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BSL BRIEF


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2013 is shaping up to be a notable year with new legislation and changes in case law. We want to keep you informed about the latest changes and issues pending at federal and state levels, so the timing is just right to kick off our Firm newsletter. If you would like further information regarding our Firm or any issue raised in this legal update, please feel free to contact us. We thank you for your continued support and look forward to working with you this year!

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The Changing Tide of Insurance Coverage for Construction Defect Claims

-Stephen T. Snow, Esq.-

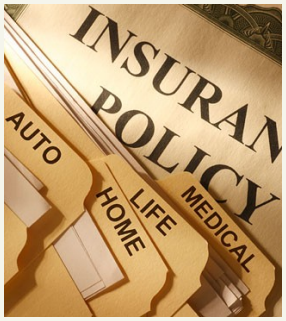
As with most areas of law, insurance law evolves like a pendulum or the rise and fall of the tides. For a period of time, court rulings may favor insurers by interpreting policy provisions in a manner that restrict insurers' coverage obligations. Then, for a period of time, the courts may issue rulings more favorable to insureds by broadening coverage. Over time, the tides rise and fall less and less until the courts find the proper balance between insurers and insureds on the particular matter at issue. For the past several years, the tides have consistently favored insurers with the courts issuing numerous rulings that narrowly interpret covered "occurrences" and broadly interpret policy exclusions. However, in 2012 the Georgia Supreme Court and the 11th Circuit have both issued rulings that may signal that the tides have begun to shift in the insureds' favor.

The "proper and safe course of action . . . is to enter upon a defense under a reservation of rights and then proceed to seek a declaratory judgment in its favor."

In *Hoover v. Maxum Indemnity Company*, 291 Ga. 402 (730 S.E.2d 413) (2012), the Georgia Supreme Court ruled that a reservation of rights is only available to insurers who undertake a defense of the insured. The ruling put an end to the common practice of insurers who deny a claim outright, but then attempt to reserve the right to assert different or additional coverage defenses in the future. As a result of the Court's ruling, an insurer's available coverage defenses are now limited to those defenses articulated to the insured in the coverage denial letter. No longer is an insurer able to deny a claim based upon the limited information known at the time the claim is denied and then reserve the right to rely upon any other coverage defenses that may come to its attention as it obtains more information about the claim during the discovery process—even where those additional defenses completely preclude coverage and the facts giving rise to those defenses were unknown to the insurer at the time the denial was issued. Rather, the Court held that an insurer's coverage defenses are limited solely to those articulated in its denial letter. In so ruling, the Court warned insurers that the "'proper and safe course of action . . . is to enter upon a defense under a reservation of rights and then proceed to seek a declaratory judgment in its favor.'" *Id.* at *405, quoting *Richmond v. Georgia Farm Bureau Mut. Ins. Co.*, 140 Ga. App. 215, 217 (1) 132 S.E.2d 245) (1976). This ruling makes it very difficult for insurers to deny a claim pre-suit unless the known coverage defenses are so strong as to make it unnecessary to rely upon any additional defenses that might be discovered at a later date.

Hoover has had a discernible impact on insurers' coverage behaviors. We have already seen instances where insurers who would have flatly denied certain claims prior to the ruling have now opted instead to defend the insured in the underlying action while they concurrently file a declaratory judgment action to avail themselves of all possible coverage defenses. While *Hoover* is undoubtedly an insured-friendly ruling, the practical benefit to insureds is not in the form of an insurance-funded defense, since an insurer may simply move the court to stay the underlying action while it pursues a declaratory judgment action. Rather, the *Hoover* ruling's true benefit to insureds is the creation of settlement funds that would not have existed otherwise. Faced with the increased threat of a potential bad-faith claim if their stated grounds for denying a claim are inadequate, as well as the guaranteed expense of having to retain coverage counsel to litigate the declaratory judgment action, we anticipate that insurers who might previously have denied claims outright will now be more likely to contribute toward a quick settlement of the underlying action. As a result, we are likely to see insurers agree to defend their insureds under reservations of rights, file immediate declaratory judgment actions, and then use the coverage issues to negotiate a favorable settlement with the plaintiff in the underlying action. The limited amount an insurer is willing to contribute to such a settlement will likely be tied to the litigation costs it anticipates incurring to obtain a favorable judgment in the declaratory judgment action.

Similarly, the 11th Circuit recently certified two questions of previously "settled" insurance law to the Georgia Supreme Court, which signals a desire on the part of either the 11th Circuit or the Georgia Supreme Court to depart from existing policy interpretations. As both questions relate to issues that are currently interpreted in the insurer's favor, their certification likely indicates that the insurance coverage tides are in the process of changing in favor of insureds.



