

# B&B BALCH & BINGHAM LLP

## Appellate Monthly



Georgia Supreme Court

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*Court of Appeals held assertions of fact contained in the briefs of the parties do not, standing alone, constitute competent evidence for the resolution of a summary judgment issue.*] (Blackburn, G., 3-0).

**City of Atlanta v. Roach**, No. A09A0456; 2009 WL 929980 (Ga. App.) [*Workers' Compensation: A superadded injury arises as a natural consequence of, or directly from, the original work-related injury or reasonable medical treatment of the injury.*] (Mikell, C., 3-0).

**Department of Transportation v. Douglas Asphalt**, 2009 WL 962170 [*Evidence: A motion in limine may be used to exclude irrelevant evidence, not insufficient evidence.*] (Blackburn, G., 3-0).

**Department of Transportation v. Douglas Asphalt**, 2009 WL 1015122 [*Appeal: When an appeal is dismissed, all cross appeals will also be dismissed unless there is an independent basis for the cross appeal.*] (Blackburn, G., 11-1-0).

**DuPree v. South Atlantic Conference of Seventh Day Adventists, Inc.**, No. A09A0722, 2009 WL 1014817 [*Property: Protracted delay created issue of fact as to whether seller waived earnest money defense.*] (Johnson, E., 3-0).

**Fox v. City of Cumming**, No. A09A0532, 2009 WL 1085740 [*Eminent Domain: The Court of Appeals reversed an award of attorneys' fees holding that while plaintiff's arguments did not prevail, they did not lack substantial justification.*] (Mikell, C., 3-0).

**Futch v. Lowndes County**, Nos. A09A0014, A09A0201, 2009 WL 8885284 [*Nuisance: County may be liable for nuisance where it exercised control of a drainage ditch that flooded on multiple occasions.*] (Phipps, H., 3-0).

**Gettner v. Fitzgerald, et al.**, No. A09A0155 [*Defamation: Employer was entitled to summary judgment for invasion of privacy claim where employee signed a release, but jury issue existed in claim against publisher as to whether the defamatory statement about employee could be proven false.*] (Ellington, J., 3-0).

**Lehman v. Keller**, No. A09A0690 [*Contracts: Home purchasers cannot maintain fraud and breach of contract claims against seller when they had notice of defects.*] (Mikell, C., 3-0).

**Liberty Mutual Insurance Co. v. Roark**, No. A09A0550, 2009 WL 1085799 [*Worker's compensation: When an injury occurs in Georgia, the worker's compensation law of Georgia applies.*] (Johnson, E., 3-0).

**Pope v. Mercury Indemnity Company of Georgia**, No. A09A0619; 2009 WL 943733 [*Insurance: Court of Appeals held insurance policy was void where homeowner made misrepresentations to insurance company.*] (Blackburn, G., 3-0).

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## CASE SUMMARIES

**Insurance Co. of the State of Pennsylvania v. APAC-Southeast, Inc.**, No. A09A0081, 2009 WL 1026595 (April 17, 2009). **Balch & Bingham lawyers Dart Meadows and Alex Khoury** were successful in the Court of Appeals. This case involves a dispute over excess general liability coverage for an additional insured under a follow-form excess policy issued by Defendant Insurance Company of the State of Pennsylvania ("ICSOP"). The Plaintiff, APAC-Southeast, Inc. ("APAC") entered into a contract with the Georgia Department of Transportation to serve as the general contractor on a road rehabilitation project. APAC hired Defendant Costello Industries, Inc. ("Costello") as a subcontractor on that project. APAC's subcontractor agreement required Costello to obtain various insurance policies with a minimum coverage of \$1 million each. The agreement also required Costello to name APAC as an additional insured on "all policies," except its workers compensation policy. Costello hired insurance broker Lockton Insurance Agency, Inc. ("Lockton") to obtain the required policies. Lockton obtained a general liability policy with \$1 million coverage that extended additional insured coverage to any entity Costello was required by contract to name as an additional insured. Lockton also obtained a follow-form excess policy from ICSOP which provided \$10 million in excess cover-

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age. The follow-form policy was silent as to additional insureds, and therefore, followed the general liability policy's definitions and terms regarding additional insureds. Lockton issued a certificate of insurance to APAC on Costello's behalf indicating Lockton's belief that both the general liability policy and the excess policy named APAC as an additional insured.

