Your Words (In a Release) Do Matter!

By Stephen Cotter

Why not use a “form” release? Aren’t form releases effective most of the time? And less expensive?

When contemplating a form release, the prior misfortunes of others should be considered. For example, neglecting to include the mandatory notice of O.C.G.A. §33-7-12 (regarding the insured’s non-consent to the settlement) makes the settlement, and the settlement payments, void. As the Supreme Court has made painfully clear, failure to expressly name each and every party to be released leaves the unnamed parties open for another suit. Posey v. Medical Center, 257 Ga. 55 (1987). Future related claims are not barred when those specific claims are not adequately and completely described in the release. Winding River Condo. Assoc. v. Barnett, 218 Ga. App. 35 (1995).

Recently, a homeowner was able to parlay an awkwardly-worded form release into a double million-dollar recovery both from the homeowner’s own carrier and from the at-fault contractor. Rabun & Assoc. v. Berry, 276 Ga. App. 485 (2005). As escalating healthcare costs drive payors of medical expenses to aggressive subrogation positions, it becomes increasingly important to adequately address potential claims in a release or otherwise.

So, your words do matter. Consider closely the actual wording of your release. We do. It is a hidden minefield out there.

For more information, contact Steve Cotter at 404.888.6137, stephen.cotter@swiftcurrie.com

Defending a Negligent Security Case

By Lynn M. Roberson and Valerie E. Pinkett

Your company or your insured owns a commercial property. You are notified that a female tenant at your apartment complex reported being attacked and robbed last night in her apartment by an unidentified assailant. As the tenant arrived home at 2 a.m., she was assaulted by the perpetrator, forced into her apartment at gunpoint and ultimately robbed of her possessions. The police were called and spent a few hours interviewing the victim and investigating the crime scene.

Now, what do you do with this information?

The key to a successfully defended premises security case can be summed up in one word: Investigation. In your early investigation, you should at least do as many of the following as are appropriate to the circumstances:

1) As soon as possible, document what precautions were taken by the property management.

2) Obtain all available police investigation records on the crime itself.

3) Obtain police records regarding general crime on the property and in the area for the past three years.

4) Document the physical condition of the property, and whether any conditions contributed to the incident.

5) Obtain witnesses.

6) Preserve all surveillance records.

E-mail List

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7) Find out what similarly situated/nearby properties do.

8) Gather all "perishable" evidence.

For a more detailed article explaining the items in this list and why each item is important, contact Lynn Roberson at 404.888.6146, lynn.roberon@swiftcurrie.com or Valerie Pinkett at 404.888.6169, valerie.pinkett@swiftcurrie.com.

Asbestos and Silica Litigation: Tort Reform Update

By S. DeAnn Bomar

The Georgia Legislature recently enacted legislation addressing asbestos and silica litigation. The new laws place heavy burdens upon plaintiffs seeking to bring or maintain asbestos and silica-related claims in Georgia. These laws were intended to relieve crowded court dockets of cases brought by plaintiffs who could not provide proof of injury and who had never lived or worked in Georgia. Since certain provisions of the legislation were retroactive, that is, they were to be applied to pending cases, the legislation was challenged by the plaintiffs’ bar as unconstitutional.

In November 2006, the Georgia Supreme Court deemed the retroactive provisions of the legislation to be unconstitutional. However, the Court used confusing language which could be interpreted as striking down even those provisions which, by their express terms, were only to apply to future-filed cases such as the Georgia residency and work history requirements. Not surprisingly, this has already become the subject of much debate.

For now, what we do know is that any asbestos or silica cases filed in Georgia, prior to the passage of the legislation, will not be subject to its provisions and will continue to be litigated in our courts. However, as to future-filed cases, it is uncertain whether the tort reform provisions will be held to apply.

For more information on asbestos and silica litigation, contact DeAnn Bomar at 404.888.6164, deann.bomar@swiftcurrie.com.

