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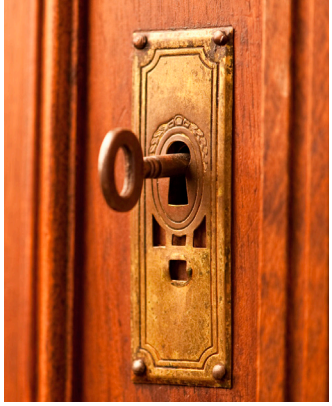

The 1st Party Report

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You Can't Have it Both Ways! A Party Cannot Rely on Correcting Inconsistent Statements to Prevail on Summary Judgment

By: Gillian S. Crowl

During discovery, litigants elicit sworn testimony, including interrogatory responses and deposition testimony. What happens when a party changes his testimony later, such as in an affidavit in support of a motion for summary judgment? The Georgia Court of Appeals has recently expanded the rule which governs a party's self-contradicting statements.

In *Prophecy Corp. v. Charles Rossignol*, 256 Ga. 27, 28, 343 S.E.2d 680, 682 (1986), the Georgia Supreme Court supplemented prior Georgia holdings on the effect of contradictory statements on motions for summary judgment. The Court first noted that the general rule "is that the testimony of a party who offers himself as a witness in his own behalf at trial 'is to be construed most strongly against him when it is self-contradictory, vague or equivocal'" and "if on motion for summary judgment a party offered self-contradictory testimony on the dispositive issue in the case, and the more favorable portion of his testimony was the only evidence of his right to a verdict in his favor, the trial court must construe the contradictory testimony against him . . . [and] the opposing party would be entitled to summary judgment." In the case before the Court, Prophecy moved for summary judgment, and, in response, Rossignol submitted an affidavit explaining, and contradicting, testimony made during his deposition regarding the substance of a conversation between Rossignol and a representative of Prophecy. Prophecy relied on Rossignol's testimony regarding the conversation in its summary judgment motion. Specifically, in his affidavit, Rossignol stated that following the depositions, he reviewed his notes and records and refreshed his recollection regarding the conversation. Although the affidavit contradicted his deposition testimony, the Georgia Supreme Court held that when a deposition and affidavit are contradictory, but a reasonable explanation of the contradiction is offered in the affidavit, a genuine issue of material fact can be created; which warranted the denial of summary judgment in favor of Prophecy in that action. This is often referred to as the *Prophecy* rule.

In a recent Georgia Court of Appeals case, *State Farm Mut. Auto. Ins. Co. v. Fabrizio*, 344 Ga. App. 264 (2018), the issue of contradictory statements was further addressed as it relates to a party's attempt to rely on inconsistent statements in support of a motion for summary judgment. In *Fabrizio*, the plaintiff, Toni Fabrizio, was involved in a motor vehicle accident and sued State Farm Mutual Automobile Insurance Company to collect underinsured motorist coverage under five separate policies issued by State Farm to her father, Tony Foster.

In interrogatory responses, Fabrizio stated that she only lived with her three children at the time of the incident. At her initial deposition four months later, she testified that her father maintained a separate residence across the street at the time of the incident. Two months after her deposition, Fabrizio executed an affidavit stating that her father moved into her home two months before the incident and was still living with her on the day of the incident. In her affidavit, Fabrizio characterized her prior deposition testimony regarding the members of her household as "a mistake that [she] realized after [her] deposition . . . after speaking to [Foster]." Foster also executed an affidavit, stating that he moved in with Fabrizio two months before the incident, where they both lived at the time of the accident. State Farm took Fabrizio's deposition a second time, and she testified that she lived with her father and three children at the time of the accident.

Fabrizio then moved for summary judgment on the resident relative issue. In a simple order, the trial court granted Fabrizio's motion, citing to *Prophecy*. State Farm appealed. The Georgia Court of Appeals noted that it can be implied from the ruling in Fabrizio's favor that the trial court found Fabrizio's explanation for the contradictory

testimony to be reasonable and, thus, disregarded her deposition testimony pursuant to the *Prophecy* rule.

