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News

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Third-Party Liability - South Carolina Addresses When a Non-Client Can Sue a Lawyer

By: David W. Overstreet and Douglas W. Mackelcan

There is nothing new about lawyers being sued by non-clients. In fact, it should be expected to some extent based upon our adversarial process. However, certain rules usually prevent these cases from getting very far before they are dismissed. Unfortunately, that is not always the case. Recently, South Carolina addressed third-party liability in two separate reported cases. One case confirms the existing law on immunity, while the other arguably expands an attorney's scope of liability in certain situations.

In Rydde v. Morris[1], the Plaintiffs were identified as prospective beneficiaries of an elderly woman with lung cancer. Shortly before her death, the elderly woman met with an attorney to prepare an estate plan and filled out a questionnaire listing the Plaintiffs as beneficiaries. However, the woman became incapacitated shortly thereafter and before she was able to execute the Will. The Plaintiffs alleged that the attorney failed to timely prepare the Will thereby depriving them when she died without a Will.

The attorney filed a Rule 12(b)(6) Motion to Dismiss based on the law in South Carolina that attorneys are immune from liability to third-parties for injuries allegedly resulting from the performance of professional activities on behalf of their clients[2]. The trial court granted the attorney's motion to dismiss. The Supreme Court, in affirming the dismissal, stated "Without pause, we reject the notion of imposing a duty on an attorney in favor of a prospective beneficiary for the attorney's purported negligent failure to timely draft a will." In reaching its decision, the Court analyzed how courts in other jurisdictions have treated the intended beneficiary class of Plaintiffs, and decided not to "depart from existing law which imposes a privity requirement as a condition to maintaining a legal malpractice claim in South Carolina."

More recently, in Moore v. Weinberg[3], the Supreme Court of South Carolina opted not to recognize immunity from non-clients when it held that an attorney could be liable to a non-client in his capacity as an escrow agent. In Moore, Clarence Wheeler approached the Plaintiff for a loan. Wheeler offered a promissory note to the Plaintiff and secured the note with funds escrowed with the Court related to a pending lawsuit. The Plaintiff spoke with Wheeler's attorney to confirm the terms of the loan, which included an assignment of recovery from the lawsuit Wheeler was involved in at the time.

"Recently, South Carolina addressed third-party liability in two separate reported cases. One case confirms the existing law on immunity, while the other arguably expands an attorney's scope of liability..."

The litigation involving Wheeler settled, but the attorney failed to pay Moore from the settlement proceeds. The Plaintiff then sued the attorney for negligence, conversion, and civil conspiracy. It was undisputed that the attorney had not represented the Plaintiff. As such, the trial court granted summary judgment in favor of the attorney because he did not have a "legal relationship" with the Plaintiff. The Court of Appeals reversed and held that the trial court erred in granting summary judgment on the negligence claim, because there was evidence that the attorney owed a duty to the Plaintiff nonetheless. The Supreme Court of South Carolina then addressed whether an attorney could be liable to a third party over disbursing funds to a client (when the attorney was aware the funds had already been assigned to the third-party).

The Supreme Court stated that the attorney acted as the escrow agent for the loan and, as a result, owed a fiduciary duty to Moore by virtue of his role as the escrow agent. The Court specifically conditioned its decision to the facts of the case and held that the attorney's role as an escrow agent is independent of his status as a lawyer and distinct from duties that arise out of the attorney/client relationship.

While the holding in Rydde appears to confirm the well-settled law on third-party liability, the holding in Moore appears to create a specific exception to it, at least to the extent an attorney is independently acting as an escrow agent. This sort of situation is yet another example of the potential pitfalls that face attorneys in the ordinary course of representing their clients.

The South Carolina Courts have made clear the fact that there is no absolute bar to third-party liability. Each situation is case specific. And as unfortunate as it may seem, what further duties the Court might declare in the future that attorneys owe to non-clients is unclear.

RESOURCES

1. Rydde v. Morris, 381 S.C. 643, 675 S.E.2d 431 (2009).
2. Gaar v. North Myrtle Beach Realty Co., Inc., 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct. App. 1986).
3. Supreme Court of South Carolina, No. 26702, August 12, 2009.

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Is There Really a Safe Harbor? An Analysis of the Recent Fortner Decision

By: Charles M. McDaniel, Jr.

