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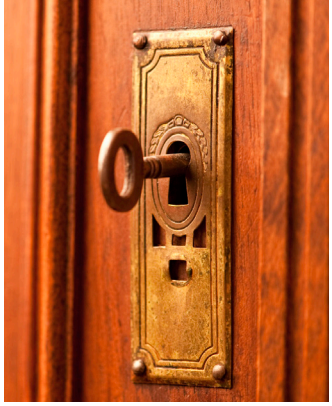


The Tort Report

An Update on Liability Issues

Fall 2014

Timeless Values. Progressive Solutions.

A New Development in Apportionment Law

By: D. Lee Clayton

Apportionment pursuant to O.C.G.A. § 51-12-33 has been a fast-moving area of the law in Georgia since its passage as part of Tort Reform in 2005. Recently, a divided Georgia Court of Appeals took up the issue and further muddied the waters as to what acts are subject to apportionment by the jury in a tort suit. On July 16, 2014, the Georgia Court of Appeals addressed apportionment in the context of negligent entrustment of a vehicle. *Zaldivar v. Prickett*, 2014 WL 3557495 (Ga. Ct. App. July 16, 2014). The specific question addressed was whether "a defendant may ask a jury to determine that a non-party plaintiff's employer shares a percentage of fault for the plaintiff's injuries because the employer negligently entrusted the plaintiff with one of its vehicles." The Court of Appeals held that because the employer did not "contribute" to the plaintiff's alleged injuries, apportionment was not applicable as a matter of law.

In *Zaldivar*, the plaintiff and defendant were both injured in a motor vehicle accident where one party was turning left on a yellow/red light. Even though both parties were injured, only the plaintiff (who was driving a company car at the time of the accident) sued for his injuries. The defendant filed a notice of non-party fault seeking to add the plaintiff's employer to the verdict form on a theory that the plaintiff's employer negligently entrusted the company work vehicle to the plaintiff. The Court of Appeals determined that because the plaintiff could not directly sue his employer under a theory of negligent entrustment, the defendant could not apportion any fault to the plaintiff's employer. The employer could not, as a matter of law, "contribute" to the plaintiff's injuries. In reaching this conclusion, the Court noted that even if the plaintiff "was determined to be negligent and partially responsible for his own injuries, his own negligence would break the causal connection between any negligent act of his employer… in entrusting a vehicle to him and the injury that [he] sustained. As such, any negligence by [his employer] in entrusting the vehicle to [him] cannot be said to have 'contributed' to his injuries or damages, and thus O.C.G.A. § 51–12–33(c) simply has no application."

The Court of Appeals went further and limited the language in *Couch v. Red Roof Inns*, 291 Ga. 359 (2012), to the specific facts addressed therein (whether an intentional act of a non-party tortfeasor could constitute "fault" under the language of the statute), stating the apportionment statute must be strictly construed in all cases. While the *Zalvidar* decision is likely to be read by many as limiting the scope of apportionment, the full impact of the decision is unclear, as the facts and legal theories in the case were unique. Certiori to the Georgia Supreme Court has been accepted. ■

The Continuing Protections of the Mental Health Privilege in Georgia

By: Alicia A. Timm

The Georgia Supreme Court recently held that only a patient may waive the psychiatrist-patient privilege protecting mental health records from disclosure. O.C.G.A. § 24-5-501(a).

In *Cooksey v. Landry*, 295 Ga. 430 (June 30, 2014), the Georgia Supreme Court reversed a permanent injunction, issued by the trial court and upheld by the

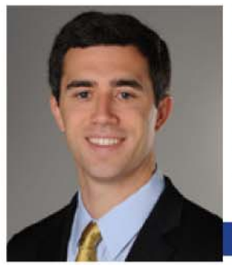
Georgia Court of Appeals, directing a psychiatrist to produce all records of his treatment of a deceased patient to the patient's parents and administrator of the patient's estate. The lawsuit arose from Mr. and Ms. Landry's investigation of a potential medical malpractice, wrongful death and survival action relating to their son's suicide while under the care of Dr. Crit Cooksey, a psychiatrist.

As part of their investigation of potential legal claims, Mr. and Ms. Landry sought their son's psychiatric records from Dr. Cooksey. Dr. Cooksey refused to produce the records, claiming they were protected from disclosure by Georgia's psychiatrist-patient privilege. Mr. and Ms. Landry filed an action in the Superior Court of Cobb County seeking a permanent injunction through the exercise of the trial court's equity jurisdiction directing Dr. Cooksey to turn over all of their son's psychiatric records. The Landrys argued that, although there is no statutory authority which required Dr. Cooksey to produce the records, the superior court through equity had the authority to order the production in furtherance of the Landrys' right to bring a civil action against Dr. Cooksey. The trial court agreed and held that without Dr. Cooksey's records, the Landrys could not gain the information they required to pursue a medical malpractice claim against Dr. Cooksey.

