

B&B BALCH & BINGHAM LLP

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Georgia Supreme Court

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Blue View Corp. v. Bell, Nos. A09A0325, A09A0326, 2009 WL 1331490 [*Personal Injury: To recover for intentional infliction of emotional distress, Plaintiff must prove the conduct was intentional or reckless, the conduct was extreme and outrageous, the conduct caused emotional distress, and the emotional distress was severe.*] (Smith, J., 3-0).

Davenport v. Yawn, 2009 WL 1199222 [*Personal injury: Court affirmed verdict finding Defendants not liable for the collision.*] (Blackburn, G., 3-0).

Hicks v. Heard, No. A09A0874, 2009 WL 1199258 [*Personal Injury: The mere fact that the driver of the automobile that injured Plaintiff worked for Defendant “as needed” was not sufficient to create a jury question as to whether the driver was acting within the scope of her employment with Defendant at the time of the accident; nor is evidence that the driver had two traffic citations in the two years prior to the accident sufficient to put the Defendant on notice that the driver was incompetent or habitually reckless.*] (Blackburn, G., 3-0).

John Deere Constr. & Forestry Co. v. Mark Merritt Constr., Inc., No. A09A0333, 2009 WL 1272081 [*Sufficiency of Affidavit: Testimony given in affidavit regarding value of repossessed collateral must be minimally sufficient to show knowledge, experience, or familiarity with value of property in question without patently flawed valuation methodology or express assumption as to condition of property.*] (Phipps, H., 3-0).

Nyankojo v. North Star Capital Acquisition, No. A09A0704 [*Debt Collection: Plaintiff failed to prove assignment as a result of incomplete records and inadequate authentication by individual without personal knowledge of the transaction.*] (Phipps, H., 3-0).

Precision Planning, Inc. v. Richmark Communities, Inc., No. A09A1039 [*Contracts: A bargained-for contractual provision limiting liability for any professional negligence to the greater of (1) \$50,000 or (2) the amount of the professional’s fee was not void against public policy. A party may contract away liability to the other party for the consequences of his own negligence without contravening public policy except when such an agreement is prohibited by statute.*] (Blackburn, G., 3-0).

Serchion v. Capstone Partners, Inc., No. A09A0662 [*Property: While Plaintiff’s claim was not barred by a four-year statute of limitations, failure to produce any evidence of misrepresentation or fraud resulted in dismissal of the claim.*] (Blackburn, G., 3-0).

Tookes v. Murray, No. A09A0563 [*Dental Malpractice: Evidence high interest rate on loan to finance negligent dental work did not support claims under the Fair Business Practices Act or claims for unlimited punitive damages; however, such evidence precluded summary judgment on standard punitive damages claim.*] (Johnson, P.J., 3-0).

CASE SUMMARIES

Century Center at Braselton, LLC et al. v. Town of Braselton et al., No. S09A0647 (May 4, 2009). Mike Bowers, Josh Archer, Michelle Rothenberg-Williams, and Righton Johnson of Balch & Bingham represented Century Center in this successful appeal. Mike Bowers and Michelle Rothenberg-Williams presented oral argument before the Supreme Court on April 13, 2009. Century Center filed a claim in Jackson County Superior Court challenging a local zoning ordinance. Century Center sought to develop property owned in the Town of Braselton, which has a local ordinance requiring certain streetscape improvements, including curbs, lights and sidewalks. The ordinance required Century Center to make improvements in the State Road 211 right-of-way, which is owned by the Georgia Department of Transportation and located outside the Town of Braselton’s limits.

The Supreme Court found for Century Center and held the ordinance was unconstitutional because a municipality does not have the authority to zone outside its boundaries.