In *HDI-Gerling America Insurance Company v. Morrison Homes, Inc.*, 701 F.3d 662 (11th Cir. Ga., 2012), the 11th Circuit certified the following questions to the GA Supreme Court for resolution:

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

The *HDI* case involved the common situation in construction defect cases where the claim merely alleged the failure of a portion of the project to comply with plans and specifications, but where there were no allegations of resulting damage to other property as a consequence of the alleged construction defect. Under traditional insurance law in Georgia, the resulting damages may be covered, whereas the defective work itself would not.

In *HDI* the 11th Circuit acknowledged that the Georgia Court of Appeals has consistently held in recent years that resulting damages are required for coverage to exist and that the Georgia Court of Appeals has also included the requirement of resulting damages within the definition of "occurrence." The 11th Circuit further acknowledged that, as a rule, it follows precedent of the Georgia Court of Appeals in the absence of clear case law from the Georgia Supreme Court. In this instance, however, the 11th Circuit chose to certify the questions rather than follow the precedent of the appellate courts, which have directly held that "there has been no occurrence within the policy where the faulty workmanship causes damage only to the work itself." *Custom Planning & Dev., Inc. v. Am. Nat'l Fire Ins. Co.*, 270 Ga. App. 8, 10 (606 S.E.2d 39, 41) (2004); *see also McDonald Constr. Co. v. Bituminous Cas. Corp.*, 279 Ga. App. 757 (632 S.E.2d 420, 422-24) (2006) (finding no coverage where an insured's costs arose from "a pre-existing contractual obligation"); *Glens Falls Ins. Co. v. Donmac Golf Shaping Co.*, 203 Ga. App. 508 (417 S.E.2d 197, 200) (1992) (finding the requirement of damage to other property articulated in "business risk" exclusions); *Custom Planning*, 270 Ga. App. at 10 ("Occurrence does not mean a breach of contract, fraud, or breach of warranty from the failure to disclose material information"); *Forster v. State Farm Fire & Cas. Co.*, 307 Ga. App. 89 (704 S.E.2d 204, 206) (2010) (tying the preclusion of claims for breach of contract to the definition of "accident" and "occurrence"); *Hathaway Dev. Co. v. Am. Empire Surplus Lines Ins. Co. (Hathaway I),* 301 Ga. App. 65 (686 S.E.2d 855, 860) (2009)("[W]hile construction defects constituting a breach of contract are not covered by CGL policies, negligently performed faulty workmanship that damages other property may constitute an 'occurrence' under a CGL policy").

Whether resulting damages are prerequisites for an "occurrence" is important because it determines who bears the burden of proof. Specifically, the insured bears the burden of establishing that a claim falls within the coverages afforded by the policy. Thus, it is the insured's burden to establish that the claim constitutes an "occurrence" under the policy. Once the insured has satisfied this initial burden, the burden then shifts to the insurer to establish that one or more policy exclusions apply. In this instance, at issue were the policy's "business risk" exclusions that preclude coverage for the risks inherent in doing business. Specifically, general liability policies do not protect contractors from the inherent risk that they may be required to repair or replace defective work to make it conform to the contractual requirements. The basis for this position is that claims arising out of defects in the insured's own work are not really tort claims for which general liability coverage exists, but rather they are claims for breach of contract for failure to comply with contract specifications.

Once the insured has satisfied the initial burden, the insurer must establish that one or more policy exclusions apply.

It is a maxim of contract interpretation that a contract should be interpreted in a manner that gives effect to all of the contract's provisions and that does not interpret one provision so broadly as to render another provision superfluous. Opponents of the Georgia Court of Appeals' current requirement that damage to other property must exist in order for there to be an "occurrence" argue that requiring damage to other property as a prerequisite for an "occurrence" would render the business risk exclusions superfluous, since no claim involving only damage to the insured's own work would ever constitute an "occurrence" to begin with. It would appear that the 11th Circuit agrees.

Similarly, the second certified question is a similar departure from the 11th Circuit's rule of following appellate court precedent in the absence of direct guidance from the Georgia Supreme Court. As referenced above, the Georgia Court of Appeals previously held, "Occurrence does not mean a breach of contract, fraud, or breach of warranty from the failure to disclose material information." *Custom Planning*, 270 Ga. App. at 10. By certifying to the Georgia Supreme Court the precise language of the Court of Appeals' holding in *Custom Planning*, rather than following its precedent, the 11th Circuit has essentially requested that the Georgia Supreme Court reverse the appellate court's ruling. (*continued on page 10*)

SIGNIFICANT MEDICAL MALPRACTICE RULINGS IN 2012

-Kristin L. Hiscutt, Melanie S. Taylor, Robert W. Stannard, Esqs.-

Medical malpractice rulings in Georgia in 2012 addressed topics of interest to all Georgia healthcare professionals: Appellate rulings explored attempts by plaintiffs to amend complaints and add new claims; the physician-patient relationships; limitation to patients' informed consent claims; and the right of plaintiffs to be present in the courtroom during trial. The following highlight some of the significant changes that will impact the work of hospitals and physicians in 2013.

