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Georgia Supreme Court Weighs in on Negligent Security Cases

By: Kim M. Ruder

In February of 2005, the Georgia Legislature overhauled the apportionment statute codified at O.C.G.A. § 51-12-33. Since then, attorneys across the state have struggled to interpret the new statute, and courts have applied it inconsistently.[1] The Georgia Supreme Court will have its first opportunity to comment and shed some light on these inconsistencies in the context of premises liability: *Couch v. Red Roof Inns, Inc. et al.*

The Battle Regarding Georgia's Apportionment Statutes Heats Up In Negligent Security Premises Liability Cases

Couch is a premises liability case in which the plaintiff was attacked by unknown assailants while staying at the defendant's hotel. Couch sued the hotel, contending that the hotel was negligent in failing to protect him from foreseeable criminal activity. The hotel asked (pursuant to the new apportionment statute) to have the jury apportion fault between it and the criminal assailants. Couch responded with a motion in limine seeking to preclude apportionment. The trial court, recognizing the importance of this issue, asked the Georgia Supreme Court for guidance. In this article, we will look at the policy underlying the apportionment statute and the issues raised on appeal in *Couch*.

Historically, Georgia had a "pure" joint and several liability scheme. This meant that in cases involving multiple tortfeasors, the plaintiff could sue all of the tortfeasors jointly, regardless of their actual (individual) contribution to the injury. Accordingly, a defendant who was only one percent

at fault could be held responsible for the entire verdict. The remedy for this inherent unfairness was to allow the defendant to sue his co-defendants for contribution to recover the "overpayment."

In exchange for this risk, a non-settling defendant also enjoyed a setoff or "credit" for the amount paid by his co-defendants who settled out of the lawsuit. However, the jury could not, in most instances, consider the fault of a non-party to the lawsuit in any formalized way. The only practical remedy, at trial, was to point to the "empty chair." As part of the 2005 comprehensive "tort reform" package, a push was made to change this scheme to a system of "proportional liability," which allows the jury to decide whether a defendant pays at all and, if so, what percentage of the total verdict - according to his percentage of fault.

"The outcome [of *Couch*] will have far-reaching implications for a broad spectrum of businesses..."

Defense attorneys heralded the revised statute for allowing the jury to consider the fault of non-parties and -- more importantly -- reduce the verdict by the non-party's percentage of fault. At long last, it seemed that defendants would be held responsible only for the damage commensurate with their degree of fault, as determined by the jury. On the other side of the bar, plaintiffs fought to have the revised statute declared unconstitutional, arguing that it was inconsistent with other statutes (O.C.G.A. §51-12-31, et al.) which the Legislature failed to modify when it revised the apportionment statute. Against this backdrop, some trial judges permitted juries to apportion fault to non-parties, while others flatly refused.

In July of 2011, the Court of Appeals had its first opportunity to weigh in on this hotly-contested issue in *Pacheco v. Regal Cinemas, Inc.*, 311 Ga. App. 224 (2011), holding that the jury could apportion damages among a property owner, its security company, and the unknown criminal assailants who shot and killed a man in the owner's parking lot. Unfortunately, the opinion was not unanimous and is considered "physical precedent only." Since *Pacheco*, at least three trial courts have refused to allow juries to apportion, the most recent of these decisions declaring the apportionment statute unconstitutional. Two of these cases, *Martin v. Six Flags Over Georgia* (being defended by this writer and partners Wayne D. McGrew, III and Charles M. McDaniel, Jr.) and *Salinas v. Coro Realty Advisors* are now pending before the Georgia Court of Appeals. The third, Medina v. GFI Management Services, Inc. was recently appealed directly to the Georgia Supreme Court.

In the wake of these pending appeals, all eyes are on *Couch*. On December 8, 2011, the *Couch* trial court certified the following questions to the Georgia Supreme Court:

1. In a premises liability case in which the jury determines a defendant property owner negligently failed to prevent a foreseeable criminal attack, is the jury allowed to consider the "fault" of the criminal assailant, and apportion its award of damages among the property owner and the criminal assailant, pursuant to O.C.G.A. § 51-12-33?

2. In a premises liability case in which the jury determines a defendant property owner negligently failed to prevent a foreseeable criminal attack, would jury instructions or a special verdict form requiring the jury to apportion its award of damages among the property owner and the criminal assailant, pursuant to O.C.G.A. § 51-12-33, result in a violation of the plaintiff's constitutional right to a jury trial, due process or equal protection?

These questions give the Georgia Supreme Court its first chance to define the boundaries of responsibility in a premises liability case involving a property owner/occupier and a non-party criminal assailant. The outcome will have far-reaching implications for a broad spectrum of businesses, such as apartment complexes, gas stations, convenience stores/grocery stores, and other types of retail businesses, especially those which may be located in "rough" areas of town beset with criminal activity.

