


B&B BALCH & BINGHAM LLP

Appellate Monthly



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Rothschild II v. Columbus Consolidated Government, No. S08G1619 [*Jurisdiction: A plaintiff has standing to seek a writ of mandamus where defendant owes plaintiff a public duty which plaintiff is entitled to have enforced.*] (Sears, 7-0).

Trinity Outdoor LLC v. Central Mutual Ins. Co., No. S09Q0605 [*Insurance: Insurer cannot be liable for bad faith failure to settle claim in absence of verdict in excess of policy limits or agreed-upon settlement.*] (Melton, 12-0).

Smith, et al. v. Finch, et al., No. S08G1845 [*Medical Malpractice: The hindsight charge is now limited to: "In a medical malpractice action a defendant cannot be found negligent on the basis of an assessment of a patient's condition that only later, in hindsight, proves to be incorrect as long as the initial assessment was made in accordance with reasonable standards of medical care."*] (Hunstein, 5-2).

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Board of Regents of the Univ. Sys. of Georgia v. Hogan, No. A09A1036 [*Employment: An administrative law judge's ruling in an employment dispute must be upheld by the superior court if there is any evidence in the record to support that the termination was not arbitrary or capricious.*] (Johnson, 3-0).

Greenhorne & O'Mara, Inc. v. City of Atlanta, No. A09A0114 [*Contribution: Res judicata in contribution action applies when joint tortfeasor's non-liability on same claim is adjudicated in prior adjudication where party seeking contribution was present as co-defendant.*] (Doyle, 3-0).

Old Republic National Title Insurance Co. v. Attorney Title Services, Inc., No. A09A0999 [*Professional Negligence: A claim for breach of a professional services contract sounds in tort and requires an expert affidavit pursuant to O.C.G.A. § 9-11-9.1.*] (Blackburn, 3-0).

T&G Enterprises, LLC v. White, No. A08A1029 [*Property: Specific performance could not be upheld under the alternative theory of reformation of the contract where the remedy of reformation was not sought by the plaintiff, was omitted from the pretrial order, and where the final order does not mention reformation.*] (Adams, 3-0).

Triad Health Mgmt. of Georgia, III, LLC v. Johnson, No. A09A0286 [*Contract: Son that signed agreement to admit his elderly father to a retirement home, bound his father to arbitration clause in contract, and the FAA preempted conflicting state law.*] (Adams, 3-0).

CASE SUMMARIES

Meadows v. Diverse Power, Inc., No. S09C1202 (June 29, 2009). On June 29, 2009, the Supreme Court denied Appellants' Petition for Certiorari in this action. Accordingly, the Court of Appeals decision stands affirming summary judgment in favor of Diverse Power, Inc. and holding that Diverse Power, Inc. was not the proximate cause of the wrongful death and other injuries alleged where plaintiffs' vehicle left roadway and struck a Diverse Power, Inc. utility pole, which was located well off the traveled portion of a roadway, safe from ordinary danger of collision from vehicles. **Hugh McNatt** and **Anne Kaufold-Wiggins** argued this case.

American Multi-Cinema, Inc. v. Brown, No. S08G1934 (June 1, 2009). On Christmas of 2003, plaintiff took her children to see a movie at one of defendant's movie theaters. While plaintiff was watching the movie, one of the theater staff placed a wet floor sign over an area where a spill had been cleaned up in the hall outside of plaintiff's theater. As plaintiff was exiting the theater, she tripped on the wet floor sign, which had been knocked down by the crowd as it exited, and suffered severe injuries. Plaintiff alleged that she had been unable to see the knocked-down sign due to the crowd surrounding her. Plaintiff sued defendant for negligence on the theory that it was foreseeable that the wet floor sign would pose a tripping hazard when placed in the path of large crowds due to the ease with which such signs can be knocked down. Through discovery, defendant was able to show that the sign had been properly installed, that the person who installed it had been trained in safety procedures, and