ATTEMPTS BY PLAINTIFFS TO AMEND COMPLAINTS AND ADD NEW CLAIMS

JENSEN V. ENGLER, 317 GA. APP. 879 (2012)

On May 1, 2008, a surgeon performed laparoscopic gallbladder surgery on a patient. On May 6, 2008, the patient presented to emergency room with signs of emerging infection. The surgeon did not go to the hospital to personally examine the patient but, instead, indicated that he would see the patient at his previously scheduled follow-up appointment. Prior to that appointment, the patient collapsed at home and was brought to the ER, but was pronounced dead after resuscitative efforts. An autopsy revealed that the patient died of acute bacterial infection caused by thermal burns in the surgical area.

The surviving spouse filed suit on March 5, 2010 alleging ordinary negligence of the surgeon in failing to ensure proper functioning of monitoring equipment during surgery to prevent thermal burns. The spouse amended her complaint on July 15, 2011 to include a claim of professional negligence of the surgeon in failing to come to the hospital on May 6, 2008 and personally examine the patient. The spouse filed an expert affidavit along with her amended complaint in support of the professional negligence claim.

The Court of Appeals was guided by O.C.G.A. § 9-11-15 in considering whether the claims in the amended complaint were barred by the statute of limitations. Their review involved the following rules of law:

- A party may amend his pleading as a matter of course and without leave of court at any time before the entry of a pretrial order. O.C.G.A. § 9-11-15.
- Whenever the claim or defense asserted in the amended pleading arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. O.C.G.A. § 9-11-15(c).

The question of relation back of the amendment turns on fair notice of the same general fact situation from which the claim arises. The strict rule of no relation back is not applicable unless the causes of the action are not only different but arise out of wholly different facts.

The Court concluded that the spouse's professional negligence claim did *not* have to be based upon the same factual allegations giving rise to her original ordinary negligence claim in order to relate back to the original complaint. The Court of Appeals found that the allegations in the original and amended complaints were based on the patient's surgery, emergency room visit, and discharge. The surgeon's follow-up care was part of the same general occurrence and did not arise from wholly different facts. Therefore, the new professional negligence claim *related back* to the date of the original complaint and was not barred by the 2-year statute of limitation.

MACFARLAN V. ATLANTA GASTROENTEROLOGY ASSOCIATES, INC., 317 GA. APP. 887 (2012)

The physicians performed a colonoscopy on the patient in 1994, which showed an abnormal growth. A biopsy two months later confirmed ulcerative colitis but showed low-grade dysplasia. When the patient decided not to remove his colon, the doctor recommended sigmoidoscopy in six months and a third colonoscopy in one year. The patient returned in 1995 for a follow-up colonoscopy, which showed chronic colitis but no dysplasia. The doctor recommended a colonoscopy in the following year. Over the next six years, the patient received five more colonoscopies, none of which showed dysplasia. When the sixth colonoscopy, performed in 2001, showed high-grade dysplasia and an identifiable lesion, the doctor referred the patient to a colorectal surgeon. The patient died of metastatic cancer less than three months later, in 2002.

In 2004, the patient's parents filed suit for medical malpractice against the doctor and his medical practice, alleging that as a result of alleged negligent treatment from 1994 to 1996 and thereafter, their son's cancer was not timely discovered, resulting in his death. The parents filed an amended complaint including claims under the Georgia Fair Business Practices Act and the Uniform Deceptive Trade Practices Act. They argued the statute of repose did not bar their action.

Although the original complaint alleged negligent treatment between 1994 and 1995, the complaint was filed in 2004. Thus, the allegations of the original complaint are barred by O.C.G.A. § 9-3-71(b), which prohibits any action for medical malpractice brought more than five years after the alleged negligence. The negligence claims in the amended complaint dealt with treatment between 1994 and 2001, whereas the original complaint concerned care and treatment from 1994 to 1995. It was held that the claims did not relate to the same occurrence, and were barred by the statute of repose.

Limitations to Informed Consent Claims

The Court of Appeals examined the statutory requirement for informed consent in the context of a dental procedure that did not require general anesthesia.

