honest exercise of professional judgment entitled to judgmental immunity. The 11th Circuit further agreed that Plaintiff could not show that any alleged wrongdoing by the law firm proximately caused him damages because there was no valid defense to the enforcement of the guaranty. John and Joe also thwarted the plaintiff's attempt to bring adversary claims against the law firm through his corporation in the bankruptcy court by negotiating a settlement of those claims with the trustee, which the bankruptcy court approved after a day long hearing.

Supreme Court Overturns 16 Year Old Precedent and Finds State Employed Physicians Immune from Tort Actions: Shekhawat v. Jones, 2013 WL 3475325.

Adam Appel and **Kim Ruder** successfully defended a catastrophic medical malpractice case against a Medical College of Georgia anesthesiologist. Plaintiffs claimed that the anesthesiologist as well as numerous other medical providers were negligent in their care and treatment of a newborn baby. The anesthesiologist provided anesthesia services to the newborn who underwent emergency lifesaving surgery. The child, after being transported to the NICU, coded for an extended period of time but was ultimately resuscitated by the NICU team. In suit, Plaintiffs claimed that the child suffered profound brain damage as a result of the lack of oxygen to his brain during the code. The child was ultimately diagnosed with spastic cerebral palsy in all four quadrants of his body. Plaintiffs sought damages in excess of $15 million.

Following extensive fact witness and expert witness discovery, Ruder and Appel filed a motion for summary judgment arguing that the anesthesiologist, who was employed by the Board of Regents/State of Georgia, was entitled to immunity from suit pursuant to the Georgia Tort Claims Act. The Trial Court agreed and dismissed the doctors. After Plaintiffs settled their claims with the state and the private hospital entity who employed the non-physician defendants for several million dollars, Plaintiffs then sought to hold the physician individually liable and appealed to the Georgia Court of Appeals. On appeal to the Georgia Court of Appeals, the Court reversed the trial court, finding that the physician was not immune from suit and that the Georgia Tort Claims Act did not apply to the claims of medical malpractice.

Ruder and Appel appealed the case to the Georgia Supreme Court and successfully demonstrated that the immunity afforded by the Georgia Tort Claims Act applies to state employed physicians sued for claims arising out of their care and treatment of their patients. This Appellate decision reversed a 16 year old Supreme Court precedent previously relied upon by Plaintiffs to deny stated employed physicians immunity for medical malpractice actions. Now, with the *Jones* decision, the law is clear that state employed physicians are undeniably immune from suit for torts committed in the scope of their employment.

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Upcoming Events

August 25-28 **Georgia State Board of Workers' Compensation Annual Education Conference**
Visit us at booth 55. For information on the conference, or to register, visit http://sbwc.georgia.gov.

September 19 **Insurance Coverage and Bad Faith Seminar**
Join us at the Atlanta Botanical Garden for five hours of continuing education and the opportunity to explore the Gardens. Register at www.ccsrsvp.com.

October 8 **Employment Law Beyond the Basics Seminar**
Join Attorney Marquetta Bryan to earn CLE and explore emerging developments in employment law. Register at http://bit.ly/11RkkYl.

October 24 **Handling Complex Auto Insurance Coverage Disputes**
Charlie McDaniel, Erica Parsons and Megan Boyd will speak at the National Business Institute Seminar, "Handling Complex Auto Insurance Coverage Disputes". Six hours of legal and insurance continuing education will be offered. Register at http://bit.ly/15CfgnC.

November 11 **The Reptile Revolution: Appeal to Juror's Primitive Instincts**
Gary Lovell of Copeland & Stair LLP will co-present "The Reptile Revolution: Appeal to Juror's Primitive Instincts" at the Trucking Industry Defense Association Annual Seminar in Orlando, Florida. Register at http://bit.ly/1bDmrkc.