Mass Torts Case Law Update

Offers of Judgment Statute Held Constitutional

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Smith v. Salon Baptiste
S09A1543, March 15, 2010

In a landmark case addressing one of the cornerstones of the Tort Reform Act of 2005, a divided Georgia Supreme Court upheld the validity of O.C.G.A. §9-11-68, the statute which creates offers of judgment and settlement, against constitutional attacks under the theories of "right of access" and uniformity of laws. However, the court did not rule upon the propriety of applying the current version of the statute in suits which were filed while the former version was in existence.

In *Smith*, the plaintiffs had filed a defamation claim based on statements by the defendant broadcasters. The defendants offered to settle for $5,000, and the offer was deemed rejected under §9-11-68(c) when the plaintiffs did not respond. After the trial court granted the defendants' motion for summary judgment as to all claims, the defendants moved for attorney's fees under §9-11-68(b)(1). The trial court denied the motion and found the statute unconstitutional on the grounds that it impeded access to the courts and also violated the uniformity clause of the Georgia Constitution. The Georgia Supreme Court reversed, finding that §9-11-68 does not impede court access and is not a special law in violation of the uniformity clause.

1. Right of Access

"'[T]here is no express constitutional "right of access to the courts" under the Georgia Constitution.'" (citing *Couch v. Parker*, 280 Ga. 580 (2006)). Instead, the Georgia Constitution guarantees a right to choose between self-representation and representation by counsel: "No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state." Ga. Const. of 1983 Art. I. Sec. I. Par XII.

As the court noted, "[T]he history of the current version of the constitutional provision . . . 'indicate[s] that the sole purpose underlying the revision and adoption of Art. I., Sec. I. Par. XII was to define and protect the right of an individual to represent himself in the court of this state.'" (citing *Nelms v. Georgian Manor Condominium Assn.*, 253 Ga. 410 (1984)) . "*Nelms* compared the Georgia constitutional provision to the access to court provisions of other states, which, unlike the Georgia provision, expressly 'provide that all courts shall be open to every person for the redress of an injury done him[.]'" "Moreover, §9-11-68(b)(1) does not deny litigants access to the courts, but simply sets forth certain circumstances under which attorney's fees may be recoverable."

The trial court also had deemed §9-11-68 unconstitutional in violation of Art. I. Sec. I. Par XII, because the statute allows recovery of attorney's fees without the prerequisites required in O.C.G.A. §§9-15-14 and 13-6-11. "However there is nothing in Art I. Sec. I Par XII or any other provision of the Georgia Constitution, which mandates that attorney's fees can only be awarded pursuant to those two code sections. Rather, in Georgia, '[a]ttorney's fees are recoverable . . . where authorized by some statutory provision or by contract.'"

2. Uniformity clause

"The trial court further [had] ruled that O.C.G.A. §9-11-68 is a special law that violates the uniformity clause of the Georgia Constitution, because it applies only to tort claims, not all civil cases." Georgia's uniformity clause states, "Laws of a general nature shall have uniform operation throughout this state and no local or special law shall be enacted in any case for which provision has been made by an existing general law . . . ." Ga. Const. of 1983, Art. III, Sec. VI. Par. IV(a).

Reversing the trial court, the Georgia Supreme Court held that "O.C.G.A. §9-11-68 is not a special law affecting only a limited activity in a specific industry during a limited time frame." Because the statute applies uniformly to all tort cases statewide, it is a general law. "The clear purpose of this general law is to encourage litigants in tort cases to make and accept good faith settlement proposals in order to avoid unnecessary litigation. . . . This is certainly a legitimate legislative purpose, consistent with this State's 'strong public policy of encouraging negotiations and settlements.'" (citing *Edelkind v. Boudreaux*, 271 Ga. 314, 317 (1999)).

At the time that the plaintiff filed the suit, the old version of O.C.G.A. §9-11-68 was in effect, and the new version had been implemented by the time that the defendants filed their motion for fees. Although the Georgia Supreme Court had previously held in *Fowler Properties, Inc. v. Dowland*, 282 Ga. 76 (2007) that the statute cannot be applied retroactively, the *Smith* court refused to hold that it would be unconstitutional to apply the new version, because the plaintiff had not raised that ground in the trial court and had not obtained a distinct ruling upon it. ❖