IN THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA

CMD REALTY INVESTMENT FUND, IV, L.P, *
*
*
Petitioner, *
*
v. * CASE NO. S07C0501
*
GEORGE CORNELIUS NEVITT, *
*
Respondent, *

BRIEF OF AMICUS CURIAE GEORGIA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER CMD REALTY INVESTMENT FUND, IV, L.P. AND REQUEST TO GRANT PETITION FOR CERTIORARI

INTRODUCTION

COMES NOW the Georgia Defense Lawyers Association ("GDLA") and files this *amicus curiae* brief, as permitted by Rule 23 of the Rules of this Court, in support of petitioner CMD Realty Investment Fund, IV, L.P. ("CMD").

One of the issues before this Court is whether prior written and recorded statements made by respondent George Cornelius Nevitt ("Nevitt") to representatives of CMD's insurance carrier constitute admissions or propositions made with a view to compromise and are, therefore, inadmissible at trial, in whole or in part. *Amicus Curiae* requests that the Court reverse the decision of the Court

of Appeals and conclude it erred in holding that certain factual statements made by Nevitt are inadmissible.

IDENTITY AND INTEREST OF AMICUS CURIAE

The GDLA is an association of Georgia lawyers who engage in litigation, primarily for the defense, and is dedicated to supporting and improving the civil defense bar. It consists of approximately 650 attorneys, including sole practitioners and members of law firms of all sizes throughout the state of Georgia.

The GDLA has a direct interest in upholding the integrity of the adversary system through the allowance of relevant, admissible evidence at trial to aid the fact-finder. The GDLA is concerned with the ramifications of the holding by the Court of Appeals and submits this brief to assist the Court in understanding that the exclusion of statements, such as those given by Nevitt, will severely inhibit the settlement of claims and will lead to inherent unfairness at trial.

STATEMENT OF THE CASE

Amicus Curiae adopts the Facts and Proceedings Below presented by petitioner in its pleadings before this Court. For purposes of this brief, however, the following facts are summarized.

On June 3, 2003, Nevitt sent a letter to CMD informing it that he had been injured on June 19, 2001 while in the stairwell of one of its buildings. Nevitt's letter described the facts surrounding his injury, claimed that CMD was negligent

in violating certain building code provisions, and expressed his hope and desire that the matter be settled. To this end, Nevitt requested that CMD's insurance carrier promptly contact him to discuss the incident.

CMD forwarded Nevitt's letter to its insurance carrier, and on June 12, 2003, a claims adjuster called Nevitt and took a recorded statement from him. In response to the adjuster's questions, Nevitt recounted how the accident had occurred and asserted the same claims of negligence as he had in his June 3 letter. Although Nevitt made some mention of workers' compensation and/or insurance during this interview, there was no discussion of a compromise or settlement of his claim. Indeed, Nevitt's case did not settle, and so Nevitt, a licensed attorney, filed a pro se lawsuit just prior to the expiration of the statute of limitations.

Shortly after suit was filed, Nevitt hired counsel, who amended the complaint to change Nevitt's theory of liability. Whereas Nevitt had initially claimed negligence based upon building code violations, his new theory of recovery claimed that a slick, metallic stair nosing had caused his fall.

Prior to trial, CMD indicated its intent to introduce Nevitt's June 2003 letter and his recorded statement to demonstrate Nevitt's prior inconsistent factual allegations. At the pre-trial conference, the trial court denied Nevitt's motion to exclude the entirety of the letter and the recorded statement but agreed to redact all references to settlement in both. Thus, a redacted version of the letter and

transcript of the recorded statement were later admitted into evidence. At the conclusion of the trial, the jury returned a verdict for CMD. Nevitt appealed, and the Court of Appeals reversed, holding that the trial court had erred in admitting the redacted letter and recorded statement into evidence.

