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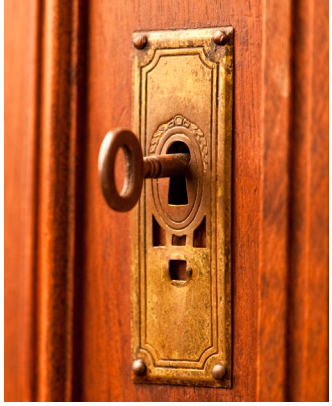

The Tort Report

An Update on Liability Issues

Spring 2014

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The Importance of Full Disclosure: Harsh Lessons from the Ford Motor Cases

By: Dania L. Haider

Ford Motor Company's policy of withholding details of its complicated excess insurance structure has worked its way through the Georgia Appellate Courts and the message to defendants, insurers and lawyers is clear: withhold the information at your peril.

Under O.C.G.A. § 9-11-26(b)(2) insurance agreements are discoverable. Georgia law also permits a plaintiff to obtain information about insurers who may cover a judgment against the defendant in order to determine whether prospective jurors should be qualified as to relationships with those insurers under O.C.G.A. § 15-12-135(a).

The recent decisions involving Ford Motor Company have reinforced the mandate under the Georgia Civil Practice Act that defendants disclose all potentially applicable insurance coverage, even if such coverage may not be called upon to satisfy a verdict in the case.

This issue first came to light in a product liability action filed against Ford in Cobb County, Georgia, by the parents of Donald R. Young III (the "Youngs"). In their discovery to Ford, the Youngs requested liability insurance information and Ford responded by stating it had sufficient resources to cover any judgment that reasonably could be expected to be awarded as damages. In pretrial hearings, Ford's counsel objected to the Youngs' request that the jury be qualified as to any insurer of Ford, stating the company was self-insured to a point that would satisfy any judgment in the case. The trial court stated the issue was not whether Ford had the resources to pay a judgment, but rather the issue was about qualifying the jury as to any person or company that had a potential financial interest.

After the start of voir dire, Ford's counsel stated on the record there was no insurance that would be applicable to satisfy a judgment in the case. After the jury had been sworn in, Ford's counsel informed the Youngs that the company did in fact have insurance coverage applicable to the claims made. As a result of this revelation, the trial court revoked the *pro hac* admissions of Ford's lead counsel, declared a mistrial and, as a sanction against Ford, ruled the company could not contest the assertion that it failed to adequately warn consumers of the alleged danger of a seatbelt failure during a rollover. The Youngs and Ford subsequently settled and the case was dismissed.

However, this was not the end of Ford's problems. Nineteen months earlier, Ford had successfully defended product liability claims by Jordan and Renee Conley (the "Conleys"). Like the *Young* case, Ford did not disclose the excess insurance layers in discovery. With the newly discovered information that came to light in the Young case, the Conleys filed a motion seeking a new trial. The trial court granted the Conleys' motion, finding Ford's non-disclosure of the insurance information was willful and intentional. The Georgia Court of Appeals was equally divided on the issue and the case was transferred to the Georgia Supreme Court.

On February 24, 2014, the Georgia Supreme Court affirmed the trial court's decision to grant a new trial. The Court found that Ford had misled the Conleys with the general discovery responses on insurance information. The Supreme Court found the Conleys had acted with due diligence in seeking the insurance information, despite failing to file a motion to compel, raise the issue at pretrial hearings or include insurer qualification questions on the jury questionnaire. The Court held that "[b]ecause the Conleys acted with due diligence to raise their claim that the jury should have been qualified as to Ford's insurers, because the jury should have been so qualified, and because the failure to do so raises an unrebutted presumption that the Conleys were materially harmed, the

trial court did not abuse its discretion in granting the Conleys' extraordinary motion for new trial on this ground."

The takeaway from these cases is clear, Georgia law provides that insurance coverage information is discoverable and is to be provided. Failure to disclose this information may lead to sanctions against defendants and/or their attorneys. ■

Questions Posed by the "ER Statute" in Medical Negligence Cases

By: Shannon S. Hinson

In late 2013 and early 2014, the Georgia Supreme Court gave additional guidance regarding the application of O.C.G.A. § 51-1-29.5, which limits health care liability claims to gross negligence in emergency medical care. When evaluating a claim of medical negligence under this "ER Statute" there are three things to consider: 1) does the care at issue qualify as emergency medical care; 2) was the physician grossly negligent in the provision of that emergency medical care; and 3) can the plaintiff prove his or her case through clear and convincing evidence. Initially it was thought the statute would essentially preclude claims against emergency room physicians as a matter of course, but recent case law has indicated that summary judgment is not guaranteed.