The Georgia Court of Appeals disagreed with the trial court's ruling. Instead, the Court held, "[t]he general rule of construing contradictory testimony against a summary judgment respondent is inapplicable here because [Fabrizio] is the movant." The Court noted that the burden of proof on summary judgment precludes application of the *Prophecy* rule to contradictory statements made by a party moving for summary judgment. *Id*. "Thus, even if the trial court determined that a reasonable explanation exists for Fabrizio's contradictory testimony, this does not permit her to effectively 'erase' her own prior contradictory testimony and prevail on her own motion for summary judgment." Id. Accordingly, the Court of Appeals held that the trial court erred by granting summary judgment to Fabrizio because "Fabrizio's initial testimony regarding whether she resided with Foster at the time of the accident remains in the record, along with her own subsequent testimony, which together present a factual question as to whether she was a resident relative of Foster's household at the time of the accident so as to qualify for coverage under the State Farm policies at issue."

Thus, under Georgia law, it is now clear that neither a movant nor a respondent may contradict himself to obtain a favorable verdict on summary judgment.

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Do Not "Waive" Goodbye to Your Defenses

By: Kori E. Eskridge

An insurance contract is full of rights, conditions, and defenses that are evaluated and analyzed in response to a wide variety of claims. While it is modeled as a one-size-fits-most agreement, not all defenses are applicable to every claim. Instead, upon receipt of a claim, a claims professional often has to make a relatively quick determination about the merits of the claim. To make things even trickier, such determinations are often made with limited knowledge about the claim. As additional facts and information are uncovered during the claims investigation, certain defenses may become more relevant, while others may be rendered moot. It is often a fluid situation until such time as a claims decision is rendered.

In the third party context, "[t]he insurer has a duty to defend the action if the allegations 'even arguably' implicate insurance coverage." *Moon v. Cincinnati Ins. Co.*, 920 F. Supp. 2d 1301, 1306, reconsideration denied, 975 F. Supp. 2d 1326 (N.D. Ga. 2013). If an insurer undertakes a defense, it is later precluded from disclaiming liability unless it has given notice to the insured of the non-waiver of the policy-related defense. *State Farm Mut. Auto. Ins. Co. v. Anderson*, 104 Ga. App. 815, 818, 123 S.E.2d 191, 193 (1961). Because of this, when an insured is seeking coverage for a liability claim, it is important for insurers to quickly and clearly inform their insureds if there are any questions regarding coverage. In a third party claim, failure to do so could result in an insurer "waiving goodbye" to its right to deny coverage later.

The Georgia Court of Appeals addressed the issue of reservations of rights in *American Safety Indem. Co v. Sto Corp.*, 342 Ga. App. 263 (2017). American Safety Indemnity Co. provided two sets of insurance policies to Sto Corp., a manufacturer and distributor of stucco products and coating finishes for residential and commercial construction. In 2010, Sto notified American Safety of a potential claim relating to a complex in South Carolina with complaints of delamination of the stucco system. In response, American Safety's adjuster responded by letter requesting additional information and asserting that American Safety's "investigation and evaluation" would be conducted under a reservation of rights. Shortly thereafter, the complex filed a lawsuit against Sto. Approximately five months later, American Safety denied coverage. However, three months after that, it agreed to defend the claim and took control of the litigation. There was no evidence that Sto received any further notification that the claim was being defended under a reservation of rights. (Although the adjuster's claim notes indicated "issued N.I.R.O.R.," which he testified stood for "named insured reservation of rights," the adjuster could not recall whether he issued a reservation of rights or made any verbal statements regarding the same. Additionally, while the claim file included a reservation of rights letter addressed to Sto, Sto had no record of receiving the letter.)