ARGUMENT AND CITATION OF AUTHORITY

A. Respondent's Oral And Written Factual Statements Were Not Made As Part Of An Offer To Compromise

1. Petitioner Did Not Induce An Offer To Settle Or Contemplate A Compromise

Pursuant to O.C.G.A. § 24-3-37, "admissions or propositions made with a view to a compromise are not proper evidence." At the same time, a court should not exclude the admission of a party "who may desire to settle a claim where the opposite party [does] not induce the statement and [does] not contemplate a compromise or abatement of [the] demand." Pacific Nat. Fire Ins. Co. v. Beavers, 87 Ga. App. 294, 73 S.E.2d 765 (1952).

In Graves v. Graves, 252 Ga. 27, 28, 310 S.E.2d 901, 902-03 (1984), the parties had engaged in discussions concerning the valuation of some land at issue in the lawsuit. One of the parties sought to exclude these statements as offers of compromise. In rejecting this contention, this Court held that while the parties clearly had come together for a discussion and while the topic of conversation had dealt with the issues and parties involved in the lawsuit, there was "no evidence

whatsoever that the [discussions] formed a part of an admission or proposition made with a view to compromise." Id. at 28-29. "The record shows that whatever [appellee] may have had in mind when he and his attorney arrived at the meeting, no compromise or settlement proposition was offered by either party." Id.

Here, the Court of Appeals held that Nevitt's June 2003 letter was an offer to compromise. It did so, reasoning that the rule in Beavers was inapplicable because "Nevitt's June 2003 letter . . . did contemplate a compromise of his demand." This holding ignores the fact that ***CMD*** did not initiate the contact with Nevitt nor did it contemplate a settlement. Under Beavers, admissions or propositions by a party are admissible "where the opposite party did not . . . contemplate a compromise." Nevitt's letter was submitted unilaterally, without any inducement by CMD and without the slightest suggestion by CMD that it desired to compromise Nevitt's claim. While ***Nevitt*** may well have "induced" settlement, nothing suggests that CMD did so.

The Court of Appeals further held that the statements Nevitt made in his recorded conversation with CMD's insurance adjuster were induced by Nevitt's request to enter into settlement negotiations. The court found that the call to Nevitt induced his statements, reasoning that even if the adjuster had not directly induced an offer to compromise, "she unquestionably induced Nevitt to give the statement concerning his version of the incident." Under this novel holding by the Court of

Appeals, gathering information about an incident following an insurer's receipt of a notice of a claim will henceforth be considered an "inducement" or contemplation of compromises if, during the conversation, the claimant makes any reference, however vague, to resolving, settling or otherwise compromising his claim. Thus, it is now the rule in Georgia that any factual statements given by a claimant to an insurance adjuster will be excluded from trial, if the impetus for the statements is a demand letter by the claimant to settle his case. This cannot and should not be the law.

Amicus Curiae urges this Court to find that, like Graves, although Nevitt and the adjuster "came together for [a] discussion" about the incident, Nevitt's statements did not constitute an admission or proposition made with a view to a compromise. Further, this Court should hold that under the circumstances presented in this case, CMD did not induce Nevitt to make any statements to its insurer.

2. No Offers To Compromise Occurred Because Neither Party Made Concessions With A View To Bring About A Settlement

O.C.G.A. § 24-3-37 has been held to be applicable only to admissions made as a concession to bring about a compromise or settlement. Bounds v. Coventry Green Homeowners' Ass'n, Inc., 268 Ga. App. 69, 72, 601 S.E.2d 440, 442 (2004). The common meaning of the word "concession" includes a "settlement of differences in which each side makes concessions," American

Heritage Dictionary (2000), or "an agreement resolving differences by mutual concessions esp. (sic) to prevent or end a lawsuit." Merriam-Webster's Dictionary of Law (1996).

Where the facts show "no more than a demand for payment and an offer to accede to plaintiff's demand upon certain terms then there is no offer to compromise [within the meaning of O.C.G.A. § 24-3-37]." Allen v. Brackett, 165 Ga. App. 415, 418, 301 S.E.2d 486, 489 (1983). Therefore, the crucial issue in determining if concessions have been made is whether the evidence shows intent by either party to "surrender any alleged right for the purpose of reaching a compromise." Id.

