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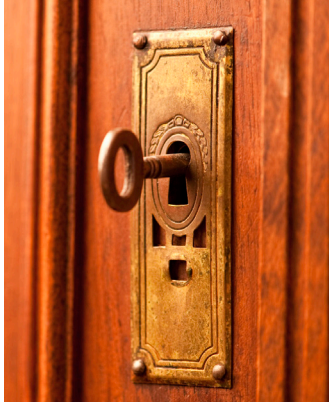

The Tort Report

An Update on Liability Issues

Fall 2016

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A Costly Lesson: Understanding Damages Under Georgia's Wounded Feelings Statute

By: Pilar C. Whitaker

O.C.G.A. § 51-12-6, which applies to cases where a plaintiff has not alleged any physical injury, provides "in a tort action in which the entire injury is to the peace, happiness, or feelings of the plaintiff, no measure of damages can be prescribed except the enlightened consciences of impartial jurors. In such an action, punitive damages under Code Section 51–12–5 or Code Section 51–12–5.1 shall not be awarded."

Attorneys are likely to encounter this statute in false imprisonment, false arrest, malicious prosecution cases or any other cases where the plaintiff alleges humiliation or embarrassment. A recent Georgia Court of Appeals case serves as a good reminder that attorneys must object to a jury charge of punitive damages and a jury verdict form that includes damages for both wounded feelings under § 51-12-6 and punitive damages under § 51-12-5 *before* the case is given to the jury. As shown in *The Higbee Company v. Solomon*, the failure to raise a timely objection where a plaintiff has requested both categories of damages can leave the defendant on the hook for both types of damages, notwithstanding the clear language of the statute. 334 Ga. App. 884, 884, (2015), cert. denied (Feb. 22, 2016).

In *Higbee*, a plaintiff was awarded both punitive and wounded feeling damages following a false imprisonment trial against a department store. At the close of evidence, counsel for the defendant sought a directed verdict as to the plaintiff's claim for punitive damages based solely on an argument of insufficient evidence. Defense counsel did not cite O.C.G.A. § 51-12-6 as a basis for the motion. The court ruled the issue of punitive damages was for the jury to determine and read the jury a punitive damages charge. The jury verdict form also included a section for punitive damages. The defendant did not object to either the jury charge on punitive damages or the jury verdict form. The jury awarded the plaintiff $250,000 in compensatory damages under O.C.G.A. § 51-12-6 and $350,000 in punitive damages pursuant to O.C.G.A. § 51-12-5.1. Following the jury's award, the defendant argued punitive damages were unavailable as a matter of law because the plaintiff's entire injury was to his peace, happiness, or feelings. The trial court held that, even if this were true, counsel waived this argument by failing to raise this objection *before* the jury returned its verdict.

On appeal, the defendant asserted this argument was not waived for several reasons, the most important being that recovery under both statutes was an impermissible double recovery of punitive damages. The Court of Appeals disagreed, noting damages under O.C.G.A. § 51-12-6 are not punitive in nature, and thus the plaintiff did not recover punitive damages twice. The Court of Appeals affirmed the entire $600,000 judgment to plaintiff.

The lesson from *Higbee* is, where the injury is to a plaintiff's peace, happiness, or feelings, a specific objection regarding recovery of punitive damages should be made as early as possible and at every opportunity. While the determination of whether an injury is solely to the peace, happiness and feelings of the plaintiff is case specific, the failure to properly object to an additional award for punitive damages could be a costly mistake. ■

Stanfield v. Waste Management of Georgia, Inc. Overruled: The Impact of Private Nuisance Claims

By: Eleanor G. Jolley

In June, the Georgia Supreme Court held that plaintiffs bringing claims of nuisance and trespass could recover for both "discomfort and annoyance" and "diminution in

their property's fair market value" without violating the rule against double recovery. *Toyo Tire North America Manuf. Inc. v. Davis*, 299 Ga. 155 (2016). The plaintiffs in *Toyo Tire* filed claims for nuisance and trespass, alleging Toyo Tire's manufacturing plant caused noise, odors and black dust to consistently permeate their property and cause the property's value to substantially decrease. The trial court denied Toyo Tire's motion for summary judgment that argued the plaintiffs could not recover for both annoyance and discomfort, and the diminution in property value. A partially divided Court of Appeals panel affirmed the trial court's decision. The Georgia Supreme Court granted certiorari in part to decide whether O.C.G.A. § 41-1-4 (which states "[a] private nuisance may injure either a person or property, or both, and for that injury a right of action accrues to the person who is injured or whose property is damaged") permitted double recovery for the same injury.