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that none of defendant's employees had seen the sign get knocked down or lying on the ground before plaintiff's accident. Defendant moved for, and won, summary judgment on the grounds that it did not have actual or constructive knowledge of the fallen sign before the accident. The Georgia Court of Appeals reversed the trial court, and defendant applied for certiorari to the Georgia Supreme Court. The Supreme Court affirmed the Court of Appeals' reversal. The Supreme Court noted that under plaintiff's theory of the case, it did not matter whether defendant had knowledge that the sign had fallen because plaintiff alleged that defendant's negligence was to knowingly place a sign with a propensity for falling over in an area travelled by large crowds as they exited the theater. Reasoning that a property owner's duty of ordinary care to keep its property in a safe condition extends to the property owner's selection and use of safety devices, the Court held that the question of whether defendant was negligent in the way it used the wet floor sign was a question for the jury.

Boca Petroco, Inc. v. Petroleum Realty, II, LLC, No. S08G2019, S08G2020, S082025, S08G2043, S08G2044 (June 8, 2009). The appeals in this case stemmed from lawsuits in Florida between Appellants Boca Petroco, Inc., Trico V Petroleum, Inc., and Trico VII Petroleum, Inc. and Appellees Petroleum Realty II, LLC, and Petroleum Realty V, LLC over respective lease rights for properties in several Georgia counties. The properties were to be used for the operation of gas stations and convenience stores. Boca filed notices of lis pendens against the properties. Petroleum Realty, with mixed success, petitioned the various trial courts to cancel the notices of lis pendens. The Court of Appeals held that the notices of lis pendens were invalid because the Florida court lacked subject matter jurisdiction over the properties located in Georgia. The Georgia Supreme Court affirmed.

Condra v. Atlanta Orthopaedic Group, PC, No. S08G1833 (June 29, 2009). Daphyne Condra brought a medical malpractice suit when she developed aplastic anemia as a result of consecutive regimens of Tegretol, an anti-convulsive drug, which had been prescribed to her for the treatment of back, neck and arm pain. Her treating physician failed to conduct any blood count monitoring during the period in which the drug was being administered. At trial, Condra was prohibited from asking about any personal practices of the Defendant's expert witnesses. The Georgia Supreme Court overturned their own decision in Johnson v. Riverdale Anesthesia Assocs., 275 Ga. 240, 563 S.E.2d 431 (2002), and held that evidence regarding an expert witness' personal practices, unless subject to exclusion on other evidentiary grounds, is admissible both as substantive evidence and to impeach the expert's opinion regarding the applicable standard of care. The primary basis for their reversal was the intervening passage of the Tort Reform Act governing the qualification of expert witnesses through personal professional experience.

Expedia, Inc. v. City of Columbus, No. S09A0567 (June 15, 2009). Expedia, Inc., an online travel company, contracts with hotels for the right to broker or facilitate the reservation of hotel rooms at a discounted "wholesale rate." Expedia advertises and offers the rooms for the wholesale rate on its website, but actually charges the customer for an amount greater than the wholesale rate, known as the "room rate," which charges the customer an extra fee for "taxes and service fees." After the customer's stay, Expedia pays the hotel for the wholesale rate and occupancy taxes based on the wholesale rate. The City of Columbus brought suit against Expedia alleging that the amount of hotel occupancy taxes paid by Expedia should be based on the room rate rather than the wholesale rate. The trial court granted the City's request for injunctive relief and issued a permanent injunction enjoining Expedia from collecting the hotel occupancy tax based on the wholesale rate. Expedia appealed on a number of grounds, but the Court affirmed the imposition of a modified injunction consistent with its opinion.