Oral argument in *Couch* took place on March 6, 2012, with the Supreme Court actively questioning the attorneys on both sides. The plaintiff first argued that the hotel owner had a "non-delegable duty" under Georgia law to keep its premises safe and to prevent harm to those that come upon the property, including the harm caused by criminals. By extension, the plaintiff argued that property owners cannot "insulate" themselves from liability by claiming that the criminal is the one responsible for the injury. The plaintiff's main contention is that apportionment nullifies the established duties of a property owner and -- assuming the criminal is uninsured or otherwise has no collectable assets -- leaves the plaintiff without a true remedy for his injury.

Second, the plaintiff argued that property owners must be held responsible for "all" of the consequences flowing from their negligent conduct. More specifically, plaintiff argued that if it is foreseeable that a criminal may injure people on the property and the owner fails to address that issue, then the owner should be held solely responsible when someone is injured.

Finally, the plaintiff argued that his injury is a "single" indivisible injury incapable of being divided up between a property owner and criminal assailants. In other words, there is

no rationale way for a jury to determine the injury caused by the owner versus the injury caused by the criminal assailant.

In response, the defendant hotel argued that the plain language of the apportionment statute requires the jury to apportion damages between a property owner defendant and a non-party criminal, based upon a percentage of fault - not upon a division of the injury. The hotel argued that over the last hundred years, the Georgia legislature has slowly but surely eroded common law joint and several liability, in favor of a more equitable scheme. In addition, the hotel argued that the General Assembly intended for the law to apply in all tort cases, without limitation and regardless of whether the injurious conduct at issue was negligent or intentional. In support of this position, hotel counsel cited introductory statements in the tort reform bill evidencing the legislature's intent to "change provisions relating to apportionment of award according to degree of fault." The hotel also argued that the statute, as written, is constitutional.

Finally, the hotel argued that the "fairness" complaints made by the plaintiff are complaints best directed to the legislature, not the court, since the court is required to follow the law as written. The hotel argued that it should be allowed to present evidence to the jury regarding its own liability, as well as the liability of the un-named or unknown criminal assailants who caused injury to the plaintiff. In short, the jury should be allowed to decide whether the landowner is wholly or partially responsible for the plaintiff's injuries.

As we await a ruling in *Couch*, landowners and businesses should continue to timely invoke the apportionment statute and seek to reduce their liability by placing as much blame as possible on the criminal assailants responsible for a plaintiff's injuries.

Resources

1. Under the current version of the statute, it provides in pertinent part:

(a) Where an action is brought against one or more persons . . . and the plaintiff is to some degree responsible for the injury . . . the trier of fact . . . shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages . . .

(b) Where an action is brought against more than one person for injury . . . the trier of fact . . . **shall** after a reduction of damages pursuant to subsection (a) . . ., if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person . . .

(c) In accessing percentages of fault, **the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit.**

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Firm News & Notes

Carlock, Copeland & Stair Attorneys Selected for Georgia Super Lawyers® and Rising Stars®

We are proud to announce that 20 of our lawyers have been selected for inclusion on the Georgia *Super Lawyers*® and *Rising Stars*® lists for 2012.

Super Lawyers	Rising Stars
Thomas S. Carlock*	Shannon M. Sprinkle
Wade K. Copeland*	Peter Werdesheim
Kent T. Stair	Amy J. Urban
Douglas W. Smith	Heather H. Miller
David F. Root	Marquetta J. Bryan
W. Dan McGrew	Michael Ruppersburg
Fred M. Valz, III	John L. Bunyan
Johannes S. Kingma*	
D. Gary Lovell, Jr.	
Scott D. Huray	
Adam L. Appel	
Gregory H. Wheeler	
Eric J. Frisch	

*Also honored on the *Super Lawyer* Top 100 List indicating the attorney's survey point totals were of the highest in Georgia nominations.

Only five percent of the lawyers in the state are named by *Super Lawyers*. The selections for this esteemed list are made by the research team at *Super Lawyers*, which is a service of Thomson Reuters. Each year, the research team at *Super Lawyers* undertakes a rigorous multi-phase selection process that includes a statewide survey of lawyers, independent evaluation of candidates by the attorney-led research staff, and a peer review of candidates by practice area.

Rising Stars is a listing of exceptional lawyers who are 40 years of age or under, or who have been practicing for 10 years or less, and have attained a high degree of peer recognition and professional achievement. Only 2.5 percent of the total lawyers in the state are honored on the Rising Stars list.

