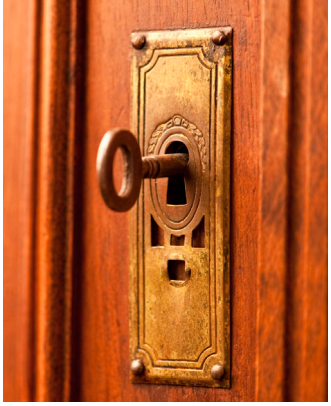
Swift Currie
ATTORNEYS AT LAW

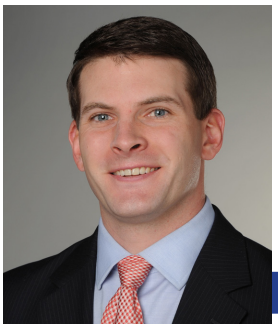


The Tort Report

An Update on Liability Issues

Spring 2015

Timeless Values. Progressive Solutions.



Rebutting the On-the-Job Presumption of Driving a Company Vehicle

By: Daniel J. Kingsley

Now more than ever, employees have the ability to work remotely without stepping foot into an employer's place of business. The application of vicarious liability and the theory of respondeat superior require detailed attention in situations where employees work remotely and regularly drive company vehicles to and from service appointments. In *Mastec North America, Inc. v. Sandford*, 330 Ga. App. 250 (2014), the court of appeals analyzed the application of the theory of respondeat superior where a remote employee was involved in an accident while driving a company vehicle.

In *Sandford*, Warnock was employed by Defendant Mastec as a field technician, and his job duties included going to the homes of DirecTV customers to install and repair satellite television equipment provided by DirecTV. Warnock was given a Mastec work van to drive to and from his appointments. Mastec also allowed Warnock to work out of his home. For $40 per week deducted from his paycheck, Mastec authorized Warnock to drive the work van to and from his home at the start and end of each workday. Documents in Warnock's personnel file defined "WORKING TIME" in part as "travel time between jobs" and "traveling from the office to your first job and back to office after completing your last job." "NON-WORKING TIME" was characterized as "time spent traveling home after work." Mastec also instructed its employees: "If you drive home after your last job, the time spent driving home [is] non-working time."

On the day of the accident, Warnock received a call from his supervisor instructing him to report to a new job at a home in Newnan, Georgia. Warnock completed the job in Newnan and, using a handheld device, "closed out" the assignment on the device as was required by his employer. Warnock testified he was required to complete a timesheet. On the day of the accident, Warnock did not recall when he completed his timesheet.

After completing the job in Newnan, Warnock began driving to his home when he ran a stop sign and collided with the plaintiff's vehicle. The plaintiff brought suit against Warnock, Mastec, and DirecTV and alleged Mastec and DirecTV were liable under the theory of respondeat superior. The court of appeals ruled Warnock was not within the scope of his employment at the time of the accident. The court reaffirmed its prior rulings, holding that "[g]enerally, an employee traveling to or from work is not in the course of his employment but rather is engaged in a personal activity." *Id.* at 254 (citing *Farzaneh v. Merit Constr. Co.*, 309 Ga. App. 637, 639 (2011)).

Given the wrinkle in this case—that the employee never traveled to or from an office, but rather to and from his residence in the company vehicle—the court analyzed the case under a "burden-shifting framework" established by the Georgia Supreme Court in *Allen Kane's Major Dodge v. Barnes*, 243 Ga. 776 (1979). When an employee is involved in an accident while operating his employer's vehicle, "a presumption arises that the employee was acting in the course and scope of his employment at the time of the collision, and the burden is then on the employer to show otherwise." *Id.* (citing *Dougherty Equipment Co. v. Roper*, 327 Ga. App. 434, 436 (2014)).

The court in *Sandford* found that Mastec (the employer) rebutted this presumption by establishing that at the time of the accident, the employee was traveling home after completing his last job. It was insufficient for the plaintiff to rely on circumstantial evidence that it was possible he did not complete his timesheet before beginning his drive home. The court held direct evidence was needed "to show the employee was acting within the scope of his employment *at the time of the accident*." The court reasoned that even if the employee completed his paperwork when he arrived home, "company policy clearly stated that he would only be paid for the time spent completing paperwork at home, not his driving time."