Bvers et al. v. McGuire Properties, Inc. et al., No. S09A9695 (May 18, 2009). In January 2000, Portfolio Home Development Company, LLC (“PHDC”) obtained a construction loan from First Capital Bank for the development of a subdivision owned by PHDC. The loan was personally guaranteed by the Appellant George Nemchik, the president of PHDC’s manager, Appellant McGuire Properties, Inc. (“McGuire”). PHDC also executed security deeds naming First Capital and Nemchik as grantees.

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On April 5, 2002, McGuire and Nemchik entered into an agreement with PHDC to end their business relationship, which included an agreement that Nemchik would be released from his loan guaranty in exchange for cancellation of his security deed and that McGuire's management fee would be evidenced by a promissory note and secured by a new security deed. The McGuire security deed was filed for record on Fulton County on April 29, 2002, but not indexed until June 26, 2002. Before the McGuire security deed was indexed, on May 10, 2002, one of the lots encumbered by the McGuire security deed was conveyed to Appellees David. R. Byers and Sharon L. Byers (Byers) by PHDC. PHDC did not disclose the McGuire security deed to Byers at the closing. As part of the conveyance, Bowers executed a security deed on the lot, of which was subsequently assigned to Appellant SunTrust Mortgage, Inc. ("SunTrust"). PHDC declared bankruptcy in March 2003 and in July 2003, McGuire began to advertise Byers' lot for foreclosure pursuant to the power of sale contained in its security deed. Byers and SunTrust brought suit against McGuire and Nemchik seeking several type of relief, including cancellation of the McGuire deed based upon alleged fraud, a decree to quiet title, and equitable subrogation. McGuire counterclaimed seeking, in part, a quiet title decree.

On appeal, the Georgia Supreme Court affirmed in part and reversed in part, the trial court's rulings on the parties' motions for summary judgment. The Court affirmed the trial court's rejection of Appellees' challenge to the validity and enforceability of the McGuire security deed under constructive fraud and fraud by silence theories. Because McGuire was not present at the closing and never spoke to Byers before or after the closing, the Court found there was no evidence of silence by deception nor was there any evidence of Appellants' reliance on any representation made by Appellees. The Court also affirmed the lower court's ruling that the McGuire security deed did not constitute a fraudulent conveyance under O.C.G.A. §§ 18-2-22(2) and (3), as Appellees claimed, because there was no evidence that either Appellant had any actual or constructive knowledge of PHDC's intent to defraud Appellants by failing to disclose the McGuire security deed prior to closing on Byers' lot. The Court also rejected Appellees' argument there was no valuable consideration for the McGuire security deed, finding that it was undisputed in the record that the deed was given as part of the settlement agreement between PHDC and Appellees when they separated. Citing to Georgia law that holds the performance of services and the compromise of disputed claims, as recited in a settlement agreement, can be considered valuable consideration, the Court also noted the McGuire security deed was given in exchange in return for payment of its management fee and withdrawal as PHDC's manager. As to Appellees' equitable subrogation claim, the Court reversed the trial court and held that an express subrogation agreement is not required in cases involving a sale to a third party; therefore, SunTrust was entitled to equitable subrogation. Finally, the Court affirmed that McGuire's quiet title decree claim did not require McGuire to have actual possession of the Byers' lot, as argued by the Appellees, therefore the McGuire security deed was valid and enforceable against Byers' lot, but subordinate to SunTrust's superior lien holder position as a result of the Court's equitable subrogation ruling.

Chester v. Smith, No. S09A0176 (May 18, 2009). Phil and Mary Chester sought to propound the will of decedent Campbell. Decedent's brothers objected to the probate, and the probate court agreed that the will was invalid because it was not signed in decedent's line of vision as required by state law. The Chesters appealed the probate court's decision to the county superior court. The superior court granted the brothers' motion for summary judgment, rejecting probate of the will as a matter of law. The record revealed that decedent's will was witnessed by two bank tellers while decedent sat in the passenger seat of a car. Because the will was witnessed inside the bank, decedent could not have witnessed the signing if she desired to do so. Accordingly, the Georgia Supreme Court affirmed the superior court's grant of summary judgment holding that the will was improperly executed.