Bottom Row (from left): Valz, Copeland, Root, Kingma, Ruppersburg
Top Row (from left): Miller, Huray, McGrew, Werdesheim, Lovell, Bryan, Appel, Bunyan, Urban
Not Pictured: Carlock, Stair, Smith, Wheeler, Frisch, Sprinkle

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What's New at The State Board of Workers' Compensation for 2012

By: Christopher A. Whitlock

The State Board of Workers' Compensation is working on finalizing their proposed legislative package for the 2012 Legislative Session. Based on what I have seen thus far, there are no big surprises this year from what the State Board is proposing; however, there could be several other bills presented that may affect our workers' compensation system. For example, I have heard rumor that someone may be introducing a bill to reduce attorney fees from 25 percent to 10 percent. As you can imagine, this is causing somewhat of a stir among claimants' counsel. Listed below are a few items of note that are contained in the proposed legislative package from the State Board:

"...there are no big surprises this year from what the State Board is proposing; however, there could be several other bills presented that may affect our workers' compensation system."

- increasing the TTD rate from $500.00 per week to $525.00 per week (this will be the first increase since July 1, 2007);
- increasing the TPD rate from $334.00 per week to $350.00 per week;
- modifying O.C.G.A. § 34-9-221(f), regarding the 20 percent late payment penalty on payment of settlements to include language that the penalty may be excused by the State Board where there is just cause (for example, counsel not receiving electronic notification from the State Board of the STIP approval);
- modifying O.C.G.A. § 34-9-226 in which the State Board can appoint a guardian/conservator for a minor settlement up to $100,000.00;
- modifying O.C.G.A. § 34-9-15 to allow any party (or the State Board) to require social security set off language in any STIP;
- establishing a medical advisory counsel that will propose medical treatment guidelines and protocols for treatment of workers' compensation patients. The goal is to establish treatment protocols for workers' compensation patients by January 2014.

The State Board is also proposing a temporary "fix" to the *McRae v. Arby's* Court of Appeals decision regarding ex parte communications (see "Ex Parte Communications in Workers' Compensaion" on page 8 for more information on this case). The State Board is proposing legislation to specify that O.C.G.A. § 34-9-207(d) will allow a direct employee of the insured, third party administrator or an employer to communicate with an injured employee's authorized treating physician to assess, plan, implement, coordinate, monitor and evaluate opinions and services related to an injured employee's condition and/or vocational needs. This language is similar to Board Rule 200.1(a)(iii), and applies only to compensable claims.

The State Board is also implementing a new "expedited resolution of issues" program in which attorneys may call the State Board to request a conference call with the ALJ assigned to the claim to address the resolution of medical or other issues that have not been controverted and that should be capable of a quick resolution without an evidentiary hearing. Typical issues that are contemplated for this expedited resolution process include authorization for treatment with panel providers, problems obtaining medication, authorization for diagnostic testing, unpaid/outstanding medical bills, or accidental/improper suspension of benefits. Once a conference call is scheduled, the proper parties will be notified by e-mail to initiate the call. The parties may face penalties for failing to appear or to provide advance notice of at least 24 hours as to the reason for their unavailability. In theory, this sounds like a good idea, as it may prevent claimants' attorneys from automatically filing hearing requests over issues that should be resolved with proper communication. However, this could cause other problems such as whether the ALJ will issue a decision after the conference call and, if so, whether the decision will be appealable. The Board recognizes that it may give rise to these types of difficulties, but they are implementing this procedure on a trial basis to see how well it works. The specifics of the program can be found on the State Board's website at www.sbwc.ga.gov.

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Georgia's Transition from Foreseeable to Assignable:

Villanueva v. First Am. Title Ins. Co.

By: Shannon M. Sprinkle & C. Joseph Hoffman

Seemingly ever-expanding exposure for professionals in Georgia reached a new level in the recent Court of Appeals decision, *Villanueva v. First American Title Ins. Co.,* 2011 WL 5987910 (Ga.App. Dec. 1, 2011). In *Villanueva*, the Court of Appeals transitioned the burden on Georgia's attorneys from not only defending against the foreseeable plaintiff, but to potentially defending against the highest bidding plaintiff.

Review of Villanueva

The attorney in *Villanueva* performed a closing for a refinancing homeowner with existing mortgages. The refinancing lender, pursuant to closing instructions, instructed the attorney to pay off the existing mortgages to ensure first priority of its debt. After the closing, however, the lender discovered the attorney failed to extinguish the prior mortgages. As is the usual practice, the lender called upon its title insurer to pay off the mortgages and the insurer agreed to do so while taking an assignment of "all rights and remedies the lender would have had against any person or property." The insurer then brought a legal malpractice claim against the attorney. The trial court denied the attorney's motion for summary judgment rejecting his argument that a legal malpractice claim is not assignable.

The Court of Appeals held that "there is no *per se* bar to the assignment of legal malpractice claims." The Court supported this holding on the basis that the only codification of assignments, O.C.G.A. § 44-12-24, did not prohibit assignment of property torts. Because the lender's loss was "solely financial, the right of action was assignable." The Court also rejected public policy arguments relied upon by other jurisdictions citing the failure of Georgia's legislature to amend § 44-12-24 since 1895 to take into consideration such policy. Lastly, perhaps acknowledging the uniqueness of some attorney-client relationships, the Court held "there may be cases where the special nature of the attorney-client relationship precludes assignment." In essence, *Villanueva* turned potential exposure to assignee parties into a case-by-case determination.