As the years pass, it seems the decisions of Georgia's appellate courts continue to be adverse to insurers – particularly when the insurers are caught in difficult and uncompromising predicaments caused by complicated liability claims and limited coverage under multiple liability policies. Careful review of the decisions, however, yields a consistency, whereby the insurers are required to meet a standard of care of protecting the assets of its insureds.

In Southern General Insurance Company v. Holt, 262 Ga. 267, 416 S.E.2d 274 (1992), the Georgia Supreme Court held an insurance company may be liable for damages to its insured for failing to settle the claim of an injured person where the insurer is guilty of negligence, fraud or bad faith in failing to compromise the claim. The significance of Holt is that this standard of care was applicable even where the injured party afforded a limited time for the insurer had to accept the demand.

More recently, Cotton States Mutual Insurance Company v. Brightman, 276 Ga. 683, 580 S.E.2d 519 (2003) was decided and the Supreme Court upheld a significant bad faith verdict against Cotton States. In Brightman, the underlying tort feasor was insured under two insurance policies, one of which was issued by Cotton States. The injured party, Brightman, made demand upon Cotton States for policy limits of $300,000.00, contingent upon the second insurer, State Farm, tendering its policy limits of $100,000.00. Additionally, Cotton States was afforded only 10 days in which to respond. The demand was not accepted within the 10 days, and Brightman subsequently received $1,787,500.00 at trial. Brightman secured an assignment of the bad faith claim against Cotton States and ultimately received a judgment against Cotton States for $2,130,921.91.

On appeal, Cotton States argued it did not act in bad faith because Brightman's settlement demand contained a stipulation over which it had no control – State Farm tendering its limits. The Georgia Court of Appeals and Supreme Court disagreed and concluded the evidence was sufficient to support the jury's verdict because Cotton States failed to tender its limits and protect the interest of its insured. The Supreme Court further held:

"an insurance company faced with a demand involving multiple insurers can create a safe harbor from liability for an insured's bad faith claim under Holt by meeting the portion of the demand over which it has control, thus doing what it can to effectuate the settlement of the claims against its insured. This rule is intended to protect the financial interest of policyholders in cases where continued litigation would expose them to a judgment exceeding their policy limits while protecting insurers from bad faith claims where there are conditions involved in the settlement demand over which they have no control." Brightman, at 686, 522.

Most recently, the Georgia Supreme Court decided Fortner v. Grange Mutual Insurance Company, S09G0492 (October 19, 2009), which, at first blush, seems to eviscerate the "safe harbor" created by Brightman. As in Brightman, Fortner involved a cause of action with serious damages and limited insurance coverage under two separate insurance policies. Fortner demanded policy limits from Grange, contingent upon payment from Auto Owners, the second insurer. Grange agreed to pay its limits, but placed additional contingencies on the payment, including execution of a full release with indemnification and dismissal of the pending suit with prejudice. Fortner determined Grange's response was a rejection of its settlement demand and proceeded to obtain a $7 million verdict at trial. Fortner then pursued a bad faith cause of

action against Grange, upon assignment of the bad faith claim by the tort feasor. Grange, however, prevailed at trial, and the defense verdict was appealed. The sole issue before the Supreme Court was whether the jury charge regarding the standard of care was proper. The Supreme Court held the jury charge was not consistent with the "safe harbor" provision established in Brightman, as adjusted to the evidence in the case. In reaching this decision, the Court noted that the essence of Brightman's "safe harbor" provision is to protect an insurer where there are settlement provisions over which it has no control. The Supreme Court noted, Grange inserted additional conditions upon Fortner's offer, over which Grange had control, which ultimately the jury should have considered.

Specifically, Grange required Fortner to forgo any claim against the tortfeasor as a condition of Grange paying its policy limits, which potentially required Fortner to forfeit access to the tortfeasor's $1 million liability policy with Auto Owners. The Supreme Court determined the jury should have been allowed to consider whether or not the additional conditions placed upon the settlement offer by Grange were reasonable and thus, whether Grange is entitled to the protections of the safe harbor. Because the jury charge did not permit the jury to consider the reasonableness of the additional Grange conditions, the Supreme Court reversed. However, the Court further stated, "we offer no opinion regarding whether Grange, in adding its own settlement conditions, 'acted reasonably' and 'like the ordinary prudent insurer' in responding to Fortner's settlement offer." [cits.] Fortner.