***Roberts v. Connell*, 312 Ga. App. 515 (2011)**

In *Roberts*, the patient consulted with the dentist for restorations of her crowns. During the procedure, the patient's lower lip was lacerated when an instrument slipped. The patient claimed that the injury resulted in scarring, nerve and sensory deficits, and chronic pain.

The Court of Appeals examined O.C.G.A. § 31-9-6.1 which requires that anyone who undergoes a surgical procedure under general, spinal, or major regional anesthesia must consent to the procedure and be informed of the diagnosis, purpose of the procedure, likelihood of success, risks, alternatives, and prognosis if the procedure is not performed.

The Court of Appeals concluded that the statutory requirement for informed consent did not apply to the dental procedure because it involved only the mouth and jaw, which are not considered "major regional anesthesia." The Court was unwilling to expand the specific scope of the statute in a way that would fundamentally alter the meaning of "major regional anesthesia."

Alternative Creation of Physician-Patient Relationship

***Rindsberg v. Neacsu*, 730 S.E.2d 525 (2012)**

The law recognizes creation of a physician patient relationship when the patient knowingly seeks the assistance of the physician and the physician knowingly accepts her as a patient. An *implied* physician-patient relationship can be created where a physician has done something, such as participate in the patient's diagnosis and treatment, which supports the implication that she consented to a physician-patient relationship. A physician's on-call status alone is not enough to establish an implied physician-patient relationship.

Rindsberg examined the creation of the implied physician-patient relationship. In that case, executors of a decedent's estate sued healthcare providers for medical malpractice and wrongful death. One of the patient's adult children was informed that his mother was being discharged from the hospital, and called the hospital operator and asked her to page the physician who was discharging the patient. When the physician did not respond, the son left a message with the physician's medical group. Another doctor from the group received the page and the message from the patient's son. The physician called and spoke with the patient's son and followed up with the patient's nurse, but did not see the patient. The patient died after being discharged.

The Court concluded that there was some evidence of an implied physician-patient relationship. The physician was on duty; she was the on-call doctor who received the son's page; she was responsible for treating the patient in the absence of the patient's primary physician; and she had contacted the patient's nurse to check on the patient. This evidence was sufficient to create an issue of fact as to whether a physician-patient relationship existed, and summary judgment for the physician was inappropriate.

Right of Plaintiffs to be Present in Courtroom During Trial

An emotionally charged topic in medical malpractice cases involves the right of a Plaintiff to be in the courtroom during trial. This issue often arises in cases in which concerns regarding evoking undue sympathy from the jury are balanced against a party's fundamental right to be present during the trial of his/her case.

***Kesterson v. Jarrett*, 291 Ga. 380 (2012)**

In *Kesterson,* a trial court excluded a child with cerebral palsy from the courtroom during the liability phase of a medical malpractice trial, finding that the child's physical and mental condition may evoke undue sympathy from the jury. The case was appealed, and the Court's decision was guided by a number of factors:

- The parties to a lawsuit have a fundamental due process right, embodied in the State's Constitution, to be present in court during the trial of their case.
- The heavy burden is on the opposing party to show that deprivation of a party from trial is necessary to protect their right to a fair trial, and that no alternative remedy exists.
- A party's physical condition alone, no matter how evocative, cannot support her exclusion from trial. A person does not sacrifice her right to prosecute … in person … that person's own cause in … the courts of this state just because she is unattractive, disfigured, or handicapped.
- The trial court has discretion to control the courtroom and ensure the orderly and dignified adjudication of cases. If, for example, a party's physical and mental condition is fabricated for trial or is excessively paraded to the jury, it might be appropriate to sanction the party with exclusion from part or all of the proceeding.

The Supreme Court of Georgia ruled in *Kesterson* that the child's exclusion from court during almost all of the trial was error. The ruling reinforces the notion that concerns regarding undue sympathy are insufficient to prevent a party from being present during trial. The Supreme Court in *Kesterson* held that the Plaintiff was entitled to new trial.

Georgia Workers' Compensation Law Update

-David H. Schulte and Robert W. Stannard, Esqs.-

As Georgia workers' compensation statutory and case law continue to evolve from year to year, we are provided with additional clarification on issues both new and old. One of the more impacting decisions of the past year came on the subject of an employer's entitlement to ex parte communications with physicians. This issue has received a lot of recent attention, and the Georgia Supreme Court issued its opinion in November, 2012.