Is the Decision Ground-Breaking?

Whether *Villanueva* is truly ground-breaking is debatable. Advocates for assignments could find support for the

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Firm News & Notes

Congratulations to Carlock, Copeland & Stair's Eight New Partners

Marquetta J. Bryan, Atlanta Office

Bryan focuses her practice on Employment and General Litigation, including defending public and private entities in employment-related litigation brought under Title VII, Section 1983, and other federal and state laws. She has successfully represented clients before the District Courts of Georgia, the 11th Circuit Court of Appeals, and the EEOC.

David J. Harmon, Charleston Office

David has practiced law in Charleston, SC since graduating with honors from the University of South Carolina School of Law in 2004. He has been successful in both jury trials and in appellate work, contributing to a brief that resulted in a published South Carolina Supreme Court opinion affirming the summary judgment for the client.

Broderick W. Harrell, Atlanta Office

Harrell's practice includes representing healthcare providers and design professionals in complex litigation. He also represents various companies in construction, general liability and premises liability matters. Broderick has litigation experience in the State and Appellate Courts of Georgia and North Carolina.

William P. Jones, Atlanta Office

Jones is an experienced litigator in the Firm's Commercial and Construction Litigation practice groups, focusing his practice on commercial and employment related matters in Federal and State courts. Bill has particular experience in national litigation relating to the protection of trade secrets and the enforceability of employment agreements.

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Villanueva ruling in Georgia's admitted trend of relaxing the rule of strict contractual privity in professional malpractice actions. Such examples include the extension of standing to an intended beneficiary of a negligently drafted will and standing to a non-client lender that knowingly relied upon the negligent opinion of title. *Young v. Williams*, 285 Ga.App. 208 (2005), *Kirby v. Chester*, 174 Ga.App. 881 (1985). Advocates against assignments, however, find *Villanueva* runs contrary to precedent limiting who the client is in the attorney-client relationship. For example, the representation of a corporation does not extend to representing its members and the representation of an executor in administering an estate does not extend to the estate or its beneficiaries. *Graivier v. Dreger & McClelland*, 280 Ga.App. 74 (2006), *Rhone v. Bolden*, 270 Ga.App. 712 (2004). Perhaps most troubling is *Villanueva's* threat to the long-standing assumption that an attorney-client relationship is inherently non-assignable because it is an engagement for "personal service, requiring skill, science, or peculiar qualifications." *Decatur N. Assocs. Ltd. v. Builders Glass, Inc.*, 180 Ga.App. 862 (1986); *Cowert v. Singletary*, 140 Ga. 435 (1913). Unfortunately, *Villanueva* may have successfully re-characterized this assumption into a case-by-case determination of whether the relationship does in fact contain something unique or peculiar that should preclude the ability to assign any claim arising out of the relationship.

Minority v. Majority of Assignable Malpractice Claims

Regardless of whether *Villanueva* is ground-breaking, this decision has indisputably placed Georgia in the minority view permitting the assignment of attorney malpractice claims on a case-by-case basis. A majority of states have a *per se* ban on assignments noting the uniquely personal relationship between attorney and client, public policy considerations concerning the duty of loyalty and confidentiality, and the fear that legal malpractice claims will become the next hot commodity on the trading block.

A significant minority of states, presently including Georgia, generally prohibit assignment or generally allow assignment and then make exceptions to this general rule on a case-by-case basis. In *Villanueva*, the court apparently opted to allow assignment of legal malpractice claims and place the burden on the defense to carve out an exception showing the "special nature" of the attorney-client relationship. Examples of states with claims held assignable include Rhode Island, which has permitted assignment of a legal malpractice claim arising out of an assigned loan agreement. Massachusetts has permitted assignment where the assignee had a direct interest in the underlying claim negligently handled by the litigating attorney. Other states, such as Texas, Washington and Connecticut, permit assignment unless the assignment is to an adverse party in the underlying action. These case-by-case exceptions provide insight into potential future litigation of this issue in Georgia. Notably, in addressing its own issue of first impression, the Supreme Court of Connecticut provided a comprehensive review of many case-by-case exceptions. *Gurski v. Rosenblum and Filan, LLC*, 276 Conn. 257 (2005).

The Georgia Supreme Court may have a final say in this matter as a petition for certiorari has been filed. A reversal of *Villanueva* and a *per se* ban on the assignment of legal malpractice actions would provide needed clarity and limit potential exposure. If review is denied or *Villanueva* is affirmed, however, the pattern of exceptions carved out by the minority of states throughout the country will provide some guidance on what limits might be imposed on assignments. But, the result will still be ever-expanding exposure for Georgia attorneys and potentially other professions.