City of Atlanta v. Kleber, S08G1417, S08G1424 (May 4, 2009). Plaintiff neighboring homeowners brought this nuisance and negligence action against Norfolk Southern Company ("Norfolk") and the City of Atlanta ("City") contending Norfolk and the City had failed to properly maintain a drainage pipe and culvert near their property, resulting in their home being flooded during heavy rains. The drainage pipe and culvert were installed over forty years prior to the filing of the lawsuit. The trial court granted summary judgment to Defendants finding, among other things, the lawsuit was barred by the four-year statute of limitations for trespass to property and the Court of Appeals reversed. In reversing the Court of Appeals decision, the Supreme Court focused on the Restatement of Torts approach to categorizing permanent and continuing nuisances: a permanent nuisance gives one right of action, which accrues immediately upon the creation of the nuisance, whereas continuing nuisance gives rise to a new cause of action for each accrual of the nuisance. Relying on the findings of a court-appointed special master, the Supreme Court found no evidence that Norfolk negligently built or maintained the culvert or drainage pipe and no evidence that Norfolk had taken subsequent action to increase the flow of water onto the homeowners' property. Consequently, the homeowners' nuisance claim is permanent in nature and both the negligence and nuisance claims against Norfolk were barred by the statute of limitations. Likewise, the Court found the homeowners failed to present a triable issue with respect to their claims against the City. Specifically, the City had not contributed to the flooding through the connection of its sewer line to the Norfolk drainage pipe and the City could not be liable for approving construction permits for surrounding land.

Justices Hunstein and Sears dissented on the belief that the majority incorrectly classified the nuisance claim against Norfolk as permanent in part rather than entirely continuing in nature. They found that because the nuisance was transient (only existed during periods of heavy rain) and allegedly abatable (through construction of an additional drainpipe or widening of existing drainpipe), the nuisance should have been classified as a continuing nuisance.

Abdul-Malik v. AirTran Airways, Inc., 2009 WL 1331579 (May 14, 2009). The Court of Appeals held that the trial court did not err in granting summary judgment against a former employee who failed to prove the elements of an intentional infliction of emotional distress claim. Plaintiff was terminated after an internal investigation wherein it was determined that Plaintiff made threatening phone calls to his supervisor, including threatening to blow up his house. During the internal investigation, a member of management asked Plaintiff if he was a Muslim, called him a terrorist, accused him of lying, and said he was guilty. Plaintiff was terminated for failure to cooperate or lying in a company investigation, which was prohibited by the employee handbook. The Court held that the comments made by management, including false accusations of dishonesty, do not rise to the level of intentional infliction of emotional distress.

Anthony Hill Grading, Inc. v. SBS Investments, LLC, 2009 WL 1259993 (May 8, 2009). The Court of Appeals held that the provisions of O.C.G.A. § 14-11-209(f), substituted service of process on a corporation by serving the Secretary of State, must be strictly followed to perfect service. The record reflected that Plaintiff sent by overnight mail a copy of the summons, complaint, and other documents to the Secretary of State's office. Plaintiff did not send two copies of the summons and complaint, or the written certification by counsel stating that Plaintiff had forwarded by registered or certified mail or statutory overnight delivery such process, notice, or demand to the most recent registered office listed on the records of the Secretary of State and service could not be effected at such office. The Court of Appeals held that the trial court did not abuse its discretion in setting aside the default judgment Plaintiff had obtained based on insufficient service of process.