In 2003, two teenage boys were severely injured while driving through the construction zone where Costello was working pursuant to its contract with APAC. The injured boys filed suit against APAC, Costello, and others for their injuries resulting from the accident. Before the trial, APAC settled all claims against it. APAC demanded that ICSOP contribute to its settlement up to the limits of the excess policy. ICSOP refused to provide coverage to APAC, arguing that APAC was not an additional insured under the excess policy. APAC sued ICSOP for failing contribute to the settlement and for bad faith. In the alternative, APAC sued Costello for breach of contract and Lockton for breach of fiduciary duty and negligence arising out of Lockton's preparation of the certificates of insurance. Both APAC and Lockton moved for summary judgment on the grounds that APAC was an additional insured under the excess policy. The trial court agreed, granting summary judgment to Lockton and partial summary judgment to APAC.

The Court of Appeals affirmed the trial court's ruling. Applying Georgia's rules of contract interpretation, the Court determined that the language "all policies" in the agreement was not limited to the types of policies specifically required by the agreement, as argued by ICSOP, but instead referred to all policies Costello obtained in order to provide coverage for its work under the agreement. The Court also concluded that the additional insured endorsement was ambiguous as to whether it extended additional insured coverage where the underlying contract did not require the subcontractor to obtain excess coverage, but did require additional insured coverage for any excess policy that was procured. The Court interpreted the ambiguous additional insured endorsement in favor of the insured, as it must under Georgia's laws of insurance contract interpretation, and ruled that APAC was an additional insured under ICSOP's excess policy.

**Adams v. State Farm Mutual Automobile Ins. Co.**, No. A08A2315 (April 14, 2009). In Adams v. State Farm, Randolph Adams suffered injuries in a car wreck, eventually recovering \$25,000 from Nationwide Insurance Co., the tortfeasor's insurer. Nationwide paid \$9,217.66 to Grady Hospital for Adams' hospital stay. Adams sought additional compensation from his own insurer, State Farm, for the injuries. Adams and State Farm disagreed, however, over the amount State Farm could set off from Adams' uninsured motorist policy - Adams claimed State Farm was not entitled to the \$9,217.66 paid to Grady Hospital. The Court examined O.C.G.A. § 33-7-11(b)(1)(D)(ii), which defines an uninsured motor vehicle as one in which the tortfeasor has liability insurance but the available coverage is less than the limits of the uninsured motorist coverage provided under the insured's insurance policy. The Court further analyzed the statute's definition of "available coverage's" as the policy limits "less any amounts by which maximum amounts payable under such limits of coverage have, by reason of payment of other claims or otherwise, been reduced below the limits of coverage." Relying on two Georgia Supreme court cases and in particular, the phrase "other claims or otherwise," the Court determined the amount of the available liability coverage was reduced by the amount of a lien and reversed summary judgment, holding that Grady's hospital lien falls within the meaning of Georgia's uninsured motor vehicle statute. Therefore State Farm is prohibited from taking credit for the \$9,217.66 paid directly to Grady by the tortfeasor's carrier.

**Aaron v. Georgia Farm Bureau Mutual Ins. Co.**, No. A09A0354 (April 8, 2009). In Aaron v. Georgia Farm Bureau Mutual Ins. Co., Alvin Aaron sued his insurance company, Georgia Farm Bureau Mutual Insurance Company ("Georgia Farm") after Georgia Farm refused to pay for certain damages to Aaron's house. Over the course of a year, the parties exchanged several letters regarding the calculation of damages. Eventually, Aaron offered to settle the dispute, but Georgia Farm refused, stating that the one-year limitation in the policy had passed, thereby precluding Aaron from suit under the policy. Aaron sued, arguing that the one-year limitation provision did not bar him from seeking payment of the original amount calculated by Georgia Farm; it simply barred him from suing Georgia Farm. Aaron's argument was based on a provision of the policy which stated that Georgia Farm would "adjust all losses with [the beneficiary]." The trial court dismissed Aaron's claim finding that Aaron's claims were barred by the policy's one-year limit. The Appellate Court was "not persuaded by Aaron's attempt to couch his claim as something other than an action under the insurance policy, which is subject to the one-year claims limitation." In addition, the one-year limitations period barred the insured's ability to seek an appraisal, which the Court reasoned is merely a method for calculating amount of loss. The Court further held that although Aaron may have been lulled into believing that Georgia Farm wanted to settle, "mere negotiation for possible settlement unsuccessfully accomplished is not the type of conduct designed to lull the claimant into a false sense of security so as to constitute an estoppel by conduct thus precluding an assertion of that defense by the insured."