Both parties extensively briefed the issues and the Court distinguished the case law cited by Toyo Tire which involved circumstances where there was only one alleged injury. In such cases, Toyo Tire was correct that multiple recoveries addressing one injury constituted impermissible double recovery. However, in affirming the lower courts' decisions, the Georgia Supreme Court found the plaintiffs' injuries to be separate and distinct. The Georgia Supreme Court noted that recovery for "discomfort and annoyance" is intended to "compensate [plaintiffs] for what they have already experienced as residents of the property." *Id.* at 179. In contrast, the compensation for future discomfort and annoyance "is reflected in the diminished fair market value of the property" which is an ongoing injury that should be separately compensated. *Id.* In drawing this distinction, the Georgia Supreme Court reasoned that a non-owner resident would be able to recover for the "discomfort and annoyance" while the owner-resident would be able to recover for the future diminution in value upon the sale of the property. Because there are two distinct injuries which compensate for past and prospective injuries, as evidenced by the Court's analogy, the plaintiffs were able to recover both types of damages.

Medicare Lien Reimbursement: Recent Case Law Update

By: Calvin P. Yaeger

Typically, when resolving a personal injury claim, defense counsel will include language in the release stating the plaintiff agrees to indemnify, defend and hold harmless the defendant and the defendant's liability insurer for any and all liens, including Medicare or Medicaid liens, statutory hospital liens pursuant to O.C.G.A. § 44-14-470, workers' compensation claims for reimbursement or any other type of claim from a third-party payor. Cautious defense counsel may even include a provision requiring plaintiff's counsel to keep a sufficient portion of the settlement funds in escrow to satisfy any known, pending liens.

However, based on a recent ruling from the United States District Court of Appeals for the Eleventh Circuit, these oft-used precautionary measures may not be sufficient to protect a tortfeasor's liability insurer from a subsequent claim by Medicare where the plaintiff has failed to satisfy an outstanding lien.

In *Humana Medical Plan, Inc. v. Western Heritage Insurance Company*, the United States Court of Appeals for the Eleventh Circuit decided, as a matter of first impression, that the Medicare Secondary Payor Act (MSA) permitted a Medicare Advantage Organization (MAO) to sue a primary payor (liability insurer) that refused to reimburse the MAO for a conditional payment. 2016 WL 4169120 (11th Cir. 2016).

In *Humana*, Mary Reale was injured at Hamptons West Condominiums, and sued the Hamptons West Condominium Association, Inc. (Hamptons West) for personal injury. Mrs. Reale received Medicare Part C coverage as an enrollee in a Medicare advantage plan administered by Humana. Under the Medicare Advantage program, a private insurer, such as Humana, is authorized to operate as an MAO to administer Medicare benefits pursuant to a contract with the Centers for Medicare & Medicaid Services (CMS). *Id.* Humana paid $19,155.41 in total medical expenses related to Mrs. Reale's fall at Hamptons West.

As the Reales' and Hamptons West's liability insurer, Western, were on the eve of a settlement of the personal injury claim, Humana issued an Organization Determination in the amount of $19,155.41, which was unchallenged by either the Reales or Western, Hamptons West's liability insurer. Western and the Reales eventually entered into a settlement agreement that resulted in the Reales' release of Hamptons West and Western, and payment to the Reales from Western in the amount of $115,000.00. As part of the settlement, the Reales agreed to indemnify, defend, and hold harmless Hamptons West and Western for any and all liens.

The *Toyo Tire* decision is also important because the Georgia Supreme Court expressly overruled the Court of Appeals' decision in *Stanfield v. Waste Management of Georgia, Inc.*, 287 Ga. App. 810 (2007). The Court of Appeals in *Stanfield* precluded parties from recovering for "both discomfort and diminution of value" in nuisance and trespass claims. *Id.* at 812. In *Toyo Tire*, the Supreme Court overruled *Stanfield* because the decision "failed to apprehend the crucial distinction between double recovery cases . . . and cases like this one." The injuries sustained by the plaintiffs in *Toyo Tire* were continuing in nature and not easily fixable. Additionally, money damages awarded for injuries to their persons would not remedy the damage to their property, and vice versa. Therefore, the evaluation of damages for claims made pursuant to O.C.G.A. § 41-1-4 must include consideration of discomfort and diminution in value. ■

Location, Location, Location: Qualification of Jurors as to Insurance Companies Must Occur in Open Court if Requested by any Party

By: Ari E. Shapiro

In a civil case, parties are entitled to have the jury qualified as to any insurance company with a financial interest in the case. As the Georgia Court of Appeals recently clarified, however, this qualification must occur in open court — not in a jury assembly room behind closed doors — if so requested by any party.

Prior to the settlement, Humana notified Ms. Reale of a pending claim under the MSA for $19,155.41. Despite efforts by Western to include Humana as a payee on the settlement check, the Reales refused. However, the Reales ultimately agreed to hold $19,155.41 of the $115,000 settlement payment in trust pending resolution of Humana's claim. The Reales failed to resolve or satisfy the pending lien with Humana. Accordingly, Humana initially filed suit against the Reales and their attorney in the Southern District of Florida to recover the unpaid lien amount, but voluntarily dismissed the suit. Thereafter, the Reales sued Humana in Florida state court, seeking a declaration as the amount they owed Humana. Although the trial court ruled that Humana was only entitled to $3,685.03 of the stated lien, Florida's Third District Court of Appeals reversed the decision for lack of jurisdiction, finding that the Medicare Act provided an exclusive administrative process to adjudicate the dispute between Ms. Reale and Humana regarding her benefits.