Ultimately, the Fortner bad faith cause of action against Grange will return to the trial court for an additional trial, and the jury charge regarding the duties of an insurer will be modified. Under the facts as reported, it is certainly possible that a jury will find in favor of Fortner, on the basis that Grange did not give equal consideration to its insured's financial interest and fulfill its duties to him when it proposed additional conditions, including dismissal of the cause of action, when offering its policy limits to settle with Fortner.

The lessons provided by Holt, Brightman and Fortner are first that the standard of care for a prudent insurer has not changed. An insurer is required to act reasonably in responding to a settlement offer and in doing so the insurer must give the insured's interest the same consideration that it gives its own. Secondly, the appellate courts are clearly requiring insurers to act promptly and reasonably in responding to policy limit demands, and to focus on the aspects of any demand within its control. This concept is often easier said than done.

What is unknown, and probably most significant, is whether or not Grange meets the "safe harbor" standard if it were to have offered its policy limits of $50,000.00 in exchange for a limited liability release, which serves to fully protect the insured yet not preclude the opportunity of the injured party to recover all sums available under additional insurance policies.

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Raising the Bar: New Standard of Review for Motions to Dismiss Actions in Federal Court

By: Erica L. Parsons

With a weathered eye on the tort-reform horizon, the Supreme Court has issued two decisions that effectively abrogate the old "liberal pleadings" standard in favor of a more stringent approach[1]. These decisions and the resulting new standard, commonly referred to as the *Iqbal/Twombly* standard, signify an important shift in federal practice that should prove distinctly advantageous to defense counsel and their clients when faced with the unpleasant task of dealing with a meritless claim in federal court.

In order to state a claim for relief, a pleading in a federal action must contain a short and plain "statement of the grounds for the court's jurisdiction, …statement of the claim showing that the pleader is entitled to relief; and a demand for the relief sought."[2] While each allegation is required to be simple, concise, and direct, no technical form is required.[3] Federal law has long allowed for courts to dismiss a complaint for "failure to state a claim upon which relief can be granted."[4] However, in years past, a court was only permitted to dismiss a claim where the movant demonstrated "beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief."[5]

In 2007, the Supreme Court considered the practical effects of this liberal approach on the judicial system and litigants in the anti-trust case of *Bell Atl. Corp. v. Twombly*. The Court expressed its concern that "a plaintiff with a largely groundless claim [is] allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value."[6] The Court further recognized that case management by individual judges had not proven efficient or effective at culling out groundless claims.[7] Accordingly, the Court articulated a new, more stringent standard for determining whether a claim was sufficient to survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6): a court could dismiss a complaint "if the facts as pled failed to state a claim for relief that was plausible on its face."[8]

For two years, federal circuit and district courts were left to discern for themselves the intended impact of *Twombly* on federal

practice, but in *Ashcroft v. Iqbal*, decided in May 2009, the Supreme Court clarified its *Twombly* holding as to four significant points: (a) the heightened pleadings standard articulated in *Twombly* applied to all federal civil actions; (b) the *Iqbal/Twombly* standard applied to all elements of a claim, including knowledge and intent; (c) the *Iqbal/Twombly* standard required plaintiffs to demonstrate that each element of the claim was plausible, not merely possibly; and (d) plaintiffs could not overcome the heightened pleading requirement simply by promising that discovery would be limited.[9] These points marked a significant departure from prior rules of federal practice and procedure.

Under the new *Iqbal/Twombly* standard, a claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[10] The well-pled allegations must nudge the claim "across the line from conceivable to plausible."[11] The mere possibility the defendant acted unlawfully is insufficient to survive a motion to dismiss.[12] Factual allegations in a complaint "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)."[13] Unwarranted deductions of fact or conclusory allegations in a complaint are not admitted as true for the purpose of testing the sufficiency of plaintiff's allegations.[14] Although it must accept well-pled facts as true, the court is not required to accept a plaintiff's legal conclusions.[15] In considering a motion to dismiss, a court may review the complaint, its attachments, and documents attached to the motion to dismiss, if central to the plaintiff's claims and referred to by the plaintiff, without converting the motion to a motion for summary judgment.[16]