The Court of Appeals upheld the trial court's permanent injunction, but the Georgia Supreme Court reversed in part, holding the psychiatric-patient privilege is statutorily enacted and psychiatric records can only be disclosed pursuant to a waiver by the patient. The trial court could not exercise its equitable powers to provide relief because such exercise would be contrary to the law. In its reasoning, the Supreme Court briefly examined the history and purpose of the privilege, finding Georgia law provides for the confidentiality of communications between a psychiatrist and a patient in order to "encourage the patient to talk freely without fear of disclosure and embarrassment, thus enabling the psychiatrist to render effective treatment of the patient's emotional or mental disorder." The Supreme Court noted the privilege is inviolate and is not subject to involuntary waiver. The psychiatric-patient privilege can only be waived by the patient and is not waived even when the patient puts his injuries or condition at issue in civil litigation. *See* O.C.G.A. § 24-12-1(a). In support of its opinion, the Supreme Court further relied on the fact the Georgia legislature excluded psychiatric records from the statutes authorizing the release of a patient's medical records to a deceased patient's representatives.

The Supreme Court then determined the Landrys had a right to pursue a wrongful death claim with or without the psychiatric records, and could attempt to obtain Dr. Cooksey's files through normal discovery procedures. In its analysis, the Supreme Court compared the language of O.C.G.A. § 24-5-501(a), which specifically precluded the relief the Landrys sought, with the legal right the Landrys asked the trial court to enforce and determined equity could not override a specific statutory enactment.

In remanding the case to the trial court, the Supreme Court noted that not all documents or information in a psychiatrist's file are privileged and, therefore, directed the trial court to review the psychiatrist's file and produce the documents and information which were not protected by privilege. ■



Recovery for Emotional Distress — Has the Long Standing "Impact Rule" Been Eviscerated?

By: Matthew R. Shoemaker

For over 100 years, Georgia courts have adhered to the "impact rule" when deciding cases involving claims for negligent infliction of emotional distress. This rule allows a plaintiff to recover for emotional distress in a negligence case only when the emotional distress is caused by a physical impact causing injury. The effect of the impact rule, for the most part, has been to deny recovery to plaintiffs who did not suffer a physical impact and injury but have allegedly suffered emotional distress as a result of witnessing injuries to another.

Over the years the effect of the impact rule has been softened by allowing recovery for emotional distress pursuant to the "pecuniary loss" rule. In applying this rule, Georgia courts have held a plaintiff can recover for emotional distress even in the absence of a physical impact causing injury, so long as the plaintiff suffered both pecuniary loss and some form of injury to his/her person. Unfortunately, Georgia courts have not specifically defined what type of personal, non-physical injury is sufficient to allow a plaintiff to recover for emotional distress under the pecuniary loss rule. This ambiguity came to a head recently before the Georgia Court of Appeals in *Oliver et. al. v. McDade et. al.* 762 S.E.2d 96 (July 16, 2014).

In *Oliver*, the plaintiff was riding as a passenger in his own truck. The plaintiff's friend was driving and they were towing another vehicle down the interstate. The driver noticed something on the trailer was not secured so he pulled onto the shoulder, got out of the truck and walked back toward the trailer. At the same time, a tractor-trailer swerved onto the shoulder and struck both the truck and trailer, killing the driver. The impact threw the plaintiff against the interior of his truck, shattered the glass in the rear of the truck's cab, and propelled blood and tissue

Deductibles Versus Self-Insured Retentions: Does Your Trucking Company's Insurer Qualify for an Exemption to the Georgia Direct Action Statute?

By: Zach M. Matthews

The Georgia Direct Action Statute is a long-standing quirk of Georgia law that allows insurers of motor carriers to be named and sued directly in trucking lawsuits. The Direct Action Statutes have recently undergone widespread revision as part of Georgia's adoption of the Federal Uniform Carrier Registration (UCR) system, with many of the old loopholes being closed in the process; however, the "excess insurer exemption" appears to have survived. This means self-insured motor carriers continue to be their own front-line insurers, making any insurance carrier offering coverage over and above the self insured retention (SIR) limits an improper party to a direct action suit.

But what if your company doesn't maintain an SIR? What if you instead opt for a high-deductible policy? Some high-deductible policies function exactly like an SIR: the only distinction is that the policy language uses the term "deductible" instead of "self-insured retention." In other words, your "high-deductible" policy may be a *de facto* SIR masquerading under another name.

Georgia courts have not yet addressed this specific scenario in the context of direct actions, but other states have. The Massachusetts courts took up the question in *Boston Gas Co. v. Century Indemnity Co.*, 454 Mass. 337, 341, 910 N.E.2d 290, 294 (2009), explaining "the difference between a self-insured retention and a deductible is usually that, under policies containing a self-insured retention, the insured assumes the obligation of providing itself a defense until the retention is exhausted."

Similarly, the federal District Courts of New York recognize the true test of a self-insured retention (versus a deductible) is the obligation of the insured: "with a deductible, the insurer has the liability and defense risk from the beginning . . . ." *In re September 11th Liab. Ins. Coverage Cases*, 458 F. Supp. 2d 104, 113 n. 10 (S.D.N.Y. 2006).