In *Arby's Restaurant Group, Inc. v. McRae*, 734 S.E.2d 55 (November 5, 2012), the Georgia Supreme Court upheld the employer's right to communicate ex parte with a claimant's physician within the realm of the Workers' Compensation Act. In this case, an order was issued by an administrative law judge (ALJ) directing an employee to sign a medical release to her treating physician authorizing the physician to meet privately with a representative of the employer. The employee refused to sign the release and the administrative law judge dismissed the hearing request.

The decision was later reversed by the Court of Appeals, which held that O.C.G.A. § 34-9-207(a) provides no support for the claim that the employer is entitled to engage in ex parte communications with a treating physician.

The Court of Appeals drew a distinction between an ex parte meeting and "all information" as provided in the statute, stating that "all information and records" could not reasonably be interpreted to require anything other than tangible documentation. *Id.* at 56-57.

The statute at issue, O.C.G.A. § 34-9-207(a), states that an employer is entitled to seek "all information and records relating to the examination, treatment, testing, or consultation concerning the employee," and that any privilege that the employee had regarding protected medical records and information is waived when the employee submits a claim for workers' compensation benefits, receives workers' compensation benefits, or when the employer has paid any medical expenses on the employee's behalf.

The Georgia Supreme Court held that the statute by its plain language requires a treating physician to disclose not just tangible documents, but also information related to the examination, treatment, testing or consultation concerning the employee. Importantly, the Court held that "information" includes "knowledge or data that is communicated to another, regardless of whether the knowledge or data has been memorialized in any tangible medium or exists only in the memory and voice of the person communicating it." *Id.* at 57.

The Court made a distinction between access to records and information under the Workers' Compensation Act and the rights of privacy afforded to individuals under HIPAA. The Court noted that privacy provisions established by HIPAA do not preempt Georgia law on the subject of ex parte communications because HIPAA exempts disclosures made in accordance with state workers' compensation laws from its requirements. *Id.* at 57. The Court did acknowledge that O.C.G.A. § 34-9-207(a) only allows the employer access to records and information appropriately related to the compensable work injury. O.C.G.A. § 34-9-207(a) does not provide an all access right to any additional information. *Id.* at 57-58.

The Court also observed that while the employer has the right to ex parte communication, the physician maintains the right to refuse a meeting or require additional conditions such as attendance of the employee and/or her counsel. *Id.* at 58.

The Supreme Court's decision will serve as a benefit to employers by facilitating a greater level of communication between physicians and counsel regarding the nature and extent of injuries sustained on the job.

New Injury vs. Change in Condition

Georgia courts have issued several decisions in the past year clarifying the distinction between a new injury and a change in condition where an employee sustains a compensable injury, receives indemnity benefits, returns to work and later goes back out of work due to the worsening of his condition. While this is not the exclusive scenario in which to distinguish a new accident versus a change in condition, it is a frequent scenario. The determination of the nature of the disability is important as a "new injury" will entitle a claimant to a fresh statutory period including the possibility of 400 weeks of benefits. Often, a "new injury" is sought when the statute of limitations has run on a prior injury.

I need to submit another claim. Two more of my fingers are tingling.

In the first case, *Scott v. Shaw Industries, Inc.,* 291 Ga. 313, 729 S.E.2d 327 (July 2, 2012), the employee sustained a compensable foot injury and received compensation before returning to work for the employer in a position which required no strenuous activity. She was required to wear a prosthesis as a result of her injury, which altered her gait and in turn caused problems with both knees. She continued working for the next 12 years before she was taken out of work by her treating physician. She sought additional indemnity benefits arguing that she had sustained a fictional new injury. Benefits were awarded by the ALJ. The Court of Appeals later reversed the decision, concluding that the employee sustained a change in condition rather than a fictional new date of injury. *Id.* at 313-314.

The Georgia Supreme Court upheld the decision of the Court of Appeals. The Court followed the rule set forth in *Central State Hospital v. James,* 147 Ga. App. 308, 248 S.E.2d (1978). (*continued on page 9*)

The workers' compensation practice group at Bendin Sumrall & Ladner, LLC is dedicated to the representation of insured employers, third-party administrators, insurance carriers and self-insured companies. In addition to thoroughly learning and understanding our clients' business on the operational level, our attorneys take pride in familiarizing themselves with workplace policies, regulations, and benefit programs. We work aggressively to close claims and have experience negotiating settlements to ensure the most favorable and cost effective outcome possible.

New Injury vs. Change in Condition (*continued from page 8*)

The rule in that case is that where a claimant is compensated for a work injury, subsequently returns to his employment and performs normal duties, then the employee's condition worsens as a result of wear and tear of ordinary life and activity connected with normal work duties, the gradual worsening will be a change in condition rather than a new injury. In *Scott*, it was noted that the claimant returned to a light duty position requiring no strenuous physical activity, and that the worsening of her condition was unrelated to her work. *Scott*, 291 Ga. 314-315. Accordingly, the court held that the employee sustained a change in condition rather than a new injury and she was therefore barred from receiving indemnity benefits by the statute of limitations. *Id.* at 315.