On its face, the new heightened pleadings standard appears to complicate matters for plaintiffs seeking to proceed with expensive litigation while asserting only vague or specious factual allegations; however, it appears that, at least at this early stage, the district courts' adoption of the new standard has not resulted in the sweeping reform anticipated by many defense counsel. In the six months since *Iqbal* was decided, federal district courts within the 11th Circuit have applied the new standard in more than a hundred cases in which defendants were seeking dismissal of the actions for failure to state claim. But, even under the heightened pleading requirements articulated in *Iqbal* and *Twombly*, the courts have granted these motions in less than half of those cases. Nevertheless, the fact remains that *Iqbal/Twombly* inarguably vests district courts with significantly more discretion to manage and dispose of cases at the pleading stage, the result being that at least some cases which would have previously continued to discovery will now end with the pleadings.

RESOURCES

1. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561-62, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).
2. Federal Rule of Civil Procedure 8.
3. Id.
4. Fed. R. Civ. P. 12(b)(6).
5. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).
6. 550 U.S. at 558.
7. *Id.*
8. 550 U.S. at 561-62.
9. 129 S.Ct. 1937, *passim*.
10. *Iqbal*, 129 S.Ct. at 1949.
11. *Twombly*, 550 U.S. at 570, 127 S.Ct. at 1974.
12. *Iqbal*, 129 S.Ct. at 1949.
13. *Twombly*, 550 U.S. at 555, 127 S.Ct. at 1964-65 (internal citations and emphasis omitted).
14. *Iqbal*, 129 S.Ct. at 1951.
15. *Id.*
16. *Brown v. One Beacon Ins. Co. Inc.*, 317 Fed. Appx. 915, 917 (11th Cir. 2009).

Major Changes At The State Board

By: Christopher A. Whitlock

Former chairperson of the State Board of Workers' Compensation, Carolyn C. Hall, has retired as of October 1, 2009. Judge Hall ended a very successful ten-year tenure as the chairperson of the State Board. Governor Sonny Perdue has appointed Richard S. "Rick" Thompson to become the new chairperson of the State Board of Worker's Compensation. Judge Thompson is a former U.S. Attorney for the Southern District of Georgia, a former workers' compensation defense attorney, and a former administrative law judge with the State Board of Workers' Compensation.

Another former member of the Appellate Division has been replaced as well. Viola S. Drew's term expired in May of 2009. Governor Purdue appointed attorney Stephen B. Farrow as the newest member of the Appellate Division. Chairman Thompson and Judge Farrow are joining the third member of the Workers' Compensation Board, C. Warren Massey, who is a former Republican state Representative.

Finally, Judge Melodie Belcher has been promoted to Chief Administrative Law Judge and will move her office to Atlanta. Judge Belcher will hear cases in Atlanta as well as mediate cases in Albany.

It will be exciting over the next several years to see what changes, if any, are made by the new Appellate Division.

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2010 Partner and Of Counsel Announcement

We are pleased to announce Spencer A. Bomar, Katherine G. Hughes, Michele R. Jones, Heather M. Miller, Paul E. Sperry, and Amy J. Urban have been named Partners. Additionally, Cheryl H. Shaw and Sarah E. Wetmore have been named Of Counsel.

Spencer A. Bomar focuses his practice on civil litigation in which he defends premises liability, products liability, medical malpractice, automobile liability, and construction defect matters. He has represented a variety of clients including doctors, product distributors and manufacturers, transportation companies, and property owners and managers. He has represented his clients in discovery, mediation, arbitration, litigation, and trial in the state and federal courts. In 2007 and 2009 Spencer was an honoree on the *Georgia Rising Stars*® list. He received his J.D. from The University of Alabama School of Law and his B.A. in Political Science, *cum laude*, from The University of Georgia.

Katherine G. Hughes' practice is focused on general liability and health care litigation. She has defended numerous clients in general litigation matters ranging from premises liability, automobile liability, property damage, contract and business disputes. In her health care practice, she has represented a variety of entities such as hospitals, nursing homes, assisted living facilities and home health agencies. She has also defended individual health care professionals such as physicians, surgeons, nurses, chiropractors and dentists. Kate was an honoree on the *Georgia Rising Stars*® list in 2009. She received her J.D. from Emory University School of Law and her B.A. from The University of Georgia.