The takeaway from the *Sandford* case is the application of the theory of respondeat superior requires attention to detail in situations where employees are permitted to use company vehicles without ever reporting "to the office." While every accident involving an employee driving a company vehicle will generate its own set of facts and circumstances, the court's decision in *Sandford* highlights how a company's policies providing clear parameters for "working" and "non-working time" may help avoid liability when employees are driving company vehicles on personal time. ■

Georgia's "Actual Notice" Exception to Unperfected Hospital Liens Doesn't Apply to Insurers

By: Drew C. Timmons

A recent decision from the Court of Appeals of Georgia in *Kennestone Hopsital Inc. v. The Travelers Home & Marine Ins. Co.* (January 16, 2015) has helped to clarify some of the rights applicable to lienholders that are found within Georgia's hospital lien statute. Hospital liens have taken over as one of the most cumbersome obstacles to the quick and stress-free resolution of otherwise straightforward personal injury claims. O.C.G.A. § 44-14-470 provides medical care providers with the right to place a lien for reasonable charges for the treatment of an injured person "upon any and all causes of action accruing to the person to whom the care was furnished . . . on account of the injuries" which gave rise to the cause of action and the treatment provided by the hospital. Moreover, O.C.G.A. § 44-14-473 expressly states that the amounts claimed in a properly perfected lien will survive any release or covenant not to sue, and may be enforced against the tortfeasor's insurer. As such, where a settlement is reached and the lien is not satisfied out of the settlement proceeds, the tortfeasor's liability carrier may be forced to pay medical expenses twice, once to the injured party, and a second time to the provider whose lien went unsatisfied. While O.C.G.A. § 44-14-471 provides a specific procedure to follow, it also contains an exception where the lien is not perfected but the tortfeasor has actual notice of the claim. Until now (likely due to the overwhelming number of decisions favoring lienholders) most cautious attorneys and insurers have assumed that the actual notice exception applies to the tortfeasor's liability carrier.

In *Kennestone*, the plaintiff, Kennestone Hospital, Inc. (Kennestone), filed suit against The Travelers Home and Marine Insurance Company (TH&M), seeking to enforce its unpaid hospital lien for medical treatment provided to Wanderson Silva (Silva) arising out of a motor vehicle accident with TH&M's insured, Deborah Chasin (Chasin). Contending that Kennestone failed to comply with the procedure set out in O.C.G.A. § 44–14–471 for perfecting a medical services lien, TH&M moved for summary judgment. In response, Kennestone filed its own motion for summary judgment, contending it had followed all of the necessary procedures to perfect its lien, but that even if it hadn't, any defects in its perfection of the lien were irrelevant since TH&M had actual notice of the lien. Based upon the facts identified below, the trial court granted summary judgment in favor of TH&M, and Kennestone appealed.

There were two primary issues for consideration by the court of appeals: (1) whether Kennestone had properly notified the "persons, firms, corporations and their insurers claimed by the injured person . . . to be liable for damages arising from the injuries" of the lien, and (2) whether TH&M's actual notice of the lien rendered the lien enforceable regardless of any defects in its perfection. The facts of record revealed that Silva was treated at Kennestone on March 2, 2011, for injuries sustained in the collision with Chasin, and released on March 20, 2011. On April 28, 2011, within the time limit prescribed under O.C.G.A. § 44–14–471, Kennestone sent notice of its intent to file a hospital lien, via certified mail, to Silva and to TH&M. Although there was a dispute between the parties as to whether Kennestone correctly designated the proper insurer in its notice to TH&M (its notice was sent to "Travelers" at the wrong address), the court of appeals avoided answering that particular legal question. Instead, the court of appeals held that Kennestone's failure to send any notice to Chasin, TH&M's insured, was fatal to Kennestone's claim that its lien was properly perfected. The notice to TH&M, even if valid, did not eliminate Kennestone's duty to notify the "persons, firms, firms, corporations ***and*** their insurers claimed by the injured person . . . to be liable for damages arising from the injuries." O.C.G.A. § 44–14–471(a)(1) (emphasis added). The court stated, "this failure alone invalidated the lien."

Alternatively, Kennestone argued that assuming it did not meet the notice requirements contained in O.C.G.A. § 44–14–471(a)(1), its lien was nevertheless enforceable against TH&M because TH&M had actual notice of the lien. Pursuant to O.C.G.A. § 44–14–471(b), a medical provider's failure to comply with the filing and notice procedures of O.C.G.A. § 44–14–471(a)(1) "shall invalidate such lien, *except* as to any person, firm, or corporation liable for the damages, which receives . . . actual notice" of the lien prior to settlement. However, the court of appeals affirmed the trial court's decision that this exception does *not* apply to insurers, since insurers are not specifically identified within that section of the statute. Prior to this ruling, many attorneys and insurers have construed "any person, firm, or corporation *liable* for the damages" to include insurers in addition to tortfeasors.