Even if Nevitt had conveyed his desire to settle his claim in his June 2003 letter, it cannot be said that any "concessions" were made on the part of either party. As to Nevitt, the letter was an attempt to put CMD on notice of his claim and included a request to have a representative of CMD's insurance company call him to discuss a possible resolution. This was a unilateral attempt by Nevitt to notify CMD of the accident, and nothing reveals that he conceded to "surrender any alleged right" in order to reach a compromise or settlement. Nor can the mere act of the adjuster's subsequently contacting Nevitt be construed as a "concession" in response to the letter. It is common knowledge that insurance adjusters contact claimants when a claim is presented to them.

Similarly, the recorded statement itself nowhere reveals any evidence of concessions. The adjuster began by seeking background information from Nevitt concerning when, where, and how the incident had occurred and the extent of Nevitt's injuries. Nevitt was asked what he believed to be the cause of the accident, and he gave his theory of liability, namely that CMD had violated the building code by locking the stairwell doors. The facts which Nevitt communicated to the adjuster were not concessions; they merely summarized the incident and the alleged acts of negligence on the part of CMD. The adjuster's questions and responses neither made an offer to settle nor conceded to settlement.

By allowing the Court of Appeals' opinion to stand, this Court would create an expansion of O.C.G.A. 24-3-37 that would severely chill insurance carriers' investigative processes and actually <u>impede</u> settlements. Under the Court of Appeal's holding, any inquiries made by insurance adjusters in response to letters proclaiming the defendant's liability could be construed as a compromise. Unlike <u>Allen</u>, where the court found that there was evidence that the parties were negotiating and "attempting to reach some understanding," there was no such evidence here. By the Court of Appeals' own admission, although Nevitt alluded to insurance coverage near the end of the conversation, he and the adjuster were "not discussing the terms of a settlement agreement." Neither the adjuster's questions nor Nevitt's statements concerning the cause of his fall and theory of

liability were made while discussing settlement, and no party made any concessions.

B. Even If Nevitt Did Make Admissions Or Propositions With A View To Compromise, His Independent Factual Statements Should Be Admissible For Impeachment Purposes

The exclusion of admissions pursuant to O.C.G.A. § 24-3-37 applies only to admissions "made as a concession to bring about a compromise or settlement" and not to "*independent statements of fact* by a party, even though made while the parties are trying to settle." Computer Communications Specialists, Inc. v. Hall, 188 Ga. App. 545, 546, 373 S.E.2d 630, 632 (1988); Austin v. Long, 5 Ga. App. 551, 63 S.E. 640 (1909). "There is a wide difference between statements of fact (or statements from which an admission of liability may be inferred), *even if made during negotiations for a settlement when made independently* or without a view of a compromise, and admissions made with a view to a compromise." Austin, 63 S.E. at 641 (emphasis added).

Although the trial court was careful to exclude any statements that even arguably related to an offer to compromise, the Court of Appeals found that Nevitt's factual statements concerning the incident and his theory of liability nevertheless were not made sufficiently "independent" of the purported offer to compromise. In so holding, the Court of Appeals imposed a unique and overly harsh requirement that factual statements and statements regarding offers to

compromise must somehow be separated. How this would work in practice is understandably never made clear by the Court of Appeals. For example, must the adjuster announce at the beginning of taking a statement that there will be no offers to compromise made? If so, what incentive does the claimant have to give the statement?

Or, if the claimant, while giving his statement, blurts out in the middle of it that he wants to settle his case, does this violate the Court of Appeals' requirement of separateness? The court's rule is as unworkable as it is illogical. Instead, what should have been done is exactly what the trial court did – simply redact any offending discussions regarding compromise or settlement.

Here, although Nevitt's supposed offer to settle and his factual statements occurred in the same document (June 2003 letter) and/or conversation (recorded statement), under Austin, this should not automatically render them insufficiently independent of each other. The June 2003 letter set forth the facts separately from Nevitt's expression of settlement. In Nevitt's recorded statement, the only mention of money or offer to compromise came at the very end of the conversation when Nevitt mentioned insurance and/or workers' compensation. But his recitation of the facts surrounding the incident and his theory of liability did not occur in the same context or even the same general time frame as the portion of the conversation relating to insurance. Thus, all of Nevitt's statements of fact were

made independently of any alleged offer to compromise or settle; as such, they were admissible for impeachment purposes.