Auto-Owners Ins. Co. v. State Farm Fire & Cas. Co., No. A09A0041, A09A0042, 2009 WL 1299040 (May 12, 2009). This case arises from an accident on a playground work site in Albany, Georgia. During construction of the playground, an electrical conduit was damaged when it was run over by a backhoe. The construction site manager, Kenneth Cribb, determined that the damaged conduit belonged to Water Gas and Light Commission of Albany ("WGLC"), which sent plaintiff to the site to repair the damaged conduit. Cribb incorrectly advised plaintiff that the damaged conduit did not contain any live wires. While sawing the conduit, plaintiff came into contact with a live wire and was seriously burned. In the ensuing litigation, the insurance companies for both the non-profit entity overseeing the development of the playground and the construction company that employed Cribb filed motions for summary judgment, claiming that they had no duty to defend or indemnify their insureds because Cribb's conduct was excluded from coverage under the policies' "Professional Services" exclusion. The trial court denied the insurance companies' motions, holding in pertinent part that the underlying complaint did not assert a professional negligence claim against Cribb.

The Court of Appeals reversed the trial court's ruling and granted summary judgment in favor of the insurance companies. The Court held that the proper inquiry in determining whether the professional services exclusions applied is not whether Cribb actually drew upon his professional knowledge, experience, and training when giving the faulty advice, but whether he should have drawn on his professional knowledge, experience, and training under the circumstances. The Court reasoned that WGLC employees sought Cribb's knowledge about the presence of live wires in the damaged conduit because he was the site supervisor, and Cribb's failure to properly perform his supervisory duties caused plaintiff's injuries. Thus, because the professional services exclusion in both of the relevant insurance policies excluded coverage for "supervisory services," the Court held that the insurance companies had no duty to defend or indemnify their insureds.

Blue View Corp. v. Bell, Nos. A09A0325, A09A0326 (May 14, 2009). In May 2000, Yolanda and Wesley Bell (the "Bells") obtained a home equity line of credit and loan in the amount of \$67,000 on certain real property from Bank One. The Bells later filed for bankruptcy after falling into arrears on the loan. In December 2003, the Bells negotiated with Bank One to payoff the loan. In May 2004, without notice to the Bells or the bankruptcy court, Bank One assigned the loan to Blue View Corporation ("Blue View"). Six months later, Bank One accepted \$4,500 from the Bells as payoff of the loan. In February 2005, Blue View initiated foreclosure proceedings on the Bells' property, but then withdrew the foreclosure. In August 2005, Blue View assigned the loan to Stewart Title, which foreclosed on the property in April 2007. The property was auctioned at a foreclosure sale on June 5, 2007. The Bells alleged they suffered severe emotional distress from the actions Blue View. When Blue View failed to answer the complaint, the trial court entered a final judgment awarding the Bells \$2 million in compensatory damages and \$5 million in punitive damages. Blue view appealed the trial court's ruling and the Bells cross-appealed. The Court of Appeals held that the burden is on the plaintiff to prevail in an action for intentional infliction of emotional distress. The plaintiff must demonstrate that: (i) the conduct giving rise to the claim was intentional or reckless; (ii) the conduct was extreme and outrageous; (iii) the conduct caused emotional distress; and (iv) the emotional distress was severe. An intentional wrongful foreclosure can be the basis for an action for intentional infliction of emotional distress. However, the Court of Appeals found that the Bells established only that Blue View initiated foreclosure proceedings and withdrew them, not that Blue View initiated an intentional wrongful foreclosure. As a result, the Court of Appeals reversed the trial court's entry of default judgment in Case No. A09A0325 and dismissed as moot the Bell's cross-appeal in Case No. A09A0326.

Davenport v. Yawn, 2009 WL 1199222 (May 5, 2009). This personal injury action arose out of collision between an automobile driven by plaintiff and a tractor-trailer driven by defendant. Defendant rear-ended plaintiff when plaintiff slowed down to make a

right-hand turn. Plaintiff claimed she turned on her blinker approximately 75 feet before her destination and then applied the brakes. Defendant alleged plaintiff turned on her blinker and applied the brakes at the same time, less than 75 feet before her destination. The jury returned a verdict in favor of the defendant, and plaintiff appealed.