The Court of Appeals further clarified the distinction in *Evergreen Packaging, Inc. v. Prather*, 734 S.E. 2d 209 (November 13, 2012). There, an employee sustained a compensable back injury in 2002 and received disability benefits for a period of five weeks. After returning to work for the employer, he applied for, and was granted a job change to a new position with different physical demands. He admitted that his new job had fewer demands than his pre-injury position; however, he continued to have back pain over the course of his employment. In his final two years with the employer, his work required him to bend over frequently when performing his duties. He testified that the additional bending increased his back pain and he stopped work again in 2010. The employee requested indemnity benefits under the theory that he sustained a new back injury. The employer, citing *Scott*, argued that the claimant had instead suffered a change in condition. *Evergreen Packaging, Inc.*, 734 S.E. 2d 210-212.

While the applicable rule was the same as in *Scott*, the Court of Appeals affirmed the ruling of the lower courts that the employee sustained a new date of injury rather than a change in condition. The court held that where there is no new accident, the ordinary distinguishing feature between a change in condition and a new date of injury is the intervention of new circumstances. *Id.* at 213. The court noted diagnostic changes in the claimant's recent MRI, the fact that the employee performed different work, (though still physically demanding), after returning from disability, and that his condition worsened when the scope of his injury changed. In doing so, the court found that there was at least a scintilla of evidence to support a finding that the employee suffered a new injury because his pre-existing condition was aggravated by work that was not normal. *Scott* was distinguished because the employee in *Scott* returned to work in a position with no strenuous activity and subsequent physical issues were the result of ordinary wear and tear. Here, the employee came back to work in a physically strenuous position requiring new physical demands that contributed to further physical issues. Unlike in *Scott*, his worsening injury was not the result of ordinary wear and tear. *Id.* at 213-214.

The determination of a subsequent period of disability as a new accident versus a change in condition is therefore a fact specific one taken on a case by case basis. Where an employee sustains a compensable work injury, receives indemnity benefits, returns to work until worsening issues force him to go back out of work, the nature of the job duties that the employee performed post injury will play a large role in determining whether the disability is a change in condition, or whether it will reset the statute of limitations as a new date of injury.

Legislative Proposals

In addition to the Georgia Supreme Court's decision in *McRae,* numerous legislative changes have been proposed to Governor Nathan Deal for 2013. Several of these changes would have a significant impact on the handling of workers' compensation claims. Most notably, a proposal was made for a 400 week cap on all medical expenses for non-catastrophic cases. This 400 week medical cap matches the 400 week temporary total disability benefit cap as provided by O.C.G.A. § 34-9 -261. Should this measure be approved, long term medical costs would be reduced for many cases, though there would likely be a concomitant increase in the number of cases filing for catastrophic designation.

In addition, a proposal for an increase in the maximum weekly TTD benefit rate has been made. If this measure is passed in the legislature, the maximum TTD rate would increase from $500 per week to $525 per week as of July 1, 2013. This would apply to all injuries occurring on or after July 1, 2013 and would not affect the rates of previous work injuries. An adjustment to $525 per week would mark the first increase in the maximum TTD benefit rate since 2007.

A proposal has also been made regarding a change to Rule 240, which sets forth the procedure for an employee's return to work based on an offer of suitable employment from the employer. Under the proposed rule, a claimant will be required to remain at work for 8 cumulative hours or one scheduled work day, whichever is greater, before being entitled to a resumption of indemnity benefits. Currently there is no designated minimum amount of time that an employee must attempt to return to work before he can go back out of work within 15 days and receive indemnity benefits.

In addition to those proposals, mileage reimbursements would be required within 15 rather than within 30 days of receipt. Presently under Rule 203, an added 10% penalty is required if paid between 30 and 60 days, and a 20% penalty is added for payment between 60 and 90 days. A proposal was also made to reduce the interest rate on lump sum advances from 7% to 5%.

THE ROLE OF APPORTIONMENT AND THIRD PARTY LIABILITY IN DEFENDING PREMISES LIABILITY CLAIMS IN GEORGIA

-Matthew Branch and Melanie S. Taylor, Esqs.-

An evolving part of premises liability law over the last 20 years has been the emergence of claims by victims of violent crimes committed in motels, shopping centers, office buildings, restaurants, banks, gas stations, apartment complexes, and other public facilities. Recent developments in Georgia law provide valuable tools in the defense of these claims.