**Atcheson v. Cochran**, No. A09A0456 (April 17, 2009). On May 16, 2008, nine days before the expiration of the statute of limitations, plaintiffs sued defendants for personal injuries and loss of consortium. The defendants were finally served process almost three months after the statute of limitation expired. Although there was evidence of attempts by the defendants to evade service of process, the plaintiffs did not seek an order from the trial court permitting service by publication. When an action is filed within the applicable statute of limitation period but is not served upon the defendant within five days thereafter or within the limitation period, the plaintiffs must establish they acted in a reasonable and diligent manner in attempting to ensure that proper service is effectuated as soon as possible. It is the plaintiff's burden of showing due diligence was exercised. The trial court has discretion in determining due

diligence. As a result, the Court of Appeals affirmed the Superior Court of Paulding County grant of Cochrans' motion to dismiss on the ground that the Atchesons had not acted with required diligence in effecting service.

**Bagnell v. Ford Motor Co.**, Nos. A09A0069, A09A0070, 2009 WL 1014881 (April 16, 2009). This products liability action arose out of a one-vehicle wreck that occurred in July of 2001. Barbara Meyers, a Georgia resident, was driving her grandchildren and several other individuals from Houston, Texas to Atlanta, Georgia in a 1991 Ford Aerostar van. She lost control of the van on a Texas Highway. The van rolled over and fell off a bridge into a river. Myers and one of her grandchildren survived, but five other passengers drowned. Lori Bagnell and other representatives of the deceased passengers (collectively "Bagnell") sued Ford Motor Company in Clayton County, Georgia alleging that a design defect in the Aerostar van made it unstable and prone to roll over. A jury ultimately returned a defense verdict. Bagnell appealed arguing that the trial court erred in granting summary judgment on grounds that Georgia's 10-year statute of repose barred the strict liability and negligent design claims, which were filed over 12 years after Ford first sold the van. On appeal, Bagnell argued that Texas' 15-year statute of repose, rather than Georgia's 10-year statute, applied because the statute of repose is considered substantive in nature. The Court of Appeals noted that under the doctrine of *lex loci delicti*, tort cases are governed by the substantive law of the state where the tort or wrong occurred, but questions involving procedure or the appropriate remedy are governed by the law of the state where the action is filed. The Court noted that "statutes of repose look only to the remedy and not to substantive rights" and concluded that the statute of repose is remedial/procedural in nature. As such, the Court held that Georgia's 10-year statute of repose applied to Bagnell's claims and affirmed the trial court's determination on that issue.

**Bone v. The Children's Place, Inc.**, No. A09A0506, 2009 WL 921386 (April 7, 2009). A 20-month-old child was injured when she cut her eye on a protruding clothing rack inside the defendant's store. The child's mother brought a premises liability action. In its brief in support of its summary judgment motion, the defendant relied exclusively on an alleged admission by the plaintiff at deposition that she was unaware of any evidence that the defendant store had knowledge of the hazard. The store failed to file a copy of the deposition transcript with its motion. The trial court granted summary judgment in favor of the clothing store, relying solely on the clothing store's brief, explicitly acknowledging in two separate orders that the deposition testimony was not considered. On appeal, the Georgia Court of Appeals reversed, holding that the store's brief, citing deposition testimony not in the record, was not proper evidence upon which to base the grant of summary judgment because "assertions of fact contained in the briefs of the parties do not, standing alone, constitute competent evidence for the resolution of a summary judgment issue." Additionally, the Court held that as the store was the summary judgment movant, the store had to present evidence tending to negate the existence of knowledge of the hazard. Until that initial burden was met, the plaintiff customer did not have to present evidence of the store's actual or constructive knowledge of the hazard.

**City of Atlanta v. Roach**, No. A09A0456 (April 8, 2009). On April 8, 2009, the Court of Appeals affirmed the decision of the appellate division of the State Board of Workers' Compensation (the "Board") holding that third-degree burns from a heating pad did not constitute a "superadded injury" arising out of the natural consequence of, or directly from, an original work-related hip fracture. In May 2004, Richard Roach, a City of Atlanta police officer, suffered a fractured hip and other injuries when his police vehicle was struck head-on by a drunk driver. His authorized treating physician assessed Roach a twelve percent (12%) whole-body permanent partial disability based on impaired cognition and impaired gait. After relocating to Rochester, New York, Roach drove to Atlanta to discuss returning to work in March 2006. The drive resulted in soreness of his previously fractured hip, which Roach sought to alleviate with a heating pad. After falling asleep on the heating pad, Roach discovered the heating pad caused third-degree burns. The Board found that the burn injury arose from Roach falling asleep while using the heating pad and was not the result of reasonable required medical treatment prescribed or authorized for the treatment of Roach's original work-related hip injury. The superior court set aside the Board's award and reinstated an administrative law judge's ("ALJ") previous finding that Roach suffered a compensable "superadded injury." In reviewing a workers' compensation award, courts must construe evidence in the light most favorable to the party who prevailed before the Board. The Court of Appeals reversed the judgment of the superior court insofar as it ruled that Roach suffered a superadded injury.