Michele R. Jones' practice focuses on professional malpractice litigation, representing primarily accountants and attorneys. She has defended clients from allegations of negligence, professional malpractice, securities fraud, RICO violations, common law fraud, breach of contract, breach of fiduciary duty, and interference with business relations. She has worked on cases arising out of different fields, including public accounting, tax preparation, audits, real estate transactions, employment law, and trusts and estates. She has also represented clients in investigations by government agencies and subpoena compliance matters. She received her J.D. from The University of Georgia School of Law and her B.A. in Political Science from Emory University.

Heather H. Miller focuses primarily on civil litigation within the General Liability and Health Care Litigation Practice Groups. She has a wide range of expertise handling general liability cases pertaining to premises liability, automobile liability and products liability. Her health care litigation practice focuses on the malpractice defense for doctors and nurses. She has represented her clients in discovery, mediation, and litigation in the state and federal courts. Furthermore, she has handled numerous cases representing apartment management companies and apartment Managers/Owners in contract disputes, premises liability cases and risk management issues. Heather was an honoree on the *Georgia Rising Stars*® list in 2006, 2007 and 2009 She received her J.D. and B.S. from The University of Mississippi.

Paul E. Sperry concentrates his practice on construction litigation matters, and has represented design professionals, contractors, subcontractors, material suppliers and owners in lawsuits involving construction related disputes. He also provides non-litigation support for construction clients, including contract review and advice related to payment and industry issues. Paul has taught seminars on a wide variety of construction law topics, including mechanical liens, delay claims and construction contract clauses. He received his J.D. from The University of South Carolina and his B.A. in International Studies from The George Washington University.

Amy J. Urban's practice is primarily in the area of workers' compensation. Amy has tried numerous cases before the State Board of Workers' Compensation, the Appellate Division of the State Board of Workers' Compensation, Georgia Superior courts, and the Georgia Court of Appeals. Amy represents a variety of insurance carriers, self-insureds, and third party administrators. In 2008, the Georgia Court of Appeals invited her to argue at a special session held before the students and faculty at John Marshall Law School. In 2006 and 2009, Amy was honored on the *Georgia Rising Stars*® list. She received her J.D. from The University of Tennessee College of Law and B.A. from Auburn University.

Cheryl H. Shaw practices within the Construction Litigation Practice Group where she provides consultation to design professionals in the areas of professional design malpractice, risk management, and general commercial claims. In this capacity, she has represented design professionals in a wide range of claims relating to negligent design, contract administration, and construction management in litigation, arbitration, and mediation proceedings. A significant part of Cheryl's practice is also devoted to client consultation regarding professional service agreements. She received her J.D. from Suffolk University Law School, and her B.A. from The University of Maine.

Sarah E. Wetmore's practice focuses on general civil litigation, at both the state and appellate level, where she has significant trial experience. She provides clients with legal services in the areas of insurance defense, personal injury defense, professional liability defense and construction litigation. She has led seminars on topics such as Preparing an Effective Trial Notebook, The Use of Bio-mechanical Experts in Automobile Injury Litigation, and Civility in the Practice of Law. The firm proudly supported Sarah in her notable 2009 run for election as a Circuit Court Judge, which was only defeated by one vote in the South Carolina General Assembly. She received her J.D. and B.A. from Wake Forest University.

RECENT VICTORIES

Defense Verdict in Medical Malpractice Case

Eric Frisch and Jason Hammer successfully defended an obstetrician at trial. Plaintiffs alleged the doctor failed to recognize and/or document shoulder dystocia, resulting in a permanent and severe obstetrical brachial plexus palsy involving all of the nerves from C5 to T1. The case was tried to a defense verdict in DeKalb County.

Summary Judgment for Lawyers Sued When Mixed-Use Development Failed

Andy Eaton, Shannon Sprinkle and Joe Kingma won Summary Judgment for an Atlanta lawyer accused of malpractice, breach of fiduciary duty, and fraud. The Plaintiff backed a multi-million dollar mixed-use development in Cartersville and sued after the project failed and he was called upon to satisfy his guaranty. In addition to his payment on the guaranty, the Plaintiff sought damages for lost investment opportunities, diminished credit rating, and more than $300,000 in attorney's fees. He claimed that the lawyer representing the borrower labored under conflicts of interest, owed him a duty, and gave bad advice. He bolstered his claim with the testimony of the author of a six volume Legal Malpractice Treatise, an Emory law professor, and one of the deans of the banking bar in Atlanta. Nonetheless, the Defendants' Motion for Summary Judgment was granted. The case may be appealed so stay tuned for further developments.