Often, victims of crime look to landowners to recover through allegations of inadequate security and/or lighting, failure to warn patrons of previous criminal activity, or failure to adhere to adequate security protocols or practices. The victim thereby seeks to hold a premises owner liable in negligence for the intentional acts of the criminal assailant. Traditionally, premises liability defendants could be liable for *all* damages suffered by a victim. In cases of horrible criminal assault, rape or murder, such verdicts can reach millions of dollars. A July 2012 decision from the Georgia Supreme Court has provided a clear option to shift liability back to criminal defendants, even in cases where the criminals' identity is unknown. This decision from Georgia Supreme Court definitively brings third-party premises liability cases within the ambit of the 2005 Tort Reform Act. As a result, Defendants now have the means to seek apportionment of fault, and thereby argue that a premises owner should not shoulder any more than their own portion of liability for the injuries caused by a criminal assailant's actions.

Apportionment

Previously, a defendant in a case such as this was subject to joint and several liability, so that a Plaintiff could recover *all damages* from any one defendant, (and thereby pursue the deepest pocket for recovery - typically *not* the criminal assailant). Now, Georgia defense attorneys have another means of minimizing a client's exposure, based on the passage of the 2005 Georgia Tort Reform Act (O.C.G.A § 51-12-33), and the recent Georgia Supreme Court decision interpreting the Act, *Couch v. Red Roof Inns, Inc. et al*., 291 Ga. 359 (2012). In *Couch,* the Supreme Court of Georgia held that a jury is allowed to apportion damages among the property owner and a criminal assailant under O.C.G.A § 51-12-33); see also *GFI Mgmt. Svcs., Inc. v. Medina,* 291 Ga. 741 (2012). When this statute is properly utilized, a jury is required to apportion its award of damages among all liable parties, including third parties not named as defendants in the suit and including the plaintiff, according to each individual's percentage of fault.

Effective use of the law by defendants means that a premises owner/proprietor, even in a case with very large potential damages, can limit exposure to only that percentage of the damages commensurate to that defendant's percentage of fault. For example, in a recent third-party-murder premises liability case, *Herrera v. Miles Properties* No. 08A83964-6, Dekalb County State Court Judge Carriere charged the apportionment requirement to the jury, listing the two criminal perpetrators of the murder as defendants, in addition to the property owner. The jury awarded a total of $184,192, but apportioned only 5% of the liability to defendant property owner, for a total of $9,210.

The recent decisions based on the Georgia Tort Reform Act present an opportunity for defendants to show that they are not financially responsible for the damages caused by others, regardless of whether or not they have been named in the lawsuit. Skillful and strategic use of this statute, particularly in the context of third-party premises liability, can be of great value in the defense of a case.

The Changing Tide of Insurance Coverage for Construction Defect Claims

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It is unlikely that the 11th Circuit would certify either question unless either it or the Georgia Supreme Court wanted to depart from the existing precedent. The 11th Circuit's refusal to simply follow the Court of Appeals precedent and its insistence that the Supreme Court weigh in is a good indication that the 11th Circuit either does not want to follow the current trend of the Court of Appeals, or else it may have received word from the Supreme Court that it desired the opportunity to depart from the Court of Appeals' precedent on its own. Given the Georgia Supreme Court's recent ruling in *Hoover*, discussed above, which was very harsh toward insurers, it appears that the Supreme Court will be inclined to respond to the certified questions in a manner that will further shift the tides in favor of insureds. It will likely be several months before the Supreme Court answers the certified questions. However, it appears that the tides are changing and that a new, broader interpretation of what constitutes an "occurrence" is on the horizon.

Third-Party Premises Liability

The *Restatement of Torts* describes the theoretical basis of third-party premises liability:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land ... for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to: 1) Discover such acts are being done or likely to be done, and 2) Give warning adequate to enable visitors to avoid the harm or otherwise protect them against it.