"Regardless of whether Villanueva is ground-breaking, this decision has indisputably placed Georgia in the minority view permitting the assignment of attorney malpractice claims on a case-by-case basis."

What is the Future of Assignability?

The broad brush applied by the court in *Villanueva* will undoubtedly interject itself beyond the realm of legal malpractice to all aspects of professional malpractice. Indeed, nearly every oral or express contract for professional services including engineers, accountants and architects, may result in the same property damage claims permitting assignability under *Villanueva*. Georgia professionals could see unhappy clients find someone willing to "fix the financial damage" for the very low cost of assigning all the client's rights and remedies against professionals they engaged.

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South Carolina's Notice and Opportunity to Cure Act:

A Review of Its Utility in Construction Defect Cases

By: Paul E. Sperry & Laura E. Paris

In 2003, the South Carolina legislature enacted the "South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act." The legislature hoped that the Act would provide an "effective alternative dispute resolution mechanism in certain construction defect matters" to reduce litigation. The Act, which mirrors legislation enacted in many other states, requires that a claimant serve written notice of a claim on a contractor advising of alleged defects at least 90 days before filing a lawsuit for defects in a single-family residence, duplex, or limited multi-family unit. The contractor then has fifteen days to request clarification of the alleged defects and thirty days to "inspect, offer to remedy, offer to settle with the claimant, or deny the claim regarding the defects." If the parties are unable to settle the dispute after such notice and cure period, the claimant may then file suit.

Given the large percentage of construction defects cases that ultimately settle, this Act seems like it would help prevent protracted and expensive litigation. However, in actual practice the Act is seldom enforced. Typically, a defendant will raise the Act as an affirmative defense, but, as discussed below, the Act otherwise lacks "teeth" needed to achieve the goal of reducing litigation. In this article, we will look at a recent appellate decision enforcing the Act and opine as to the continued utility of the Act nine years after enactment.

The most common complaint made regarding the Act is the lack of enforcement provisions. While the Act allows a trial court to stay a lawsuit if the notice requirement is not met, our experience shows that this provision is of limited utility. Most recently, the South Carolina Supreme Court addressed enforcement of such stays in the case of Grazia v. S. Carolina State Plastering, LLC, 390 S.C. 562 (2010), reh'g denied (Jan. 20, 2011). In Grazia, the Circuit Court interpreted the Act to mean that a stay should only be enacted when a plaintiff-homeowner mistakenly fails to comply with the Act. The Supreme Court reversed, holding that the stay should be enacted any time a plaintiff-homeowner fails to comply with the statute. While this clearly sent a warning to plaintiff-homeowners about compliance, neither court addressed any consequences for failing to follow the Act before filing suit.

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Firm News & Notes

New Partners continued from page 5

William D. Newcomb, Atlanta Office

Newcomb's practice focuses on commercial litigation, with an emphasis on professional liability. He regularly represents professionals in cases involving malpractice, breach of fiduciary duty, breach of contract, negligent misrepresentation and fraud. William also defends his clients in complex premises liability, product liability and medical malpractice disputes.

Brian S. Spitler, Atlanta Office

Spitler's practice is focused on defending attorneys and accountants in state and federal courts throughout the Southeast. He has litigated a wide array of cases including complex commercial, product liability, securities fraud, environmental and consumer protection litigation.

Lee C. Weatherly, Charleston Office

Weatherly has been lead counsel in over 65 jury trials and is an active member of both the South Carolina and Kentucky Bars. He has tried cases to verdict involving automobile and motor carrier liability, business and commercial litigation, employment litigation, medical malpractice, premises liability, and property disputes.

Ryan B. Wilhelm, Atlanta Office

Wilhelm practices in the firm's Construction Litigation, Commercial Litigation, and General Liability practice areas. He represents design professionals, contractors, and owners in construction matters resolved through litigation and alternative dispute resolution. Wilhelm also has extensive experience in handling general business litigation matters, premises and products liability claims, automotive claims, and insurance coverage disputes.

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It is naive to think that plaintiffs' attorneys, having invested time, effort and money into initial preparations for pursuing a case, often pursuant to a contingency fee agreement, would be content to allow a contractor / subcontractor to simply repair the underlying problem. Similarly, plaintiff-homeowners often incur expert costs before filing an action and those experts often criticize the work of the contractor. Under such circumstances, it is unlikely that plaintiff-homeowners would entertain a proposal from the same contractor to perform new work on their home. Likewise, it is unlikely that a contractor, now threatened with litigation, would be inclined to perform additional work at the plaintiff's residence.

The Act itself also creates practical barriers to the very settlements it was designed to promote. For example, while the Act allows the subcontractor / contractor an opportunity to visit the site, make an inspection, and offer a settlement, there is the possibility that an insurer would want to pay based on one site inspection and no written discovery regarding the nature and extent of the damages. Conversely, if the plaintiff-homeowner believes strongly in their damages, it is doubtful that they will accept a lowball offer to settle.