Thus, these are some questions to ask when determining whether your high-deductible policy functions as a *de facto* self-insured retention: (1) does your company bear the responsibility of handling new claims, for example via a third-party administrator that you pay separately; (2) are you responsible for attorney fees and other costs of defense "from dollar one;" (3) do you set aside money in a separate account (typically held in escrow) as a risk reserve to pay claims that may come in; and (4) are you responsible for choosing or approving defense counsel? If the answer to these questions is "yes," then chances are your company will be deemed to have assumed the "liability and defense risk from the beginning." Even if you are not technically self-insured, this scenario gives your company an excellent argument for the excess carrier exemption via a motion for summary judgment, and thus provides insulation from the verdict-magnifying dangers of a direct action lawsuit.

Motor carrier defense is one of the most technical areas of Georgia law, where familiarity with the nuances of the statutes can provide strong defenses for clients. Carefully analyzing the details of even a so-called "deductible" policy can pay big dividends if a direct action suit gets thrown out of court before mediation or trial. Historically, filing for summary judgment to dismiss the insurers of high-deductible insureds can be worthwhile, even though this question of Georgia law remains unsettled. Plaintiffs' lawyers faced with such motions know the "multiplying factor" of their direct action suit is in serious jeopardy, which can put downward pressure on expectations during settlement negotiations or at mediation. ■

from the driver (his friend) onto the plaintiff. As a result of the accident, the plaintiff suffered neck, back, and knee injuries, as well as depression and anxiety for which he sought psychiatric help. The plaintiff ultimately sued the operator of the tractor-trailer, the operator's employer, and the employer's insurer.

The defendants moved for partial summary judgment on the plaintiff's claims of emotional distress, and the trial court initially granted the motion, citing the impact rule. However, on a motion for reconsideration, the trial court denied the motion based upon the pecuniary loss rule. On appeal, the Court of Appeals voted 10-1 to affirm the trial court's denial of the defendants' motion, but the judges disagreed on how they reached their conclusions.

The majority opinion made two conclusions: (1) the impact rule did not preclude the plaintiff's recovery because the plaintiff suffered both a physical impact and physical injuries; and (2) even if some of the plaintiff's emotional distress damages were unrelated to his physical injuries, the plaintiff could recover for emotional distress under the pecuniary loss rule because there was evidence of "identifiable nonphysical injuries," most notably depression. The first conclusion is not new law but a straightforward application of the impact rule, and all but one of the judges agreed with Judge Sara Doyle on that point. The second conclusion, on the other hand, was much more divisive, and five of the 11 judges ultimately disagreed with that portion of the opinion.

Judge Doyle relied upon a 2001 Georgia Court of Appeals decision, *Nationwide Mutual Fire Insurance Co. v. Lam et. al.* (248 Ga. App. 134), in reaching the second conclusion. In *Lam*, the Court of Appeals explained that non-physical injuries can include a "mental injury, or the aggravation of a preexisting mental illness." Based on that ruling, Judge Doyle concluded the plaintiff in *Oliver* could seek emotional distress damages under the pecuniary loss rule because there was evidence of depression (non-physical injury) and medical bills for that depression (pecuniary loss).

In a scathing dissenting opinion, Judge Gary Andrews claimed the court's ruling "eviscerates the impact rule, permits litigants to routinely obtain damages for emotional distress without physical injury, and, by doing so, impermissibly supplies a remedy where none existed before." Judge Andrews explained that allowing recovery for emotional distress based on mental injury/illness is nothing more than circular reasoning that would allow "bootstrapping of an extreme nature." In other words, the plaintiff in *Oliver* could not "show the non-physical injury that he suffered as a result of the defendants' negligence [was] anything other than the same emotional distress for which he [sought] to recover." Therefore, Judge Andrews determined that Judge Doyle's second conclusion constituted an "unprecedented and unauthorized expansion of the pecuniary loss rule" which rendered "meaningless the impact rule."

The facts in *Oliver* can be distinguished from most cases on the basis that the plaintiff suffered a physical impact and physical injuries. Nevertheless, plaintiffs and their attorneys will likely cite to the *Oliver* decision in an attempt to expand their ability to recover damages for emotional distress. Their argument will be *Oliver* and *Lam* stand for the proposition that proof of some sort of mental condition (e.g., depression, anxiety, etc.) in addition to a pecuniary loss (e.g., medical bills) is sufficient to recover for emotional distress under the pecuniary loss rule even when there is no physical impact/injury. Whether this argument will be successful remains to be seen, but the potential outcome could be that defendants (and their insurers) may become liable to a larger group of people than previously allowed under Georgia law. The defendants in *Oliver* filed a petition for certiorari with the Georgia Supreme Court which has been accepted. ■

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Events

Property and Coverage Insurance Seminar: "Back to School with Swift Currie"
November 7, 2014 — 8:45 am - 3:00 pm
Cobb Energy Performing Arts Centre
Atlanta, Georgia

Joint Litigation Luncheon Presented with McAngus Goudelock & Courie
December 3, 2014 — 11:00 am - 2:30 pm
Raleigh, NC

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.