Restatement (Second) of Torts, Section 344 (1965)

In practice, this duty is shaped by the foreseeability of criminal conduct by third parties. In order to prove foreseeability of criminal conduct, Georgia allows the introduction of evidence of prior similar criminal acts. If a plaintiff can establish evidence of similar prior criminal conduct, he can usually survive summary judgment and try the case before a jury. The Georgia Court of Appeals has addressed the duty of a proprietor with respect to future criminal activity:

Simply put, without foreseeability that a criminal act will occur, no duty on the part of the proprietor to exercise ordinary care to prevent that act arises. If the proprietor has reason to anticipate a criminal act, he or she then has a duty to exercise ordinary care to guard against injury from dangerous characters... While the prior criminal activity must be substantially similar to the particular crime in question, that does not mean identical. What is required is that the prior incident be sufficient to attract the landlord's attention to the dangerous condition which resulted in the litigated incident. Further, ***the question of reasonable foreseeability is generally for a jury's determination rather than summary adjudication by the courts***. [1]

Thus, when sufficient evidence is admitted on the issue of foreseeability, a question of fact exists, and goes to the jury. This means the crux of the issue with regard to summary adjudication of this type of case is whether the evidence of prior acts is admissible in court as "substantially similar" to the litigated incident.[2] If a plaintiff's attorney can convince the judge that prior criminal activity is substantially similar, he can argue before a jury that the landowner/proprietor is responsible for whatever harm was caused by the criminal third-party.

In order to win summary judgment, it is crucial that defense counsel convince the judge that the criminal act was *no more* foreseeable by the defendant than it was to the plaintiff, and thus the plaintiff had equal or superior knowledge. [3]

[1] NOTE: A showing of prior similar incidents on a proprietor's premises is not *always* required to establish that a danger was reasonably foreseeable, if the proprietor *otherwise knew* that the danger existed. *Id*. at 690 (emphasis added).

[2] Several illustrative Georgia Cases:

In *Findlay*, the Court of Appeals held a jury question did exist as to reasonable foreseeability. In this case, the plaintiff was assaulted by older boys who had not been allowed to use the playground at a McDonald's restaurant, while the plaintiff approached the playground with small children. While the manager testified that during her 2½ year tenure, "there had never been an incident where an adult was threatened or physically attacked by older boys or others anywhere on the property," evidence was introduced that there was an attack on an adult by two boys about the same time and also on a weeknight had taken place 2 months earlier. *Wade v. Findlay Management, Inc.*, 253 Ga. App. 688, 689 (2002).

In *Mason v. Chateau Communities, Inc. et al.*, 280 Ga. App. 106 (2006) in a mobile home community, evidence of a prior sexual assault reported to the manager in September of 2002, and two weeks later, a rape, created a question for the jury with regard to foreseeability of the rape of another woman in the community in December 2002.

In *Walker v. Aderhold Props.*, 303 Ga. App. 710 (2010) in an apartment complex, evidence of three prior burglaries reported to the landlord, along with evidence of other incidents of physical assaults, created a question of fact for the jury with regard to foreseeability in the case of a tenant who was raped by two men who were in her apartment building and dragged her into her apartment.

[3]**Superior Knowledge Rule**: This liability [for third-party criminal attacks on tenants] is premised on the superior knowledge of the landlord of the risk of criminal attack on the premises. Accordingly, a "tenant will be precluded from recovery ... as a matter of law against the landlord when he or she has equal or superior knowledge of the risk and fails to exercise ordinary care for his or her own safety." *Jackson v. Post Props.*, Inc., 236 Ga. App. 701 (1999).

Editorial and Creative Team—Robert Stannard, Melanie Taylor & Justina Brown

Attorney Spotlight— Major Brian Trulock

Major Brian Trulock, on his way to represent the Marine Corps Reserve at a gathering where UPS memorialized its commitment to the hiring of veterans and current members of the guard and reserve.

Brian Trulock's practice concentrates in the areas of medical malpractice, construction, and general liability. His career began as a Judge Advocate in the United States Marine Corps. As a Judge Advocate, he gained significant trial experience serving as lead prosecutor in several felony and misdemeanor jury trials.

Since leaving active duty in 2007, Brian has represented hospitals, individual medical providers, and corporations in complex litigation. In each case, Brian develops a litigation plan with the client and ensures that the client is apprised of important developments in the litigation process. Brian believes that regular communication and collaboration with the client is the best way to achieve an efficient resolution of the case that is consistent with the client's desired results.

In addition to his work as an attorney at BSL, Brian is a Major in the U.S. Marine Corps Reserve where he serves as the commanding officer of Headquarters Company, Combat Logistics Regiment 45, 4th Marine Logistic Group. He is responsible for the training and well-being of a Company comprised of approximately 160 Marines and is accountable for the weapons and motor transportation assets organic to the Company. Major Trulock is also involved in the planning and execution of the annual training cycle and field exercises.

Brian resides in Decatur with his wife, who is also an attorney, and son and daughter. In his free time, he enjoys spending time with his family and training for marathons.

REMINDER: CHANGES IN GEORGIA'S EVIDENCE CODE TOOK EFFECT JANUARY 1, 2013. CONTACT ANY OF OUR ATTORNEYS WITH QUESTIONS REGARDING THESE CHANGES.

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