The Admissibility of Expert Testimony in Georgia

By Alicia Timm

With new expert testimony laws in Georgia, it is important to make sure your expert passes muster. Georgia courts must now determine whether an expert’s testimony is relevant and whether the expert’s methodology is “sufficiently reliable.” In determining reliability, Georgia courts may consider (1) whether the specialized theory or technique has been or can be tested, (2) the theory’s general acceptance in the expert community, (3) the rate of error, and (4) whether the theory has been peer reviewed.

In a recent case, Moran v. Kia Motors America, Inc., 276 Ga. App. 96 (2005), the Court of Appeals determined an expert’s testimony was not sufficiently reliable. The Plaintiff sued for breach of a vehicle’s warranty. To prove the value of her damages, the Plaintiff’s expert attempted to value her vehicle based upon a formula of his own creation. The Court upheld the trial court’s exclusion of the expert’s testimony. The Plaintiff could not show her expert’s formula had ever been relied upon in the automotive industry, she could not show the formula’s rate of error, nor could she show the formula had been reviewed by any outside qualified experts. As a result, the Plaintiff was unable to prove damages and a directed verdict was entered for the defendant.

Careful research and detailed work is necessary both to assure admission of key expert testimony to support your case and to exclude opposing expert testimony. Challenges to experts on both sides of a case are becoming more frequent, as is the use of additional experts for the purpose of establishing the reliability of the testifying experts’ methodologies. The costs of litigation involving expert testimony are rising accordingly.

For more information on the new expert standards in Georgia, contact Alicia Timm at 404.888.6141, alicia.timm@swiftcurrie.com.
No More “Sending a Message” to Defendants by Way of Punitive Damages?

By Lyn Dodson

In answering a Complaint seeking punitive damages, attorneys typically include “constitutional defenses.” The contours of such defenses continue to evolve as the courts define what the constitution allows. Punitive damages seek to punish unlawful conduct and deter such conduct from recurring. Courts have long grappled with due process concerns presented by punitive damages, especially the risk of arbitrariness, uncertainty, and lack of notice. In February, the Supreme Court of the United States was again asked to determine the constitutionality of punitive damages.

In Philip Morris USA v. Williams, the Supreme Court overturned an Oregon Supreme Court decision awarding $79.5 million in punitive damages to the widow of a deceased smoker. The Oregon jury found the deceased was led to believe smoking was safe by Philip Morris and his death was caused by Philip Morris’s product, Marlboro cigarettes. In addition, the plaintiff’s counsel suggested during closing arguments that the jury should base their award of damages in part on the number of smokers harmed by Phillip Morris’s products, not just on the harm done to the plaintiff.

Overturning the award, the Supreme Court held punitive damages based on a jury’s desire to punish a defendant for harming non-parties to the litigation constitutes taking of property from the defendant without due process. Thus, punitive damages may not be used to punish a defendant for conduct toward, or impact upon, individuals other than the plaintiff. Rather, the focus must be upon what this particular defendant has done or failed to do with regard to this particular plaintiff to justify punitive damages.

While harm to others is not to be considered in a jury award, less than clear was the Court’s statement that harm to others can still be considered when juries determine the overall reprehensibility of the defendant’s actions. The procedural effect of this apparent contradiction is presently unclear.

For more on this topic, contact Lyn Dodson at 404.888.6162, lyn.dodson@swiftcurrie.com.

The Importance of Causation in Medical Malpractice Cases

By Kindu A. Walker

To recover in a medical malpractice case, a plaintiff must show his or her injury was “proximately caused” by a violation of the applicable medical standard of care. Medical causation must be proved to a “reasonable degree of medical certainty” and cannot be based upon speculation.

In a recent case, King v. Zakaria, 280 Ga. App. 570 (2006), a doctor performed surgery on a patient’s lung and closed the patient’s blood vessels with sutures. The next morning the patient went into cardiac arrest and could not be revived. An autopsy revealed the patient died due to bleeding from an artery that should have been tied closed.

The Plaintiff claimed the doctor failed to properly close the artery, violated the standard of care by not being available to review x-rays, and abandoned the patient by not having a qualified physician available after surgery. However, the evidence revealed:

1) Suture failure could occur in the absence of negligence.
2) Experts could not state with certainty when or why the ties failed.
3) If the artery had been left untied during surgery, the patient would have bled to death within minutes.
4) Once the patient started bleeding from the loosened suture, even during surgery, the surgery could probably not be performed in time to save his life.