Plaintiff argued on appeal that defense counsel made an inappropriate closing arguments. Defense counsel argued that plaintiff did not apply her brakes or activate her turn signal until she was less than 75 feet from the turn. Plaintiff also argued on appeal that the jury's verdict was contrary to the evidence. The Court of Appeals affirmed the jury's verdict. The Court held that whether to permit certain argument by counsel during closing statements is left to the trial court's discretion. There was evidence presented at trial that supported defendant's position, so his arguments were appropriate. Moreover, some evidence supported the finding that plaintiff was negligent in failing to provide the defendant with adequate warning of her impending turn.

Hicks v. Heard, No. A09A0874, 2009 WL 1199258 (May 5, 2009). Plaintiff sued Jessica Heard and Mark Heard Fuel Company ("MHFC") for injuries she received in a car accident caused by Jessica Heard. Jessica Heard is the daughter of Samuel Heard, who is a co-owner MHFC, and was driving an SUV that was owned by MHFC at the time of the accident. Plaintiff sued MHFC on the grounds of vicarious liability and negligent entrustment, claiming that Jessica Heard was acting in the scope of her employment at the time of the accident and had a pattern of reckless driving. The trial court granted summary judgment in favor of MHFC on both counts, and the Court of Appeals affirmed the trial court's ruling.

Plaintiff argued on appeal that Jessica Heard worked at MHFC on an "as needed" basis was sufficient to create a jury question as to whether Jessica was acting within the scope of her employment at the time of the accident. The Court of Appeals disagreed, noting that the uncontroverted evidence showed that Jessica was driving home from school after an exam at the time of the accident. As a result, plaintiff was required to come forward with additional evidence showing that Jessica was acting within the scope of her employment at the time of the accident in order to survive summary judgment, which plaintiff did not do. Plaintiff also argued that the trial court erred by granting summary judgment on her negligent entrustment claim where the evidence showed that Jessica had received a speeding ticket and had been ticketed for failing to yield in the two years prior to the accident. The Court held that those facts were insufficient to give MHFC actual knowledge that Jessica was incompetent to drive or was habitually reckless.

John Deere Constr. & Forestry Co. v. Mark Merritt Constr., Inc., No. A09A0333 (May 11, 2009). Mark Merritt Construction, Inc. ("Merritt") financed its purchase of various construction equipment through installment loans payable to John Deere Construction & Forestry Company ("Deere"). After Merritt defaulted on the loan payments, Deere repossessed the equipment and sold it at private sales for less than the sums due on the loans. Deere then brought suit against Merritt for a deficiency judgment. Both parties moved for summary judgment. The trial court awarded summary judgment to Merritt, finding that Deere failed to carry its burden of showing the value of the equipment at the time of repossession due to deficiencies in its supporting affidavit of William Ross. Ross opined that the sales prices, which totaled \$174,500, were fair and reasonable, based on his experience, the then existing condition of the equipment, and by reviewing files stating the price of equipment by year, make, and model. The trial court found that Ross' affidavit did not provide the proper foundation for admissible evidence as to the values of equipment. A secured party has the right to dispose of repossessed collateral at a private sale so long as every aspect of the disposition, including the method, manner, time, place, and terms are commercially reasonable. The party holding the security interest has the burden of proving that terms of a sale were commercially reasonable. Value is proven by opinion evidence. The Court of Appeals found that the testimony given by Ross in his affidavit was at least minimally sufficient to show that he had some knowledge, experience, or familiarity with the value of the property and he did not use a patently flawed valuation methodology or make express assumptions as to the condition of the property. Therefore, the Court of Appeals reversed the trial court's grant of summary judgment and held that the trial court erred in its determination concerning the insufficiency of the Ross affidavit.