So what is the utility of the Act? We believe the Act works best in cases involving discrete or custom-made elements of a home, as opposed to wholesale defects with the entire construction. In such limited cases, homeowners have been willing to allow craftsmen the opportunity to repair and those same craftsmen are frequently willing to repair their own work. Similarly, local developer-general contractors whose businesses depend on their reputation have been eager to make repairs rather than risk their business; admittedly, however, homeowners are less willing to discuss repairs in these cases. Nine years after enactment, the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act has not served to significantly eliminate construction litigation. However, it is important to remember in all construction defects cases that the provisions of the Act are mandatory and, with the right client, can prove useful.

Resources

1. S.C. Code Ann. § 40-59-810.

2. PROFESSIONS AND OCCUPATIONS, 2003 South Carolina Laws Statute 82 (S.B. 433).

3. S.C. Code Ann. § 40-59-850.

4. S.C. Code Ann. § 40-59-830.

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Ex parte Communications in Workers' Compensation

By: Christopher A. Whitlock

On December 1, 2011, the Court of Appeals issued a decision in the *McRae v. Arby's Restaurant Group* (Case #A11A1021) regarding ex parte communications in the worker's compensation arena. The *McRae* decision is a good example of how bad facts can make bad case law. Hopefully, the holding in *McRae* will be limited to similar facts and not be broadened to encompass all ex parte communications with medical providers in the workers' compensation field.

In *McRae*, the Employer/Insurer sought an order from the State Board of Workers' Compensation compelling the Claimant's treating physician to meet with counsel for the Employer/Insurer, ex parte, to discuss the Claimant's medical treatment and future care. The Claimant had signed a WC-207/medical authorization, but refused to sign a specific release allowing the physician to communicate ex parte with counsel for the Employer/Insurer. Since the Claimant would not sign the specific authorization, the doctor would not meet ex parte with the Employer/Insurer's counsel. The Employer/Insurer filed a motion with the State Board to remove the Claimant's hearing request (a request for hearing on other issues) until such time as she "cooperated" with medical management of her worker's compensation claim by signing a release for the doctor to meet ex parte with counsel for the Employer/Insurer.

The administrative law judge, the Appellate Division of the State Board of Workers' Compensation and the Superior Court all granted the Employer/Insurer's motion to compel the Claimant to sign the release. The Georgia Court of Appeals, however, reversed the ruling in a close 4-3 majority opinion. The Court of Appeals held that the Claimant's WC-207 medical release refers to a release of "tangible documents" only. The Court of Appeals concluded that the Workers' Compensation Act does not require a doctor to converse ex parte with opposing counsel and, more specifically, the Act "does not require an employee to authorize his/her treating physician to communicate ex parte with the employer's lawyers in order to continue receiving benefits." The Court in *McRae* did not go so far as to state that the Workers' Compensation Act specifically forbids such communications from taking place. The Court of Appeals noted that HIPAA privacy rules expressly permit the disclosure of information "as authorized by or to the extent necessary to comply" with the requirements

of the workers' compensation laws. The Court in *McRae* also did not mention Board Rule 200.1(a)(1)(iii) which allows case managers, and direct employees of insurers, employers, third-party administrators to "communicate with ... the authorized treating physician to assess, plan, implement, coordinate, monitor and evaluate options and services relative to an injured employee's condition and/or vocational needs."

I feel quite confident that this case will be appealed to the Georgia Supreme Court who may provide more guidance on this issue. Also, I am certain that SBWC Legislative Committee will request the Georgia State Legislature pass an amendment to the Workers' Compensation Act to allow ex parte communications for workers' compensation claims. The most aggressive approach to take in viewing the holding in *McRae* is that it is limited to the employer/insurer not being allowed to force the claimant to sign a release compelling the claimant's treating physician to communicate ex parte regarding the claimant's medical care for his/her work related injury. A more conservative approach, however, would be to carbon copy the claimant and his/her counsel on all communications sent to the treating physicians and refrain from ex parte verbal communications unless specifically authorized to do so by the claimant.

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General Liability & Workers' Compensation Seminar

We will host our annual General Liability and Workers' Compensation Seminar at Turner Field on Tuesday, June 26. As in the past, the seminar will provide interesting and relevant information for claims managers, underwriters and other claims professionals.

Included with seminar registration is dinner & a ticket to see the Braves play the Arizona Diamondbacks.

Reserve Your Space Today! RSVP to cwalsh@carlockcopeland.com. Visit the Event page on our website for more information on this and our other events.

Spotlight on...

WORKERS' COMPENSATION TEAM

Carlock, Copeland & Stair has a seasoned workers' compensation defense practice located in Atlanta and Charleston, South Carolina.

We work hand-in-hand with our clients to develop policies that prevent work-related accidents and issues, and vigorously defend employers against false or inflated claims.