**Department of Transportation v. Douglas Asphalt**, 2009 WL 962170 (April 10, 2009). The Douglas Asphalt Company sued the Georgia Department of Transportation ("GDOT") for breach of contract and GDOT counterclaimed for the same, arising from a contract to widen and re-pave parts of Interstate 75. About a year into the contract, GDOT suspected that Douglas Asphalt was not mixing enough lime into its asphalt mixture (lime helps make the finished project more durable). GDOT alleges that because the asphalt did not contain enough lime, Douglas Asphalt breached the agreement. Douglas Asphalt disagreed. In support of its claim, GDOT proffered evidence of damages and attorney's fees. Douglas Asphalt filed a motion in limine to keep the testimony on GDOT's non-liquidated damages out of court. Specifically, Douglas Asphalt argued that GDOT had not shown that there was an actual shortage of lime or that GDOT's damages were caused by a shortage of lime. The trial court agreed and granted the motion in limine on GDOT's non-liquidated damages and attorney's fees. On appeal, the Court of Appeals cited to law that held a motion in limine is an appropriate method to exclude evidence because it is irrelevant, but not to exclude evidence because it is insufficient. Therefore, the Court of Appeals held Douglas Asphalt's arguments for exclusion were not appropriate motion in limine arguments and reversed.

**Department of Transportation v. Douglas Asphalt**, 2009 WL 1015122 (April 16, 2009). In a related appeal, GDOT filed a motion for partial summary judgment, which the trial court partially granted. Douglas Asphalt appealed, and GDOT cross-appealed. Douglas Asphalt failed to file a brief in support of its appeal, and the Court of Appeals dismissed Douglas Asphalt's appeal. The issue then became whether the Court had jurisdiction over GDOT's cross-appeal. The Court held it does not have jurisdiction to entertain a cross-appeal, which "must derive its life from the main appeal." Because GDOT had no independent basis under which to bring its claim, it was dismissed.

**DuPree v. South Atlantic Conference of Seventh Day Adventists, Inc.**, No. A09A0722, 2009 WL 1014817 (Apr. 16, 2009). Plaintiff DuPree entered into an agreement to purchase real property owned by defendant South Atlantic Conference of Seventh Day Adventists, Inc. The contract was executed on behalf of defendant through a specific church. The contract required plaintiff to make two earnest money payments, but because of an oversight, plaintiff failed to make both payments. The day before closing, defendant notified its agent that the pastor of the church that executed the contract did not have authorization, and defendant did not consent to the closing. Defendant's executive committee voted afterwards not to close on the property for financial reasons. Plaintiff brought suit. One of defendant's defenses was that plaintiff failed to make the second earnest money payment. Plaintiff answered that defense claiming that defendant waived the right to refuse to perform on his failure to pay the earnest money by waiting over a year after the lawsuit was filed to allege that particular defense. The trial court granted defendant's motion for summary judgment, but the Court of Appeals reversed. The Court held that although waiver may be shown by conduct before or after the closing date, a defendant's protracted silence may raise a fact issue as to whether he has waived that right. Hence, because of the protracted delay, the Court held that summary judgment was not appropriate because it was a fact question whether defendant waived the earnest money defense by its conduct.

**Fox v. City of Cumming**, No. A09A0532, 2009 WL 1085740 (April 23, 2009). The underlying suit, Fox v. City of Cumming ("Fox I"), 289 Ga. App. 803 (658 S.E.2d 408) (2008), involved claims under the Landowner's Bill of Rights and Private Property Protection Act, O.C.G.A. § 22-1-11, challenging the City's assertion of its power of eminent domain to survey property for the purpose of designing sewer facilities. The initial action was dismissed, and the City filed a motion for attorney's fees under O.C.G.A. § 9-15-14. The trial court granted the motion, awarding fees. After granting the application for discretionary appeal, the Georgia Court of Appeals reversed the grant of fees by the lower court. The Court of Appeals reversed for two reasons. First, the Court held that because the statute had not been interpreted by any court prior to Fox I, the plaintiff's interpretation and application of the statute "was not so devoid of a justiciable issue 'that it could not reasonably be believed that a court would accept' it." Second, the Court held that the trial court abused its discretion by awarding fees under O.C.G.A. § 9-15-14(b) by determining that the plaintiff's interpretation "lacked substantial justification" because there was a reasonable basis for the plaintiff's position.