In *Bonds v. Nesbitt*, the Georgia Court of Appeals addressed the issue of whether the care rendered by the defendant physician qualified as emergency medical care, noting care rendered after the patient has been stabilized and care which is unrelated to the original medical emergency is not considered emergency medical care. 322 Ga. App. 852 (2013). In *Bonds*, the decedent presented to the emergency room with abdominal pain, nausea, vomiting and dizziness. The Court of Appeals agreed with the trial court that when the decedent first saw the defendant physician as an emergency patient, the physician was rendering emergency medical care. However, the Court of Appeals reversed the trial court's grant of summary judgment on the issue of whether or not the decedent became stable over the course of his time in the ER. Thus, the *Bonds* ruling suggests that a gross negligence standard could apply to the care provided for the first few hours of the patient/physician relationship and to the extent the patient stabilizes, the remainder of the

Deemphasizing "Occurrence" in CGL Policies

By: Steven R. Wilson

What is an "occurrence" under Georgia law? The answer has slowly evolved over the last several years as the appellate courts have tried to provide clarity. In the case of *Taylor Morrison Services, Inc. v. HDI-Gerling America Insurance Company*, the Georgia Supreme Court provided much needed guidance as to the meaning of "occurrence" in a standard commercial general liability ("CGL") policy. The *Taylor Morrison* Court answered the following certified questions from the United States Court of Appeals for the Eleventh Circuit:

> 1. Whether, for an "occurrence" to exist under a standard CGL policy, Georgia law requires there to be damage to "other property," that is, property other than the insured's completed work itself.
>
> 2. If the answer to Question One (1) is in the negative, whether, for an "occurrence" to exist under a standard CGL policy, Georgia law requires that the claims being defended not be for breach of contract, fraud, or breach of warranty from the failure to disclose material information.

293 Ga. 456, 456-57 (2013).

The Court began its analysis of the first question by reviewing its recent decision in *Hathaway Development Company v. American Empire Surplus Lines Insurance Company*, 301 Ga. App. 65 (2009), where it considered the definition of the word "occurrence" and concluded that "an occurrence can arise where faulty workmanship causes unforeseen or unexpected damage to other property." *Id.* at 459. However, *American Empire* left unanswered the question of "whether faulty workmanship also can amount to an 'occurrence' when the only damage alleged is to work of the insured."

When addressing the first question certified by the Eleventh Circuit, the Court noted that the term "accident" in the CGL policy at issue was not defined and reasoned that:

relationship could be judged under a traditional negligence standard. The determination of when the patient becomes stable is likely to be a question for the jury.

Georgia Courts have also recently addressed the issue of gross negligence in the context of summary judgment. In *Johnson v. Omondi*, the parents of a child who died following treatment in the emergency department brought a malpractice action against his treating emergency physician. 294 Ga. 74 (2013). The trial court entered summary judgment in favor of the physician based upon the ER Statute and the Court of Appeals agreed. The Georgia Supreme Court disagreed, stating the fact at issue was whether the physician had been grossly negligent, and that was an issue a jury needed to consider. Gross negligence is not specifically defined by the statute, and the *Omondi* Court looked to other case law that defined gross negligence as "the absence of even slight diligence." Slight diligence is defined in Section 51-1-4 as "that degree of care which every man of common sense, however inattentive he may be, exercises under the same or similar circumstances." Thus, any judge ruling on a motion for summary judgment must consider if a reasonable jury could find that the defendant physician lacked even the diligence a careless man would employ.

Omondi also recognized that the standard of proof required when ruling on a motion for summary judgment under the ER Statute is different from the assessment of traditional negligence claims, and held "[t]he appropriate summary judgment question is whether the evidence in the record could reasonably support a reasonable finding either that the plaintiff has shown [gross negligence] by a clear convincing evidence." As the outcome of this case makes clear, however, the heightened burden of proof does not create a barrier to the courthouse, it makes it just a little harder to get in.

The holdings in *Omondi* were affirmed as recently as March 2014 in *Abdel-Samed v. Dailey*. 2014 WL 94673, No. S13G0657 (Ga. 2014). In that case, the plaintiff accidentally shot paint thinner into his finger and he presented to the ER just after midnight. A physician's assistant determined the plaintiff needed immediate referral to a hand surgeon, but there was not a hand surgeon on call and the surgery was delayed until the following morning. In considering these facts, the Georgia Supreme Court determined that a genuine issue of material fact existed as to whether actions taken by the staff in delaying treatment constituted gross negligence. The *Dailey* Court explained that when facts alleged as gross negligence create room for a difference of opinion among reasonable people as to whether negligence can be inferred

> It seems rather clear that, in its usual and common usage, "accident" conveys information about the extent to which a happening was intended or expected. Standing alone, the word is not used usually and commonly to convey information about the nature and extent of injuries worked by such a happening, much less the identity of the person whose interest are injured.

Based on this reasoning, the Court held "an 'occurrence,' as the term is used in a standard CGL policy, does not require damage to the property or work of someone other than the insured." The Court stressed that in cases of faulty workmanship, coverage can be limited by other policy provisions, such as the definitions of "bodily injury" or "property damage," as well as certain policy exclusions.