There was insufficient expert testimony to show the patient’s life would have been saved if a qualified surgeon had been
present. Lastly, there was no evidence the patient would have lived “but for” the surgeon’s failure to read the x-rays. Thus, despite the patient’s death following surgery, proximate cause was not shown.

For more detailed information regarding this topic, contact Kindu Walker at 404.888.6165, kindu.walker@swiftcurrie.com.

**Apportionment of Liability and Damages in the Wake of Georgia Tort Reform**

By Sarah E. Tollison

The Georgia tort reform statute enacted in 2005 eliminated joint and several liability and instead imposed “proportionate share” liability in many cases. Under the former joint and several liability, each party could be held liable for the entire verdict. Sometimes permitting less liable (though financially more viable or insured) defendants to be responsible for most, if not all, of the damages in a particular case. This potential inequity was eliminated with the revision of O.C.G.A. §§ 51-12-31 and 51-12-33.

Under the revised statutes, a liable party is only required to pay its individual percentage of liability as allotted by the jury. This particularly affects verdicts where the jury is apportioning fault between a negligent defendant and an intentional tortfeasor (such as a situation like that discussed in Lynn Roberson and Valerie Pinkett’s article, “Defending a Negligent Security Case.”)

Jurors can also allot a percentage of liability to non-parties, as long as a defendant has notified the court of its intention to claim a third party is liable. This notice must be given at least 120 days before trial begins. The jury may then allot liability according to the percentage of fault of each party and non-party in assessing the verdict.

For more information regarding this topic, contact Sarah E. Tollison at 404.888.6181, sarah.tollison@swiftcurrie.com.

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You and your co-workers are invited to attend our Annual Swift, Currie, McGhee & Hiers Seminars. All of our seminars will be held at Villa Christina, 4000 Summit Boulevard in Atlanta, GA. These seminars are free of charge and include a complimentary lunch.

Friday, May 18, 2007, 9:30 AM to 3 PM – Swift Currie Liability Seminar

Friday, September 28, 2007, 9:30 AM to 3 PM – Swift Currie Workers’ Compensation Seminar

Friday, November 2, 2007, 9 AM to 2:30 PM – Swift Currie Property Seminar

You can register for these seminars online at our website: http://www.swiftcurrie.com/news/seminars.asp

**Toxic Exposure Claims Trump Common Sense**

By Christopher R. Reeves

Assume apartment tenants notice black dust on their dining room table as soon as they move in. They call the property manager but nothing is done. Later, they begin to cough and have sleeping problems. They again complain. This continues for a year and the lease is renewed. The tenants go to a doctor who suggests there is something wrong with their apartment. The tenants complain again and begin addressing the problems themselves. Another year goes by, another lease renewal. The tenants are still suffering. Eventually, the tenants hire a chemist who determines the black dust is not mold but soot from the water heater burning paint fumes. The tenants go to a physician and are diagnosed with chronic exposure to burned paint particles. They sue the management company.

Given the tenants’ own knowledge of their problems for several years, their claims should be barred by the statute of limitations, right?

In a recent case, Ambling Management Company v. Purdy, 2006 Ga. App. LEXIS 1478, 7-11 (2006), the Court of Appeals relied on the theory of continuing tort to hold that the management company has an “affirmative duty to warn” the tenants of the hazard and cannot rely upon the tenants’ own observations, conclusions, and common sense to prevent the suspension of the two-year statute of limitations. Thus, the plaintiffs’ claims were allowed to proceed as the court said the plaintiffs’ ability to bring the lawsuit was renewed each day the management company failed to warn them of the problem.

Moreover, the Court found that the management company’s objections to the doctor’s testimony and reports were untimely as they did not affirmatively raise them and receive a ruling prior to entry of the pre-trial order.

For more on this case, contact Christopher R. Reeves at 404.888.6145, christopher.reeves@swiftcurrie.com.