Having failed to recover from the Reales, Humana then demanded that Western, as a primary payer, reimburse it for its conditional payment to Mrs. Reale. Western refused and Humana filed suit in the Southern District of Florida seeking double damages under the MSA private cause of action, 42 U.S.C. § 1395y(b)(3)(A).

The district court granted summary judgment in favor of Humana finding that a private cause of action was available to an MAO such as Humana, and further ruled that Humana was entitled to double damages for a total of $38,310.82. Western appealed that judgment to the Eleventh Circuit Court of Appeals.

On appeal, the Eleventh Circuit affirmed the district court's holding that an MAO was entitled to exercise the same rights as the CMS to recover from a liability insurer (primary payor) under the Medicare Secondary Payor Act. In doing so, it ruled that Western's attempt to have the Reales' attorney hold the lien amount in escrow was not the same as actual reimbursement to Humana as required by the MSA. As such, Humana was entitled to an award of double damages against Western based on its failure to reimburse Humana for the full lien amount.

As this case demonstrates, liability insurers and their defense counsel should not simply rely on an indemnification provision, or other similar lien satisfaction language in a release, or even an additional agreement for plaintiff to hold funds in escrow when settling a claim with a plaintiff who has received Medicare benefits in any form. Should the plaintiff fail to satisfy the Medicare lien as a result of the settlement payment, the defendant's liability insurer is the most direct, and now most likely, source of recovery for either the CMS or an MAO. ■

In *Mordecai v. Cain*, Case No. A16A0852, 2016 WL 4304365, at *1 (Ga. Ct. App. Aug. 15, 2016), Barbara Mordecai sued Michael Cain for personal injuries suffered in a motor vehicle collision. Because State Farm Mutual Insurance Company was Mordecai's uninsured motorist carrier, before jury selection began, all prospective jurors were asked: "Are you an officer, employee, stockholder, agent, director, or policyholder of State Farm Automobile Mutual Insurance?" *Id.* at *2. However, that questioning occurred in the jury assembly room, not in open court.

After *voir dire*, Mordecai's counsel specifically asked that the panel be qualified as to State Farm in open court in order to allow him to ask questions of the jury panel under oath. Cain's counsel objected, arguing the jurors had already been qualified in the jury assembly area, and presumably, to avoid additional reference to insurance in the presence of the panel. The Court sustained the objection and denied Mordecai's request. Instead, the Court asked the jury administrator to state, on the record, the questions she had previously asked the potential jurors in the assembly room.

However, according to the Court of Appeals, neither the pre-qualification question, nor the reading of this question into the record, met the requirements for jury qualification under Georgia law in this circumstance. Rather, because he expressly requested it, Mordecai was entitled to have the jury qualified in open court, regardless of the questioning that occurred in the jury assembly room.

As the Court of Appeals explained, "[q]ualifying each prospective juror as to the possible relationship with a non-party liability insurer that has an interest in the outcome of the case must be done before the parties begin to strike a jury." *Id.* at *3. Even more important, such qualification "must be done in open court in the presence of the parties and counsel, because a party has the right to examine prospective jurors on their qualifications, including asking questions regarding disqualifying ties to insurance companies." *Id.*

In reaching this holding, the Court rejected Cain's argument that "the decision of when and where to qualify the prospective jurors is in the sound discretion of the presiding judge." *Id.* Rather, the Court held that, "when a party requests that qualification of prospective jurors be done during *voir dire* and in open court, the trial court's discretion when and where to qualify them is, in fact, limited." *Id.* "[A] party who asks that qualification of prospective jurors be done during *voir dire* and in open court is entitled to that procedure, regardless whether prospective jurors are prequalified by a court employee before they are sent to the courtroom." *Id.* Thus, as a result of the trial court's denial of Mordecai's specific request that the prospective jurors be questioned in the courtroom and in the presence of counsel, Mordecai was entitled to a new trial.

As *Mordecai* makes clear, jury qualification is more than a mere technicality. It is not enough that prospective jurors be asked the right questions; they must be asked those questions by the right person, in the right place and at the right time. Going forward, litigants and their counsel should be aware of this standard to avoid repeating the mistakes of *Mordecai.* ■

Events

Property and Coverage Insurance Client Seminar
November 4, 2016
Cobb Energy Performing Arts Centre
8:45 am - 3:15 pm

Litigation Client Luncheon
December 7, 2016
Maggiano's - Cumberland Mall

Many Swift Currie programs offer CE hours for insurance adjusters. To confirm the number of hours offered, for more information on these programs, or to RSVP, visit www.swiftcurrie.com/events.

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