**Futch v. Lowndes County**, Nos. A09A0014, A09A0201, 2009 WL 8885284 (April 3, 2009). Ben Futch brought this case against Lowndes County and the Lowndes County Industrial Authority asserting claims stemming from the recurrent flooding of the property Futch purchased from the Industrial Authority that abutted a Lowndes County drainage ditch. Futch alleged that the county agreed to lower the elevation of the ditch so it would properly drain and not back-up on Futch's property. The county began lowering the ditch, but discontinued its efforts because officials feared the underlying sanitary sewer line would rupture without adequate drainage. When the flooding continued, Futch brought this lawsuit on theories including fraud, negligent misrepresentation, and nuisance. The superior court granted summary judgment to both the Industrial Authority and the county.

The Court of Appeals affirmed, in part, and reversed, in part. The Court found no evidence of the county's intent not to perform the required excavations and no evidence that the Industrial Authority concealed the property's "bowl configuration" from Futch. Therefore, both defendants were entitled to summary judgment on Futch's claim of fraud. Likewise, defendant's failure to inspect the property failed to state a claim for negligent misrepresentation. The Court agreed, however, that given evidence of multiple floods, the county may be liable for maintenance of a nuisance and reversed the superior court's award of summary judgment to the county on Futch's claim of negligence. Because the Industrial Authority exercised no control over the drainage ditch, however, it was entitled to summary judgment on Futch's claim of nuisance.

**Gettner v. Fitzgerald, et al.**, No. A09A0155 (April 1, 2009). In Gettner v. Fitzgerald, et al., after a report was published that plaintiff had been demoted by his former employer for poor job performance, plaintiff brought a defamation action against his former employer, its chief executive officer, and the publisher of the report. Plaintiff alleged that the report was false, claiming instead that he had voluntarily requested a demotion to increase his own job satisfaction. The Georgia Court of Appeals reversed the trial court's order granting summary judgment in favor of the publisher holding that there was an issue of fact on whether Plaintiff was demoted for some other reason other than unsatisfactory performance, which would make the publisher's statement capable of being proven false. The Appellate Court affirmed summary judgment in favor of plaintiff's former employer and its chief executive officer on plaintiffs' claim for invasion of privacy because Plaintiff expressly released them from any invasion of privacy claim and failed to

show the release was not enforceable. The Appellate Court also affirmed summary judgment on plaintiff's misappropriation of his name and likeness claim against the employer and the chief financial officer because plaintiff failed to identify any evidence in the record that defendants benefitted from the unauthorized use of plaintiff's credentials or image on their website after plaintiff was terminated.

**Lehman v. Keller**, No. A09A0690 (April 7, 2009). In Lehman v. Keller, plaintiffs purchased a home from defendant in 2004. At the time of the sale, defendant disclosed in the seller's property disclosure statement that defendant had knowledge of termite damage to the house. Plaintiffs failed to do their own inspection of the house prior to the closing. After plaintiffs tried to sell the house in 2005, a potential buyer inspected the home and termite damage was found. Eighteen months after plaintiffs purchased the home, they sent defendant a letter notifying him of their intent to rescind the Agreement. Plaintiffs then filed a lawsuit against defendant for fraud and breach of contract related to defendant's alleged failure to disclose previous termite damage reports and defendant's "cover up" repairs. The Georgia Court of Appeals affirmed the trial court's grant of summary judgment in favor of the defendant. Specifically, the Court held that plaintiffs could not establish an essential element of their fraudulent concealment claim, justifiable reliance, as a matter of law because they failed to exercise due diligence in obtaining their own inspection of the property or requesting a copy of a previous inspection they were aware had taken place. The Court also rejected plaintiffs' rescission claim as a matter of law, holding that waiver is generally found where the intent to rescind is not asserted in a timely fashion. Because plaintiffs waited eighteen months after they purchased the home to notify defendant of their intent to rescind, even though plaintiffs had notice of termite damage, their prior knowledge constituted waiver. Plaintiffs' breach of contract was similarly dismissed on summary judgment despite plaintiffs' assertion that defendant made misrepresentations regarding termite damage in the agreement between the parties because plaintiffs had notice of previous termite damage to the house but elected to forego a pre-closing inspection.