Our attorneys approach claims from a strategic standpoint - helping to evaluate the claims, develop an action plan, and determine whether a beneficial and economical resolution would be best achieved through continued litigation or alternative dispute resolutions.

The attorneys in the Workers' Compensation team work with the firm's extensive health care practice, which includes in-house nurse consultants, to provide the practice with valuable resources. We have excellent relationships with medical providers, private investigators, and rehabilitation suppliers, whose assistance is often vital in the successful resolution of workers' compensation cases.

Within this team, the firm represents employers and insurance carriers, self-insureds, group associations and third-party administrators.

To contact our Workers' Compensation Team, call:

Atlanta - 404.522.8220
or
Charleston - 843.727.0307

Workers' Compensation Partners
Christopher A. Whitlock
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Karisa M. Kopaczewski
Benjamin V. Copeland
Jennifer M. Sammons

Upcoming Events

- Atlanta Claims Association Annual Convention, April 19, 2012
- General Liability & Workers' Compensation Seminar, June 26, 2012
- State Board of Workers' Compensation Educational Conference Exhibitor, August 26, 2012

We're in this to win.

Defense Verdict in Construction Defect Case

Paul Sperry and Patrick Norris obtained a defense verdict for a large masonry contractor on January 27, 2012, in Charleston County, South Carolina. The masonry contractor was hired by the original general contractor ten years after original construction in an effort to address water intrusion concerns around windows. The plaintiff-homeowner sought over $300,000 in damages for allegedly defective work related to original construction and the subsequent masonry repairs. The jury found in favor of the plaintiff as to negligence of the general contractor, but absolved the masonry contractor of any fault for the plaintiff's alleged damages.

Court of Appeals Affirms Dismissal of SC Physician

Partners Lee Weatherly and Gary Lovell recently prevailed in the South Carolina Court of Appeals for a physician client in a case of first impression relating to South Carolina's pre-suit expert affidavit requirement under the 2005 Tort Reform Legislation. The Court of Appeals affirmed a York County trial court judge finding that the Notice of Intent Statute, and South Carolina Law, mandate the filing of a contemporaneous expert affidavit alleging one act of negligence when Plaintiff files a Notice of Intent to sue a medical professional. Plaintiff argued, in opposition, that the general provisions of the 2005 Tort Reform Legislation in South Carolina automatically grant a Plaintiff an additional 45 days to file an expert affidavit in the Notice of Intent phase of the litigation when he is within 10 days of the expiration of the statute of limitations. The Court of Appeals ruled that this argument was not persuasive and upheld the trial court's ruling, striking the Notice of Intent to File Suit from the record and ending the case.

Defense Verdict in Fulton County Superior Court in Wrongful Death Case

Partners Eric Frisch and Broderick Harrell obtained a defense verdict in Fulton County Superior Court in a wrongful death case. Plaintiffs alleged that an emergency physician failed to resuscitate a critically ill patient adequately and failed to insert a chest tube in the face of evidence of bleeding into the chest.

Sixth Circuit Affirms Summary Judgment for Audit Firm

John Bunyan, John Rogers, and Joe Kingma represented a Tennessee accountant and his firm in two lawsuits arising out of a "business divorce." The Plaintiffs alleged that the accountants were complicit in fraud and racketeering perpetrated by the CEO and claimed a loss of $125 million. The district court granted summary judgment, holding that all potential claims against the accountants had been released as part of two stock transfers. The Sixth Circuit affirmed the district court's order.

Summary Judgment for Architect in Construction Defect Action

Kent Stair, Paul Sperry, and Patrick Norris represented an architect in an action in Charleston County, South Carolina brought by the homeowner's association of a condominium complex. The court initially denied the architect's motion for summary judgment on statute of limitations grounds, holding that while the plaintiff was on notice of potential construction-related defects more than three years prior to filing the action, the plaintiff was not on notice of any design-related defects. However, following oral arguments on the architect's motion to reconsider the denial of summary judgment, the court ultimately agreed with the architect's position that the statute of limitations is an objective, rather than subjective, concept. The court reversed its original decision and granted summary judgment on all of the plaintiff's claims against the architect by order dated January 4, 2012, holding that the plaintiff had an opportunity to investigate the defects when originally brought to its attention. The plaintiff's failure to ascertain the particular cause of the defects--construction, design, or otherwise--did not toll the running of the statute of limitations.

Summary Judgment for Insurer in Bad Faith Litigation

Jason Hammer represented an uninsured / underinsured motorist carrier in a bad faith action filed in Cobb County Superior Court. The Plaintiff alleged that although he entered into a settlement agreement with his insurer, the agreement was void due to coercion, fraud and duress and that his insurer acted in bad faith in refusing to pay additional benefits. The Court granted summary judgment in the insurer's favor, finding that the Plaintiff failed to exercise due diligence in perfecting service outside the statute of limitations and that even if service had been proper, Plaintiff's claims were barred by the doctrines of release and/or accord and satisfaction.