With respect to the second question certified by the Eleventh Circuit, the Court focused on the extent to which various theories of liability would be inconsistent with the requirement of an "accident." The Court held that fraud, as it is defined under Georgia law, is incompatible with the idea of an accident and therefore does not ordinarily constitute an "occurrence" under Georgia law. Specifically, the Court noted that fraud claims generally require the presence of scienter and intent, which are mutually exclusive with the notion of an "accident."

On the issue of whether a claim for breach of warranty can result in an occurrence, the Court reached a different conclusion, finding a breach of warranty may constitute an "occurrence" in appropriate circumstances. While a breach of a warranty could be an intentional act, "warranty law, generally speaking, imposes strict liability" in those circumstances where the "product or other work is of a quality that is materially less than that which was warranted." As faulty workmanship can result in an "occurrence," it too can "cause a product or other work to amount to a breach of warranty" for that product or other work. Of course, policy definitions and exclusions may limit coverage for breach of warranty claims.

Through this opinion, the Court shifted some of the focus of establishing the limits of coverage under a standard CGL policy from the policy word "occurrence" to other policy requirements such as the presence of "bodily injury" and "property damage" (and the insured incurring a liability to pay related damages). ■

and whether that negligence was "gross," the jury should draw that inference. *Id.* at *6 (citing *Trustees of Trinity College v. Ferris*, 228 Ga. App. 476 (1997)).

These cases demonstrate that what was originally thought to be a nearly complete defense to emergency room claims has proven to be a far less formidable obstacle for plaintiffs to overcome.

Apportioning Fault to Non-Party Criminal Assailants: All Over the Map

By: Pamela Newsom Lee

It has always been difficult to predict what a jury comprised of 12 strangers (of diverse races, genders, educational levels, socioeconomic backgrounds and general human experiences) might do in any given case. In Georgia, that has likely never been more evident than when examining the application of O.C.G.A. § 51-12-33, which allows a jury to apportion fault among plaintiff, defendants and properly designated non-parties. Recent verdicts involving apportionment to criminals have created mixed results.

The case of *Polite v. Double View Ventures, LLC* (State Court of DeKalb County, Civil Action File No. 09A05619-4) arose out of an attack and shooting that happened on the property of an apartment complex while the plaintiff, a tenant, was walking back to his apartment from a local gas station. The plaintiff argued the apartment complex had not provided adequate security and failed to warn residents regarding recent criminal activity. In particular, the plaintiff argued the path he took to an adjacent convenience store (which included a "ragged and ineffective" gate) allowed criminals easy access to the property. The DeKalb County jury returned a verdict for the plaintiff, rendered a quadriplegic as a result of the shooting, in the amount of $5,250,000, and assessed percentages of fault as follows: 13% to Plaintiff, 87% to the defendants, and **0% to the criminal assailants who attacked and shot the plaintiff**.

The *Polite* case has been remanded by the Court of Appeals because the trial court refused to allow the gas station (on whose property the attack may have begun) to appear on the verdict form as a possible at-fault non-party.

Another DeKalb County jury rendered a similar verdict in *Board v. HMI Properties* (State Court of DeKalb County, Civil Action File No. 09-A-04531-3). *Board* stemmed from the March 2009 burglary, assault, battery and rape of the plaintiff, a tenant of a property owned and managed by the defendants. As part of the defense, the defendants alleged the plaintiff left her apartment door unlocked, allowing access to the apartment by the attacker, and that the sexual contact between plaintiff and the assailant was consensual. The jury returned a verdict of $900,000, assessing fault as follows: 51% to the defendants, 39% to Plaintiff and only **10% to the criminal assailant**.

These two cases are in stark contrast to a third DeKalb County case, *Herrera v. Miles Properties* (State Court of DeKalb County, Civil Action File No. 08A83964-6). *Herrera* involved the 2005 fatal shooting of Wesley Hagan on the premises of the defendants' apartment complex. At trial, the plaintiff alleged the complex had a serious history of crime and that management did little to remedy the criminal activity. The defense argued the decedent knew the assailants and had been warned to be careful. The jury awarded the plaintiff $184,192.16, but only apportioned 5% of the fault to the defendants and **95% of the fault to the criminal assailants**.

With no apparent pattern, these results can be particularly dismaying for property owners, managers and security companies (and their insurers). Perhaps juries are aware that apportioning high percentages of fault to criminal assailants (particularly unknown assailants) will yield little to the victim. Alternatively, juries may understand recovery from criminal assailants is unlikely. Whatever the reasons, litigants can never really know what a jury will do with any given set of facts, including the issue of apportionment. ■

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Events

Joint Litigation Luncheon Presented with McAngus Goudelock & Courie
Offers 3 Ethics Hours
October 1, 2014 — Raleigh, NC
October 2, 2014 — Richmond, VA

Premises Liability Webinar: Maximizing Opportunities for Summary Judgment
June 18, 2014
1:00 - 2:00 pm EST

The Tort Report is edited by Brad Wolff, Myrece Johnson and Joe Angersola. If you have any comments or suggestions for our next newsletter, please email brad.wolff@swiftcurrie.com, myrece.johnson@swiftcurrie.com or joe.angersola@swiftcurrie.com.