Continued Complications in Proving Application Misrepresentation

By: Clayton O. Knowles

The Georgia Court of Appeals recently issued a decision that may make it more difficult for insurers seeking to void an insurance policy because of application misrepresentations. In *Lee v. Mercury Ins. Co.*, 343 Ga. App.729 (2017) (cert applied for), the Court addressed an alleged misrepresentation that the insured property was not the named insured's primary residence, despite the application's statements to the contrary. The decision includes three important updates to Georgia law.

In *Lee*, Ronald Lee, a particularly sympathetic plaintiff, lived in South Carolina and frequently traveled through Georgia for work. Lee's childhood friend, Jim Constable, faced financial difficulties due to his wife's terminal illness, so Lee agreed to purchase Constable's home in Riverdale, Georgia, and allow Constable's family to live there for free. Pursuant to their agreement, Lee would stay in the house occasionally when he was in town for work. Constable referred Lee to a friend who was an insurance broker to obtain coverage for the Riverdale home. Lee obtained the policy over the phone. Lee maintained that the broker knew that Lee would not be living at the Riverdale house full-time, and, in fact, Constable signed the application for Lee. However, the application with Mercury Insurance Company only contained check marks in boxes labeled "Primary" and "Occupied by Named Insured," while boxes labeled "Secondary" and "Additional Residence for Insured" were left blank. Lee was listed as the insured, while Constable and his two children were listed with the description "Other" in a column labeled "Rel. to Ins." In other words, the application reflected that the Riverdale house would be Lee's primary residence.

On May 5, 2012, an accidental fire destroyed the insured property. Constable died in the fire, and one of his daughters was seriously injured. After Lee's claim was denied, he filed suit against both Mercury and the broker. Lee subsequently dismissed the broker. The trial court initially granted summary judgment to the insurer, based upon an affidavit from Mercury's underwriting director, and denied Lee's motion for summary judgment. The Court of Appeals reversed.

The first important element of the *Lee* opinion is that the Court of Appeals reiterated its prior holding in *Case v. RGA Ins. Svcs.*, 239 Ga. App. 1, 521 S.E.2d. 32 (1999). Under O.C.G.A. § 33-24-7, an insurer can void a policy by showing that the alleged misrepresentation, omission, concealment, or incorrect statement was either fraudulent or material, or that the insurer in good faith would not have issued the policy under the same terms if it had known the full facts. In *Case*, the Court of Appeals held that summary judgment should not be granted to an insurer based upon opinion testimony alone, such as an underwriter's affidavit asserting that the insurer would not have issued a policy if it had known of the misrepresented fact. In *Lee*, the Court of Appeals went a step farther and expressly overruled prior case law to the contrary. However, the Court suggested that, while the affidavit may no longer be sufficient on its own, it can be combined with other facts and circumstances to show good faith and materiality as a matter of law under O.C.G.A. § 33-24-7(b). *Lee*, 343 Ga. App. at 742.

The second important element of the *Lee* opinion is that the Court found that the Mercury policy's residency requirement was ambiguous and, therefore, unenforceable. The Mercury policy defined "residence premises" as follows: "the one, two, three or four family dwelling, condominium or rental unit, other structures and grounds, used principally as a private residence; where you reside and which is shown in the Declarations." The Court interpreted the semicolon as an "or" such that "a layperson could reasonably understand the defined term [residence premises] to mean 'the one, two, three or four family dwelling, condominium or rental unit, other structures and grounds, used principally as a private residence' or 'where you reside and which is shown in the Declarations.'" *Lee*, 343 Ga. App. at 734. Thus, Lee was not required to use the insured location as his primary residence because the policy only required that the insured location be "a private residence."

Third, the *Lee* opinion addressed what information is imputed to an insurer when a dual agent processes the application. Lee argued that the broker was also an agent of Mercury, and his alleged knowledge that the insured property was a secondary residence should be imputed to Mercury. In Georgia, an insurer is estopped from voiding a policy due to misrepresentations in the application if actual knowledge of the true facts could be legally imputed to it. *Lee*, 343 Ga. App. at 744 (citing *Reserve Life Ins. Co. v. Bearden*, 96 Ga. App. 549, 550 (1957)). In *Lee*, the broker had authority to bind an insurance policy with Mercury, held himself out as an authorized representative of Mercury, and accepted policy payments for Mercury. Accordingly, the Court found a genuine issue of fact as to whether the broker was acting both as an express agent of Mercury and as Lee's agent in procuring the policy.