Hospitals have long been insisting that the "actual notice" exception eliminates their need to follow the strict procedures outlined for perfecting medical liens, thereby removing any defense an insurer might have if it knew about the lien prior to settlement. By clarifying that this exception applies only to tortfeasors, insurers can breathe a (small) sigh of relief when handling settlements involving medical liens. While this interpretation of the statute does not eliminate an insurer's liability for properly perfected liens, it makes it more likely that medical providers will take affirmative action to perfect their liens in compliance with the statute, which should, in turn, increase the likelihood that the liens are identified by the settling parties and satisfied as part of the settlement agreement, instead of leaving the insurer exposed to double payment. ■

Attorney's Fees Recoverable Under O.C.G.A. § 9-11-68 Where a Contingency Contract is at Issue

By: S. DeAnn Bomar

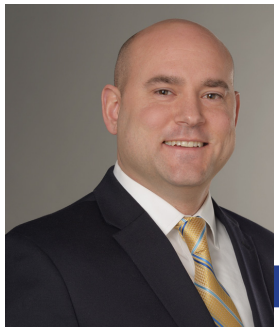
Since the enactment of O.C.G.A. § 9-11-68, Georgia's "Offer of Settlement" statute, there has been a fair amount of debate as to its application and constitutionality. As explained by the Supreme Court of Georgia in upholding the statute as constitutional, the purpose of O.C.G.A. § 9-11-68 is to encourage parties in tort cases "to make and accept good faith settlement proposals in order to avoid unnecessary litigation." *Smith v. Baptiste*, 287 Ga. 23, 29, 694 S.E.2d 83 (2010).

O.C.G.A. § 9-11-68 applies to written offers to settle tort claims which are made more than 30 days after summons and complaint are served, but not less than 30 days before trial. The statute provides that if a defendant makes an offer of settlement which is rejected by a plaintiff, and the final judgment is either one of no liability or judgment in favor of the plaintiff for an amount that is less than 75 percent of the defendant's offer of settlement, then the defendant is entitled to recover "reasonable" attorney's fees and expenses incurred "from the date of the rejection of the offer of settlement through the entry of judgment." A plaintiff who makes an offer of settlement that is rejected by a defendant is also entitled to recover "reasonable" attorney's fees and expenses incurred "from the date of the rejection of the offer of settlement through the entry of judgment" if the final judgment in favor of plaintiff is in an amount greater than 125 percent of the plaintiff's offer of settlement. O.C.G.A. § 9-11-68(b).

A recent decision of the Georgia Supreme Court provided some guidance as to the effect of a contingent fee agreement upon the recovery of litigation expenses under this section. In 2013, the court of appeals issued an opinion in the matter of *Georgia Department of Corrections v. Couch*, in which it upheld a trial court's award of attorney's fees and expenses to a plaintiff under O.C.G.A. § 9-11-68 in a tort action against the Georgia Department of Corrections (the Department). 322 Ga. App. 234 (2013). In that case, the plaintiff, a prison inmate injured on work detail, made an offer of settlement in the amount of $24,000, which was rejected by the Department. At trial, he was a awarded a jury verdict in the amount of $105,417 and the plaintiff then moved for attorney's fees and expenses. The trial court awarded over $40,000 in fees, based on a 40 percent contingency agreement between the plaintiff and his counsel, along with an additional $4,782 in expenses. The Department appealed both the appropriateness and the amount of the trial court's award. The court of appeals upheld the trial court's award of attorney's fees and expenses based on the contingency fee agreement and the Supreme Court granted certiorari.

On June 16, 2014, the Supreme Court issued an opinion holding that both the trial court and court of appeals erred in calculating the amount of fees to be awarded based solely on the contingency fee agreement, rather than upon evidence of the value of the services actually rendered by plaintiff's counsel, including the number of hours worked and rates charged. *Georgia Department of Corrections v. Couch*, 295 Ga. 469, 759 S.E.2d 804 (2014). Moreover, since O.C.G.A. § 9-11-68 allows for recovery of only those fees and expenses incurred from the date of rejection of the offer of settlement through entry of judgment, the award of the entire 40 percent contingency fee was improper.