Hospital Auth. of Valdosta & Lowndes County d/b/a S. Ga. Med. Ctr. v. Meeks, No. S09G0466 (June 8, 2009). Thurman Meeks, both individually and as executor of his deceased wife's estate, brought suit against the Hospital Authority of Valdosta and Lowndes County d/b/a South Georgia Medical Center (the "Hospital") and against Dr. Terry Tri for damages resulting from alleged negligence in credentialing of Dr. Tri to perform the cardiac procedure that resulted in death of Meeks' wife. The Hospital filed a motion for protective order, asserting that Meeks' discovery requests sought information privileged under Georgia's medical review and peer review statutes. The trial court ruled that the contents of credentialing files regarding Dr. Tri were not subject to discovery. The Court of Appeals reversed, holding that medical and peer review statutes protect all proceedings and information of review organizations. The Court of Appeals also reversed on Meeks' cross-appeal, determining that credentialing information not involving evaluations of performance of medical procedures is discoverable. The Supreme Court concluded that information in a physician's credentialing file is discoverable to the extent that it does not involve a peer review or medical review committee's evaluation of actual medical services provided by the physician.

Jones County, et al. v. A Mining Group, LLC, et al., No. S09A0846 (June 1, 2009). A mining company applied for a conditional use permit to operate a rock quarry in Jones County, but the county denied the application. The mining company filed suit against Jones County, and then sought to recuse all five judges of the Ocmulgee Judicial Circuit on the ground that each judge receives an annual salary supplement from Jones County. The Supreme Court held the judges were not obligated to recuse themselves because the judges did not have a direct pecuniary interest in the outcome. Judges shall disqualify themselves when their impartiality may be questioned, but in this case, the state legislature determines the judges' salary, even though the county must provide the funds. With no direct interest in the result of the matter, no reasonable person would question the judges' impartiality.

Manlove v. Unified Gov't of Athens-Clarke County, No. S09A0118 (June 15, 2009). College students challenged constitutionality of Athens-Clarke County Ordinance § 3-5-24, which prohibits sounds that are “plainly audible” from a distance of three hundred (300) feet at any time, with the distance reduced to one hundred (100) feet after 11 p.m. on weeknights and after midnight on weekends. Additionally, the ordinance prohibits sounds from inside an apartment or townhome that are audible five feet from the boundaries of the building. The maximum penalty for violating the ordinance is a \$1,000 fine and six (6) months incarceration. Although the students were never cited, prosecuted, or fined for violation of the ordinance, they claimed that the ordinance caused them to censor the volume of their music and filed an action for declaratory judgment challenging the constitutionality of the ordinance. The trial court granted Athens-Clarke County’s motion to dismiss, determining that the college students lacked standing because they failed to show either harm or that a particularized message was at stake for application of constitutional analysis. The Supreme Court affirmed, citing previous case law holding that a party must show an injury in fact or an adverse impact on his or her rights in order to challenge the constitutionality of an ordinance.

Rothschild II v. Columbus Consolidated Government, No. S08G1619 (June 8, 2009). The trial court found, and the Court of Appeals held, that plaintiffs must establish that the City of Columbus acted ultra vires to establish plaintiffs’ standing in a suit seeking to challenge the use of Special Local Option Sales Tax (“SPLOST”) funds. The Supreme Court granted certiorari and reversed. Columbus sought and received voter approval of a SPLOST to fund the building of a new public library. While informing voters about the project, Columbus circulated an architectural rendering that illustrated a park-like space behind the library and, at informational meetings, Columbus referred to the project as having “green space” and a “park.” A park was not built, however, and Columbus sought to use the last of the SPLOST funds for landscaping and books for the library. Plaintiffs sought a writ of mandamus compelling Columbus to build the promised park, and a temporary restraining order preventing Columbus from spending the remaining SPLOST funds until plaintiffs’ mandamus claim was decided. The trial court found that plaintiffs’ standing was dependent on their ability to prove Columbus was acting ultra vires, which plaintiffs could not prove since spending SPLOST funds on books and landscaping was a valid expenditure of SPLOST funds. The Supreme Court noted that the purpose of a writ of mandamus is to compel a due performance of an official duty if there is no other specific legal remedy for the legal rights and that O.C.G.A. § 9-6-24 confers standing to seek the writ in those cases where defendant owes a public duty which plaintiff, as a member of the public, is entitled to have enforced. In light of the foregoing, the Court held that plaintiffs had standing because they alleged that the City of Columbus failed to perform its public duty of completing the park that was allegedly promised to the voters.