C. **Public Policy Considerations Merit Reversal Of the Court Of Appeals' Decision And The Admission Of Independent Factual Statements**

By holding that Nevitt's written and recorded statements are inadmissible in their entirety, the Court of Appeals has also broadly expanded the definition of offers to compromise. If this decision is permitted to stand, whenever an adjuster contacts a claimant to discuss an incident and the claimant alludes to settlement unilaterally, anything the claimant tells the adjuster concerning the facts of the accident or his theory of liability would be considered inadmissible for *any* purpose, even if that purpose is merely to impeach the claimant about how he said the accident happened. Such a rule poses enormous obstacles for defense attorneys, insurance adjusters, **and plaintiffs**, all of whom are encouraged to reach a prompt settlement. Furthermore, such a rule would compromise the fairness and integrity of the judicial system.

Although the Court of Appeals correctly noted that the purpose behind O.C.G.A. § 24-3-37 is to encourage settlements and protect parties who freely engage in negotiations directed toward resolution of lawsuits, exclusion of such factual statements could ultimately lead to fewer settlements. Must adjusters now test the veracity of a claimant during a conversation or statement, because the

claimant cannot later be discredited about his inconsistent statements? This rule will hardly facilitate the negotiation of claims. Insurance companies and their adjusters will be wary about entering into any discussions with the knowledge that the claimant can utter the words "compromise" or "concession" at the end of the discussion and void any previous factual statements.

The inherent unfairness of such a rule is manifest. Plaintiffs will be able to assert one or more sets of facts and later conjure up another more favorable theory of liability without ensuing consequences. Without any action on the part of defendants, a claimant may simply give written notice of a claim that includes a statement that he would be willing to compromise, and any subsequent statement of the facts will be inadmissible at trial.

Prior inconsistent statements and contrasting theories of liability are important pieces of evidence for the fact-finder. Attorneys should be permitted to introduce such inconsistent statements for impeachment purposes to question a party's credibility. Where statements relating to settlement are redacted, there can be no prejudice to plaintiffs, since they can be assured that the jury will not hear any compromises or concessions. The new rule announced by the Court of Appeals impedes the ability of the fact-finder to properly evaluate the credibility of the parties and their claims.

CONCLUSION

The ill-advised expansion of the definition of "offers in compromise" by the Court of Appeals' opinion will have far reaching and undesirable effects on the likelihood of parties settling their claims. Defendants and their insurers must be given the opportunity to fully investigate the facts and must have assurances that a claimant will be truthful. Claimants should not be permitted to relay one set of facts and theory of negligence and then subsequently renege on their prior allegations under the guise that unilateral or vague statements relating to compromise were made in an attempt to settle the case. *Amicus Curiae* respectfully urges this Court to grant CMD Realty Investment Fund, IV, L.P.'s Petition for Writ of Certiorari to review the decision of the Court of Appeals.

Respectfully submitted, this the ___ day of April, 2007.

FREEMAN MATHIS & GARY, LLP

____
Theodore Freeman
Georgia Bar No: 276350

100 Galleria Parkway
Suite 1600
Atlanta, Georgia 30339-5948
Telephone: (770) 818-0000
Facsimile: (770) 937-9960

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CERTIFICATE OF SERVICE

This is to certify that I have this day served opposing counsel in the foregoing matter with a copy of **BRIEF OF AMICUS CURIAE GEORGIA DEFENSE LAWYERS ASSOCIATION IN SUPPORT PETITIONER CMD REALTY INVESTMENT FUND, IV, L.P. AND REQUEST TO GRANT PETITION FOR CERTIORARI** via first class mail by placing sufficient postage thereon to ensure delivery, and properly addressed to counsel of record as follows:

This __ day of April, 2007.

____
Theodore Freeman
Georgia Bar No: 276350

FREEMAN MATHIS & GARY, LLP
100 Galleria Parkway
Suite 1600
Atlanta, Georgia 30339-5948
Telephone: (770) 818-0000
Facsimile: (770) 937-9960
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