Nvankojo v. North Star Capital Acquisition, No. A09A0704 (May 15, 2009). Suit was brought to collect the principal amount owed on an account belonging to a furniture purchaser by a company claiming to be the assignee of the debt. Defendant purchaser challenged the standing of plaintiff as a valid assignee of the debt. Both sides moved for summary judgment, and the trial court ruled in favor of the plaintiff. On de novo appeal, the Court of Appeals reversed, finding that the evidence produced by plaintiff as exhibits failed to establish the assignment of the debt between the company originally holding the account and plaintiff.

In order for assignment to be enforceable, the transfer must be memorialized in writing, and the writing must identify both the assignor and the assignee. Plaintiff's evidence failed to identify both assignor and assignee on any of the same documents. Additionally, Plaintiff failed to lay proper foundation and was unable to provide anyone to authenticate the records who had personal knowledge of the transaction. Therefore, the contents of the documents were disregarded as inadmissible hearsay.

Precision Planning, Inc. v. Richmark Communities, Inc., No. A09A1039 (May 8, 2009). Developer-plaintiff sued architect-defendant for professional negligence when a retaining wall designed by the architect failed. The architect moved for partial summary judgment seeking to enforce a provision of the parties' agreement which limited liability for any professional negligence to the

greater of: (1) \$50,000, or (2) the amount of the professional's fee. The contract permitted the developer to increase the liability limitation above \$50,000, but the developer chose not to. The trial court found this provision unenforceable as against public policy and denied the architect's motion for summary judgment. The Georgia Court of Appeals reversed the trial court and held that the contract was not void against public policy. The Court noted the general rule that a party may contract away liability to the other party for the consequences of his own negligence without contravening public policy except when such an agreement is prohibited by statute. Further, the statute the developer claimed that the architect breached, former O.C.G.A. § 13-8-2(b), applied only to contract provisions "purporting to indemnify or hold harmless the promisee against liability for damages" and was inapplicable in this case.

Serchion v. Capstone Partners, Inc., No. A09A0662 (May 4, 2009). Plaintiff brought suit to recover land alleging defendants obtained the land by making fraudulent representations to him. Defendants filed a motion for summary judgment, claiming that the statute of limitations under O.C.G.A. § 9-3-31 was four years and that the statute had run on plaintiff's claim. Defendant also alleged that plaintiff had failed to offer any evidence of misrepresentation or fraud. The trial court granted defendant's motion for summary judgment.

On appeal, the Court of Appeals found that the trial court erred in characterizing the claim as one simply for fraud and not one to cancel a deed and recover property, which would carry a seven-year statute of limitations. However, because Plaintiff failed to present any evidence to counter Defendant's allegations that fraud had not been established, the Court of Appeals upheld the trial court's grant of summary judgment.

Tookes v. Murray, No. A09A0563 (May 12, 2009). In Tookes v. Murray, a patient sued his dentist for malpractice, breach of warranty, and violation of Georgia's Fair Business Practices Act ("FBPA") after undergoing a full mouth restoration. To finance the work, the patient took out a loan from Capital One at an annual interest rate of 19.9 percent. The patient's condition did not improve after the restoration. Two separate dentists found the restoration did not meet the standard of care and required complete replacement. The patient sought damages for medical expenses, pain and suffering, punitive damages, attorney's fees and expenses of litigation. The trial court granted summary judgment against the patient on his FBPA and unlimited punitive damages claims.

On appeal, the Court agreed with the trial court, holding that there was no evidence to support a claim under the Fair Business Practices Act ("FBPA") since there was no evidence that the dentist spoke with or had any involvement with the patient about his loan arrangement, nor did the dentist receive any sort of kickback from Capital One. The Court also found that any failure to inform the patient of risks and alternatives did not result in damages, as required under the FBPA. Finally, the Court found that while a jury could find the dentist's treatment negligent, and therefore justify a punitive damages claim, there was no evidence of specific intent to harm as required to support a claim for unlimited punitive damages. The Court affirmed summary judgment as to the FBPA and unlimited punitive damages claims, but permitted the claims for punitive damages up to \$250,000 to continue.