Trinity Outdoor LLC v. Central Mutual Ins. Co., No. S09Q0605 (June 1, 2009). On August 1, 2002, a billboard owned by Trinity Outdoor, LLC fell while it was being installed, killing two workers. The family of the killed workers sued both the manufacturer and Trinity. Trinity cross-claimed against the manufacturer, who once again ceded liability. Trinity attempted to get its own insurer, Central, to settle, but it would not. The litigation ultimately settled for \$12 million. Trinity then volunteered to contribute nearly \$1 million without Central’s approval. Central claimed the voluntary payment violated the insurance agreement and refused to pay. Trinity brought suit against Central for refusing to settle the case in bad faith. The Supreme Court held that Central had not wholly abandoned its insured and then attempted to shield itself with a no settlement clause. Rather, Central provided Trinity with a defense, and Trinity deliberately went against the insurance agreement which prohibited unilateral settlement or voluntary payments. In the absence of a jury verdict, the Court held, Trinity could not maintain an action against Central for bad faith failure to settle the family’s claim.

Smith, et al. v. Finch, et al., No. S08G1845 (June 29, 2009). In this case, the Supreme Court of Georgia disapproved of the last two sentences of the following hindsight charge:

In a medical malpractice action a defendant cannot be found negligent on the basis of an assessment of a patient's condition that only later, in hindsight, proves to be incorrect as long as the initial assessment was made in accordance with reasonable standards of medical care. In other words, the concept of negligence does not include hindsight. Negligence consists of not foreseeing and guarding against that which is probable and likely to happen, not against that which is only remotely and slightly possible.

The Court concluded that the third sentence is inconsistent with the standard of care and the second sentence is duplicative and therefore unduly emphasizes the charge. The first sentence of the hindsight charge will still be given in the appropriate case. The argument can still be made that the expert’s opinion is based on hindsight and that the standard of care was appropriate at the time of the care.

Board of Regents of the Univ. Sys. of Georgia v. Hogan, No. A09A1036 (June 18, 2009). Brenda Hogan was the registrar at Fort Valley State University. After the President of the University fired her, she sought a hearing before an administrative law judge (“ALJ”), who upheld her termination. The Board of Regents of the University System of Georgia (the “Board”) adopted the ALJ’s

decision. Hogan then sought review in the superior court which reversed the ALJ's decision, overturned Hogan's termination, and awarded her monetary damages and attorney fees. The superior court found that the Board's failure to provide Hogan with a written reason for her termination or to grant her a grievance hearing provided "compelling evidence" that the termination was arbitrary and capricious. The appellate court reversed the superior court's ruling, however, stating that when a superior court reviews the decision of an administrative agency, "[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." "The superior court's review of evidentiary issues is limited to determining whether factual findings are supported by any evidence." The appellate court found that evidence showing the registrar's office was in chaos, that students, alumni and parents had complained about the office and Hogan, and other evidence in the record supported the ALJ's decision that Hogan's termination was not arbitrary and capricious. The Court of Appeals therefore overturned the superior court's ruling.