Defense Verdict in Wrongful Death Case

Gary Lovell and Michelle Stock obtained a defense verdict in a one week medical malpractice and wrongful death case in Fulton County State Court where they defended a cardiologist accused of failing to diagnose and treat the decedent's cardiovascular disease. The suit arose after the decedent suffered a sudden cardiac death in 2005. The Plaintiff alleged that the defendant cardiologist failed to properly counsel her husband on his cardiac condition and to communicate with the referring physician. The defense presented evidence that the defendant cardiologist properly diagnosed and counseled the decedent. The jury returned a verdict in favor of the Defendants in an hour.

Defense Verdict in Medical Malpractice Case

Tom Carlock and Asha Jackson obtained a defense verdict in a two week medical malpractice case in Fulton County Superior Court where they defended a surgeon who was accused of delaying the diagnosis of a bowel leak after bariatric surgery. The attorneys argued that the doctor recognized the plaintiff's complications in a timely manner and returned her to surgery. However, due to the bowel perforation she had a prolonged recovery and expensive medical bills. After the jury deliberated they returned a verdict in favor of the defense.

Defense Verdict in Trucking Case

Fred Valz and Jessica Cabral obtained a defense verdict in a trucking case in Spalding County State Court. The lawsuit arose from a motor vehicle accident that occurred on a dark and foggy morning on a rural highway in Georgia. The Plaintiff rear-ended the Defendant's garbage truck, which was stopped partially in the highway. The Plaintiff alleged that the Defendant's truck was operating without any rear lights on at the time of the accident and produced two witnesses that saw the Defendant's truck without rear lights on shortly before the accident. The Plaintiff claimed she suffered a severe and permanent traumatic brain injury and could never return to gainful employment. The defense presented expert testimony that the Plaintiff did not have any cognitive deficits and could return to her previous job. After two and half hours, the jury returned a verdict in favor of the Defendants.

Summary Judgment in Mortgage Fraud Action

Pete Werdesheim and Lindsey Hettinger obtained Summary Judgment in a mortgage-fraud action brought against a lawyer in the Superior Court of Ben Hill County. After briefing and oral argument, Judge John C. Pridgen held that Plaintiffs' signing of the allegedly fraudulent closing documents without carefully reading them constituted a failure to exercise ordinary diligence. Plaintiffs argued that an attorney-client or other fiduciary relationship existed with the lawyer-defendant, thus eliminating their duty to read the closing documents. Judge Pridgen rejected this position as well and concluded, as the Carlock Copeland defense team argued, that the lawyer-defendant represented only the lender in the subject transaction.

Defense Verdict in Federal Wrongful Death Case

Scott Huray and Jason Hammer successfully defended their client in the United States District Court, Northern District of Georgia, after the Defendant was sued for the wrongful death of a motorcyclist. The suit arose from a tragic motor vehicle accident that occurred in the north Georgia mountains. The Defendant was turning left into a church parking lot when the motorcyclist, traveling the opposite direction, came over the hillcrest and collided with the Defendant's vehicle. The motorcyclist died instantly as a result of his injuries. The Plaintiffs, supported by an accident reconstruction expert, argued that the motorcycle was in view, but the Defendant simply failed to yield while turning left. The defense included its own expert and showed that the motorcycle was not in view at the time of the turn and it was the motorcycle's excessive speed combined with the topography of the roadway that caused the accident. The jury returned a verdict in favor of the Defendant in less than thirty minutes.

Defense Verdict in Industrial Accident Case

Dave Root and Cheryl Shaw obtained a defense verdict in an industrial accident case in Bartow County. The plaintiff truck driver was dumping a truckload of materials at the Defendant's landfill when

he was struck in the side by an excavator operated by a landfill employee, causing several broken ribs and a punctured lung. The plaintiff claimed that the employee failed to keep a proper lookout and was negligent in operating the excavator. Dave and Cheryl argued that the plaintiff, a certified crane operator, assumed the risk of injury when he stepped into the path of the excavator and that the plaintiff failed to exercise appropriate caution for his own safety. After deliberating for less than an hour, the jury returned a verdict in favor of the Defendants.