Accordingly, the Supreme Court reversed the portion of the court of appeals' ruling affirming the award of attorney's fees based on the contingency fee agreement, and remanded with direction for a recalculation of fees based on the reasonable value of the services actually provided by plaintiff's counsel from the date of the rejection of the offer of settlement through the entry of judgment. ■



Changes in Expert Testimony Rules?

By: Christopher S. Antoci

Georgia amended its Evidence Code in 2013 to more closely mirror the Federal Rules of Evidence. One particular rule change that has significant implications is O.C.G.A. § 24-7-703 (adopted from Federal Rule 703), which governs the bases of opinion testimony by experts. However, the application of this rule has yet to be fully analyzed and the lack of case law may lead to an increase in disputes over the admissibility of certain expert testimony.

Federal Rule of Evidence 703 was designed to broaden the basis for expert opinions. It is only logical that O.C.G.A. § 24-7-703 would do the same. The question now becomes how will the new section affect existing Georgia case law?

Georgia has long held that while an expert may base an opinion on facts provided by others, an expert may not simply restate the opinion of another expert. *Walker v. Fields*, 28 Ga. 237 (1859). For example, prior to 2013, a physician's testimony regarding a diagnosis made by another non-testifying physician would be inadmissible hearsay. *Augusta Coach Co. v. Lee*, 115 Ga. App. 511 (1967). Under O.C.G.A. § 24-7-703, if facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, such facts or data need not be admissible in evidence in order for the opinion or inference to be admitted." Thus, arguably, a hearsay statement of an opinion (such as a diagnosis) considered by a testifying expert for the purpose of forming the expert's opinion would be permitted. Therefore, this new code section appears to be a change in Georgia law.

However, some federal courts interpreting Federal Rule of Evidence 703 have held an expert may not simply repeat or adopt the findings of another expert without attempting to assess the validity of the opinions relied upon. *In re TMI Litig.*, 193 F.3d 613, 715–16 (3d Cir.1999) (finding blind reliance by expert on other expert opinions demonstrates flawed methodology under Daubert); *TK–7 Corp. v. Estate of Barbouti,* 993 F.2d 722, 732–33 (10th Cir.1993) (excluding expert opinion relying on another expert's report because witness failed to demonstrate a basis for concluding report was reliable and showed no familiarity with methods and reasons underlying the hearsay report). Particularly when parties do not have the opportunity to examine the information relied upon, courts must ensure that an expert witness is sufficiently familiar with the reasoning or methodology behind the information to permit cross-examination. *TK–7 Corp., 993 F.2d at 732.*

Further, courts in New Jersey, which have adopted Federal Rule 703, have held an expert may give the reasons for an opinion and the sources relied upon, but such testimony does not establish the substance of the report of a non-testifying physician. *Day v. Lorenc*, 296 N.J. Super. 262 (App. Div. 1996); *see also State v. Vandeweaghe*, 351 N.J. Super. 467 (App. Div. 2002) (noting that hearsay statements upon which an expert relies are not admissible substantively as establishing the truth of the statement); *Brun v. Cardoso*, 390 N.J. Super. 409 (2006) (stating that an MRI report could not be bootstrapped into evidence through expert testimony).

It remains to be seen how Georgia courts will interpret and apply O.C.G.A. § 24-7-703. Using the rationale from the cases outlined above, it would seem that a fair interpretation of the new Georgia statute is that the rule was not intended to create a conduit through which the jury may be informed of the results of contested out-of-court statements. ■

Events

"Golden Anniversary Seminar: 50 Years of Excellence"
Firm-Wide Client Seminar
Thursday, October 8, 2015
Cobb Galleria Centre
8:30 am - 5:00 pm Seminar
5:00 - 7:00 pm Cocktail Reception
More details at www.swiftcurrie.com.

Many Swift Currie programs offer CE hours for insurance adjusters. To confirm the number of hours offered, for more information on these programs, or to RSVP, visit www.swiftcurrie.com/events.

Email List

If you would like to sign up for the E-Newsletter version of The Tort Report, visit our website at www.swiftcurrie.com and click on the "Contact Us" link at the top of the page. Or you may send an e-mail to info@swiftcurrie.com with "Tort Report" in the subject line. In the e-mail, please include your name, title, company name, mailing address, phone and fax.

Be sure to follow us on Twitter (@SwiftCurrie) and "Like" us on Facebook for additional information on events, legal updates and more!

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 joseph.angersola@swiftcurrie.com.