Greenhorne & O'Mara, Inc. v. City of Atlanta, No. A09A0114 (June 9, 2009). Plaintiff Greenhorne & O'Mara, Inc. ("Greenhorne"), an engineering firm, appealed the grant of summary judgment to the City of Atlanta as to Greenhorne's contribution claim against the City in connection with a flooding sewer system designed by Greenhorne. The contribution claim stemmed from a 2003 lawsuit filed by residents of a condominium complex that experienced repeated flooding of raw sewage in their parking garage. The residents sued Greenhorne for professional negligence and the City under a nuisance theory for maintaining a defective sewer system. In 2004, the trial court granted summary judgment and entered final judgment in the City's favor on the grounds that the sewer lines were not properly dedicated to the City as required by the City code. That order was never appealed. In 2007, however, Greenhorne filed a separate suit against the City seeking contribution based on a nuisance theory. The trial court entered summary judgment in favor of the City in the contribution action on res judicata grounds. The Court of Appeals affirmed the summary judgment ruling in the 2007 action, holding that because the City's liability had been adjudicated in its favor in the 2003 action, res judicata applied and Greenhorne could not maintain a contribution action based on that alleged tort liability. The Court of Appeals further held that although Greenhorne had standing to appeal the grant of summary judgment to the City in the 2003 action filed by the residents, it had failed to do so; therefore, it was barred from asserting those issues in a new claim for contribution.

Old Republic National Title Insurance Co. v. Attorney Title Services, Inc., No. A09A0999 (June 12, 2009). The Court of Appeals held that the trial court did not err in dismissing a title insurance company's breach of contract claim against an attorney where the title insurance company's claim sounds in professional negligence, not breach of contract. The attorney entered into a contract with the title insurance company to provide "services, title examinations, and opinions." The title insurance company sued alleging breach of contract when the attorney negligently failed to include a conveyance in a legal description of certain property. The trial court correctly found the contract was one for professional services, so the title insurance company's claim sounded in tort, not contract. Since the title insurance company did not include an expert affidavit under O.C.G.A. § 9-11-9.1, and because the four year statute of limitations for a professional negligence claim had run, the trial court did not err in dismissing plaintiff's claims.

T&G Enterprises, LLC v. White, No. A08A1029 (June 16, 2009). Plaintiff brought this action for specific performance of a contract for the sale of property known as 435 Sagamore Drive, "being more particularly described as Lot 70 77 . . . of Freeway Subdivision as recorded in Plat Book 3724, Page 087, Whitfield County, Georgia." The version of the contract in question also contained a handwritten note providing that the "[p]ortion of property to be sold is portion containing house." Plaintiff allegedly believed that he was purchasing both Lots 70 and 77, or at least a portion of both lots containing a house and a nearby well. After a bench trial, the trial court ordered that the contract be specifically performed to award Plaintiff Lot 70, which contained the house, and the portion of Lot 77 containing the well. The Court of Appeals reversed the trial court's judgment. The Court held that the handwritten note purporting to convey the portion of property containing the house is too vague to provide a key by which the boundaries of the portion of the property within Lots 70 and 77 intended to be conveyed could be established with sufficient certainty to sustain an award of specific performance. Plaintiff argued on appeal that even if the property description is too vague to support specific performance, the trial court's ruling could be affirmed as a reformation of the contract. The Court rejected this argument, noting that Plaintiff did not seek reformation of the contract in his complaint, the issue of reformation was omitted from the pretrial order, and there is no mention of reformation in the trial court's order.

Triad Health Mgmt. of Georgia, III, LLC v. Johnson, No. A09A0286 (June 3, 2009). Johnson's father, Matthew, was incapacitated and Johnson admitted him into a nursing home. Johnson signed an "Admission Contract" which had a broad arbitration clause. Matthew died and Johnson sued the nursing home for negligence. The nursing home filed a motion to compel arbitration, and the trial court denied the motion. The Court of Appeals reversed. Johnson argued that he was suing on behalf of his father, who never agreed to the arbitration clause. According to the court, when Johnson signed the Admission Contract while his father was incapacitated, Johnson acted as his agent as contemplated by the power of attorney. Matthew Johnson, the father, was bound by the agreement as a result. Johnson also argued that the arbitration clause was not enforceable because a Georgia statute says no agreement to arbitrate is enforceable, unless made subsequent to the alleged malpractice. The Court ruled that the Federal Arbitration Act ("FAA") preempted state law and applied because the nursing home was engaged in interstate commerce. In this instance, the arbitration clause was enforceable.