Motion to Dismiss Granted for Emergency Room Physicians

Dan McGrew and Tonya Stokes recently obtained a dismissal of their clients, emergency room physicians, in a medical malpractice case. The Plaintiff in the case sued the physicians and the hospital where the emergency room treatment was provided, alleging that the physicians failed to perform a diagnostic heart test which resulted in her serious, life threatening heart condition and subsequent surgery. The Plaintiff argued that the physicians failed to meet the standard of care in not performing the heart test. Dan and Tonya argued that the Plaintiff's Complaint failed to state a claim as it did not bring forth any specific allegations of gross negligence against the physicians as required under Georgia law for emergency room physicians. In addition, Dan and Tonya showed the Court that the affidavit provided in support of the Plaintiff's claims was both defective and lacked any specific allegations of gross negligence against the physicians. The trial court agreed and granted the motion to dismiss. The Plaintiff did not appeal.

Motion to Dismiss Granted for Attorney Alleged to have Conspired to Violate Fraudulent Transfer Act

Joe Kingma and Billy Newcomb had their motion to dismiss on behalf of a lawyer defendant granted in federal court on December 11, 2009. The suit was filed by a factoring company who alleged that its security position was damaged when a textile operation sold its assets. The Defendants included the textile operation, its purchaser, a related business, and Joe and Billy's client, the lawyer with whom the seller consulted. The factor brought claims for conversion as well as conspiracy to violate the Uniform Fraudulent Transfer Act. The court ruled that the complaint at most speculated that the lawyer conspired, and that such speculation was insufficient to withstand the motion. The suit continues against the other defendants.

Successful Reversal of Summary Judgment

Charlie McDaniel was hired to appeal a summary judgment decision entered against a client who was seeking indemnity from a contractor and its insurer for a substantial portion of a $5 million personal injury settlement. The 11th Circuit Court of Appeals reversed the decision and remanded the case to the U.S. District Court for the Southern District of Alabama. Mr. McDaniel and Mr. Huray will now continue pursuit of the indemnity action.

Summary Judgment for Defense in Commercial Litigation Action

Scott Huray and Jason Hammer secured a favorable summary judgment ruling in Hall County Superior Court on behalf of their insurance agency client. Former owners of a construction company alleged the agency breached its fiduciary duties with respect to the issuance of construction bonds on several high-dollar construction projects. When the projects "went south", the surety on the bonds sought indemnity from the former owners, who filed a third-party complaint against the insurance agency. Assuming without deciding that a fiduciary relationship existed, the Court agreed with the defense and held that the former owners' failure to read the bond agreements and subsequent failure to provide proper notice to the surety of the fact that they no longer had an interest in the construction company precluded recovery.

ANNOUNCEMENTS

- Joe Kingma will present "Risk Management During a Economic Downturn" to the Atlanta Bar Association's Sole Practitioner/ Small Firm Section on February 25, 2010.

- Partner Eric Frisch has contributed an article entitled "Tying the Case Together with a Good Theme" to The Voice, the online newsletter for the Defense Research Institute.

- David Overstreet in the South Carolina office presented a seminar on "How to Avoid Being the Target of a Malpractice Claim" for the National Business Institute.

- Mike Ethridge presented a seminar on Insurance Coverage Litigation for NBI. The seminar focused on Common Types of Insurance Coverage Disputes and Interpreting Coverage Under the Insurance Contract.

- Sharese Shields presented "Student Discipline Issues: IDEA, Section 504 and OCR Investigations" with Tom Cox, a Solo Practitioner, at the GSBA's School Law Workshop.

- Chris Whitlock presented "Ten Things the Other Side Does to Annoy Me" at the Atlanta Bar Association Workers' Compensation Section Luncheon Meeting.

- Health Care practice group Partner Eric Frisch presented at the 25th annual Medical Malpractice Liability seminar in Amelia Island. This year, Eric spoke about the defense of the clear liability catastrophic surgical case. The Medical Malpractice Liability seminar is a 3 day statewide seminar that is open to all bar members.

- Joe Kingma recently spoke on Errors and Omissions Insurance Procurement and Coverage at the midyear meeting of the State Bar of Georgia at the W hotel in midtown Atlanta.

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