A petition for certiorari is presently pending before the Georgia Supreme Court, so further updates are possible. For now, *Lee* serves as a reminder that an insurer seeking summary judgment should supplement the affidavit from the insurer's representative with additional facts and circumstances to show good faith and materiality under O.C.G.A. § 33-24-7(b)(2). These considerations could include the nature of the particular misrepresentation (i.e., how it changed the nature, extent, or character of the risk), the details of the policy's coverage, the insurer's underwriting guidelines, and the negotiations between the parties. *Lee*, 343 Ga. App. at 742. To avoid being estopped from asserting the misrepresentation, the insurer should evaluate whether the agent or broker is acting as its legal "agent" with the authority to bind the insurer. If so, any knowledge the agent or broker has regarding facts at odds with the application should be immediately communicated to the insurer and addressed.

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American Safety continued to defend the claim for nearly two years before it withdrew coverage and asserted a misrepresentation defense.

Around the same time, a separate lawsuit was filed against Sto regarding issues with the stucco finish at a residential complex in Texas. Sto again tendered the lawsuit to American Safety and received a letter seeking additional information and stating that American Safety would conduct its "investigation and evaluation" under a full reservation of rights. Approximately one month later, Sto provided the requested information and American Safety ultimately denied coverage in a letter explaining that its investigation determined that Sto knew of problems at the complex prior to the applicable policy period. However, Sto contended that it did not receive this second letter and, again, American Safety did not have evidence to show that the letter was actually mailed to Sto. Additionally, American Safety continued to defend Sto for approximately two years up to and through the trial, which resulted in a jury verdict of $918,000 in favor of the residential complex. The next day, coverage counsel was engaged by American Safety to evaluate whether coverage could be withdrawn. Approximately two weeks later, Sto was informed that coverage was denied for this claim.

Sto filed a lawsuit against American Safety for breach of contract, among other claims. The trial court found, and the Court of Appeals affirmed, that American Safety failed to properly convey a reservation of rights and was therefore estopped from denying coverage as a matter of law. Specifically, the court made clear that a reservation of rights is only available to an insurer who undertakes a defense while questions remain about the validity of coverage. Once a claim is denied, the insurer is no longer "uncertain nor insecure in regard to its rights, status or legal relations." *Sto Corp., 342 Ga. App. at 268* (quoting *Drawdy v. Direct Gen. Ins. Co.*, 277 Ga. 107, 109 (2003)). Accordingly, an insurer cannot both deny a claim and reserve its right to assert other defenses later on.

The court also found that even if American Safety had mailed the reservation of rights letter to Sto in the second lawsuit, it was not done timely, and was therefore not proper. An insurer must act reasonably promptly in reserving its rights. Furthermore, when an insurer assumes and conducts an initial defense without effectively notifying the insured that it is doing so under a reservation of rights, it is estopped from asserting the defense of noncoverage.

This case reiterates and builds upon important principles in Georgia law regarding an insurer's rights and defenses. When there are coverage questions and the insurer takes action to either investigate or defend the claim, the insured must be notified in clear terms and in a timely manner of the potential coverage defenses. An insurer's failure to promptly send a reservation of rights letter may result in a waiver of coverage defenses that may have otherwise been applicable. Accordingly, it is prudent to establish good practices to follow, including sending clear and prompt communications to the insured, in the event of any claims in which coverage might be at issue.

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Events

WC Webinar: 2018 Legislative and Case Law Update
Wednesday, June 13
1:00 - 2:00 pm EST

Annual WC Client Seminar
Friday, September 14
Cobb Energy Performing Arts Centre

Annual Property, Coverage and Casualty Insurance Litigation Client Seminar
Friday, November 9
Cobb Energy Performing Arts Centre

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