**Liberty Mutual Insurance Co. v. Roark**, No. A09A0550, 2009 WL 1085799 (Apr. 23, 2009). In 2003, Robert Roark, a citizen of Tennessee, was injured while driving a commercial truck in Catoosa County. Roark received workers' compensation benefits from his employer's insurance company, Liberty Mutual, which eventually paid out approximately \$80,000 to Roark. Two years later, Roark filed a personal injury lawsuit against the driver of the other vehicle. Liberty Mutual filed an intervenor complaint, alleging that it had the right as a matter of law to intervene to protect its subrogation lien. The personal injury claim eventually settled. Afterwards, Liberty Mutual voluntarily dismissed its intervenor case and filed a petition to enforce its subrogation lien in a circuit court in Tennessee. Fearing a later suit or inconsistent Tennessee judgment allowing Liberty Mutual to recover proceeds collected by Roark from McReynolds, Roark subsequently moved to join Liberty Mutual as an indispensable party, asserting that they could not compromise their tort claim against McReynolds until the subrogation issue was settled. A few weeks later Liberty Mutual filed a petition to enforce its subrogation lien. Roark filed motions for judgment on the pleadings, which were granted. Liberty Mutual appealed on two grounds. First, it challenged the trial court's decision to apply Georgia law. The court of appeals dismissed this argument, noting the well established precedent that the Georgia workers' compensation rule of law applies when the injury occurred in Georgia. Second, Liberty Mutual claimed that Roark consented to the application of Tennessee law when he moved to join Liberty Mutual as an indispensable party. The Court also dismissed this argument, noting that appellants' cited no supporting authority, and the court itself could find none. The judgment on the pleadings was therefore affirmed.

**Pope v. Mercury Indemnity Company of Georgia**, No. A09A0619; 2009 WL 943733 (April 9, 2009). Plaintiffs purchased a homeowners' insurance policy with Mercury through plaintiffs' independent insurance agent in July 2004. In August 2005, Mercury informed plaintiffs' insurance agent that the policy was being cancelled because plaintiffs had a diving board on their swimming pool, a risk for which Mercury would not insure. After speaking with the independent agent, Mercury agreed to reissue the homeowners' policy if plaintiffs provided a picture of the swimming pool with the diving board removed. Plaintiffs provided the picture, but subsequently re-installed the diving board. On July 5, 2005, plaintiffs' property sustained significant damage from a tornado. Among the pictures taken by a Mercury claims adjuster was a photograph showing plaintiffs' swimming pool with a diving board installed. Mercury initiated an action to rescind its contract of insurance with plaintiffs based on plaintiffs' material misrepresentations. The trial court held that plaintiffs made a material misrepresentation with regard to the diving board, and the homeowners' policy was void. Plaintiffs appealed, asserting *inter alia* that the loss, damage from a tornado, was unrelated to the misrepresentation, the diving board. The Court of Appeals disagreed, finding that plaintiffs were "obligated to deal with their insurance company truthfully, regardless of whether they thought the facts in question were material," and that the fact that the loss was unrelated to the misrepresentation was not "relevant in determining whether their misrepresentation regarding the board's removal should void coverage."

**Travelers Excess & Surplus Lines Co. v. City of Atlanta**, No. A09A0025, 2009 WL 903372 (April 6, 2009). Travelers Excess and Surplus Lines Company and Travelers Indemnity Company of America (collectively "Travelers") brought this negligence and inverse condemnation action against the City of Atlanta to recover damages for commercial property destroyed in a fire. Travelers alleged the City was liable for the failure of its water department to notify the fire department that the hydrant located closest to the fire was inoperable or to tag the hydrant as out of service. The trial court granted the City summary judgment on the basis that the claims were barred by sovereign immunity. The Court of Appeals upheld the century-old precedent that a municipal corporation is

immune from liability for property damage caused by a fire even if the municipality fails to provide suitable apparatus or there exists insufficient supply of water. The court found that it is of no legal consequence that the negligence respecting the hydrant was committed by the water department rather than the fire department. Likewise, the Court of Appeals held the actual claim, whether negligence or inverse condemnation, would not change the outcome.