Summary Judgment Granted for Large South Carolina Property Owners Association

Doug MacKelcan recently obtained summary judgment for a large property owners association in Beaufort County, South Carolina. Plaintiffs alleged that the POA's Architectural Review Board improperly approved a construction

project on a neighboring property and pled nuisance, breach of contract and breach of fiduciary duty against the POA. After considerable discovery, the Court found that the POA was entitled to a judgment as a matter of law and dismissed the POA from the suit.

Summary Judgment for Insurer in Declaratory Judgment Action

Jason Hammer represented an insurer in a declaratory judgment action in Fulton County Superior Court seeking a determination that there was no uninsured / underinsured motorist coverage exposure for the insurer. The insured argued her policy should have provided for added-on coverage, not reduced-by coverage, which she attempted to support with expert testimony. Jason successfully moved the court to exclude the insured's expert and the court subsequently granted summary judgment in the insurer's favor, finding that the policy provided for reduced-by coverage and therefore no UM exposure existed as a matter of law.

Anti-SLAPP Motion to Dismiss Granted

Joe Hoffman, Bill Jones, and Joe Kingma prevailed on a motion to dismiss granted in the Superior Court of Gwinnett County on November 29, 2011.

The case arose from a contract for the sale of 36.5 acres of raw land which was going to be converted to commercial use. The sale fell through when a local municipality arguably changed the zoning rules and the developer sued the municipality as well as a local nonprofit. The developer claimed that the nonprofit employee, who was formerly the mayor of the municipality, had tortiously interfered with contractual relations and caused the loss of the sale. The developer prevailed against the municipality and obtained an advisory opinion for $1.8 million dollars.

Carlock Copeland defended the claims against the nonprofit, arguing that even if the speech was made, which was denied, it was privileged and protected by the Anti-SLAPP statute. The case was vigorously argued on motion, which was granted by the trial court on November 29, 2011.

The case has been appealed, so stay tuned for further developments.

Court of Appeals Affirms Summary Judgment for Lawyer and Rejects Attack on Prior Judgment

Chris Meeks, Shannon Sprinkle, and Joe Kingma obtained a favorable Court of Appeals decision affirming summary judgment granted to their lawyer client. Their client had been sued by an opposing party in a divorce case for claims of breach of fiduciary duty, fraud, and conspiracy. Plaintiff's claims were an effort to un-do a divorce decree, which he said resulted in an unfair distribution of marital assets. The trial court had previously rejected all of Plaintiff's claims against the lawyer as an improper collateral attack on the prior judgment and found that Plaintiff was barred by in pari delicto due to his own bad acts. The Court of Appeals affirmed the trial court's decision.

This case may be appealed so stay tuned for further updates.

Publications & Presentations

- We will host a hospitality suite at the **Atlanta Claims Association Conference** on April 19, 2012, at the Gwinnett Center in Duluth, Georgia. We have supported the ACA for many years and we always look forward to this event as a chance to reconnect with old friends and to meet some new ones, too.

- Carlock, Copeland & Stair will be a silver sponsor at the **Spring 2012 National Legal Malpractice Conference** on April 18-20, 2012 at the Waldorf Astoria in New York. This conference is presented by the ABA Standing Committee on Lawyers' Professional Liability. For more information, visit the ABA Lawyers' Professional Liability website at www.americanbar.org/groups/lawyers_professional_liability.

- Shannon Sprinkle is scheduled to present "**Malpractice Update - Who is Your Client and Who Else to Worry About**" at the annual meeting for the State Bar of Georgia. The program is scheduled for the morning of Thursday, May 31, 2012, at the Westin Resort in Savannah.

- Partner Eric Frisch is scheduled to present at **Pediatrics by the Sea & Pediatric Coding Conference,** hosted by the Georgia Chapter of American Academy of Pediatrics on June 13, 2012, at the Ritz Carlton in Amelia Island, GA.

Please visit www.CarlockCopeland.com to obtain more information on our recent publications and presentations.

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At a glance...

Carlock, Copeland & Stair Elects Eight New Partners
Carlock, Copeland & Stair, LLP congratulates the following attorneys on being selected to join the Firm's partnership: Marquetta J. Bryan, David J. Harmon, Broderick W. Harrell, William P. Jones, William D. Newcomb, Brian S. Spitler, Lee C. Weatherly, and Ryan B. Wilhelm.
More on page 5.

General Liability and Workers' Compensation Seminar
Carlock, Copeland & Stair will host our annual General Liability and Workers' Compensation Seminar at Turner Field on June 26. *More on page 7.*

2012 Atlanta Claims Association Conference
We will host a hospitality suite at the Atlanta Claims Association Conference on April 19, 2012, at the Gwinnett Center in Duluth, Georgia. We have supported the ACA for many years and we always look forward to this event as a chance to reconnect with old friends and to meet some new ones, too.