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DAILY REPORT
A SMART READ FOR SMART READERS

Fee request tests offer of judgment

LAWYER WHOSE CLIENT WON $1.3 MILLION asks whether 'offer of judgment' statute will allow him to seek fee on top of award

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Steve Newton, left, with associate Shuli Green, has asked the court to hold a hearing to determine whether he is due his 30 percent contingency fee on top of the $1.3 million awarded to his client.

THE ATTORNEY FOR a man injured when a tractor-trailer rear-ended his Porsche said he was pleasantly surprised when a jury returned a $1.3 million verdict in his client's favor. Now, says Steven J. Newton, he'll see whether Georgia's "offer of judgment" statute will allow him to seek his one-third contingency fee of more than $400,000 on top of the award in light of the defense's failure to respond to settlement offers made last year. "I anticipate two appeals coming out of this," said Newton, "the case itself, and the contingency fees. I don't know about any cases like this that have gone up [on appeal] about contingencies."

The case began in Nov. 6, 2008, when Daniel Gilortiz was driving his 2002 Boxster along Cobb Parkway in Marietta. According to the plaintiff's account in the pretrial order, Gilortiz had stopped at a traffic signal when a truck owned by Cincinnati-based Cintas Corp., which supplies uniforms and other items to businesses, ran into his automobile and pushed him into the car in front of him.

Gilortiz, then 27, suffered neck and back injuries, including lumbar disc herniations and cervical strain, according to the order, and subsequently underwent chiropractic treatment, steroid injections and physical therapy, and was placed on pain medications.

According to the defense account, Gilortiz and the car in front of him, a black Ford Mustang, were traveling "in tandem" next to the Cintas truck, abruptly changed lanes, swerved in front of the truck and hit their brakes. The truck driver, Timothy Thomas, was unable to stop in time and attempted to swerve right, but struck the bumper of Gilortiz's car. The Mustang "fled the scene shortly thereafter."

Gilortiz sued Cintas for negligence in 2009, and in August 2010 the plaintiff added the black Mustang as a "Jane Doe" defendant.

The Porsche was totaled, said Newton, but Gilortiz was treated at a local hospital and released the night of the accident. Two weeks later, when he continued to complain of pain, Gilortiz underwent an MRI exam that revealed the extent of his injuries. During the trial that began Aug. 31 before Fulton County Superior Court Judge John J. Goger, Newton and associate Shuli L. Green presented testimony from Gilortiz's surgeon that he would require at least one double-fusion surgery to his spine and would be in some degree of pain for the rest of his life.

The defense, said Newton, argued that Gilortiz had not been as badly injured as he claimed. Cintas, represented by Hawkins Parnell Thackston & Young partner Matthew F. Barr and associate Joseph H. Wieseman, also argued that if there were any liability, it belonged at least in part to Gilortiz and to the unknown Jane Doe driver.

Jane Doe, in turn, was represented by K. Eric Morrow of Sharon W. Ware & Associates on behalf of State Farm Insurance, which provided Gilortiz's underinsured motorist carrier.

On Sept. 2, the jury took three to four hours to return a plaintiff's verdict holding

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Cintas 80 percent liable, Jane Doe 10 percent liable and Gilortiz 10 percent liable. After subtracting Gilortiz's portion, Goger's order said that Cintas owed $1,151,494 and $25,685 in prejudgment interest; State Farm owed $143,937.

Newton said that in March 2009 he had issued Cintas a written 30-day time-limited offer of judgment to settle all claims for $300,000; the defense never responded, he said.

Because of that, he has asked the court to hold a hearing to determine whether he is also due his 30 percent contingency fee on top of the award under O.C.G.A. §9-11-68, Georgia's "offer of settlement" statute.

The relevant portion of the 2005 statute says that if "a plaintiff makes an offer of settlement which is rejected by the defendant and the plaintiff recovers a final judgment in an amount greater than 125 percent of such offer of settlement, the plaintiff shall be entitled to recover reasonable attorneys fees and expenses of litigation incurred by the plaintiff or on the plaintiff's behalf from the date of the rejection of the offer of settlement through the entry of judgment."

"They left my offer of judgment demand on the table, and after 30 days it expired," said Newton. "Cintas never offered a penny until right before trial. In my opinion they owe me and my client attorney's fees; I hired out on a contingency basis, 30 percent."

Goger's order says that he will schedule a hearing on the §9-11-68 claims at a future date.

Newton said he has been unable to find any case law on the 2005 statute dealing with contingency fees. The *Daily Report* asked personal injury attorney Peter A. Law, who has argued offer of judgment cases at the appellate level, whether contingency fee cases have been addressed under that law.

"To my knowledge, the issue of whether fees can be based on a contingency fee has not been answered by the courts, and the statute does not directly exclude it or include it," said Law via e-mail. "[The statute applies to] reasonable fees and expenses incurred 30 days after the offer is made, so it looks like the plaintiff's lawyer would have to either identify how much of his contingency fee/expenses were earned after the fee attachment point (30 days after expiration or rejection of the offer of judgment), or submit it on an hourly basis from the attachment point."

Newton said that he had not reviewed his file, but "I think 99 percent of my work occurred after their rejection of my offer of judgment, so it will matter little in my case if [Law] is correct on apportionment."

Barr, asked whether he will appeal and for any comment on the offer of judgment issue, said he could say little about the case at this point.

"We believe the verdict was not warranted based on the evidence," he said, "and we intend to appeal."

The case is *Gilortiz v. Cintas Corp.*, No. 2009cv165622.

In another offer of judgment motion following an auto accident case, lead defense attorney J. Robb Cruser of Cruser & Mitchell, whose client prevailed, said that—while the underlying case was routine and the attorneys fees were relatively small—the case is unusual in that it reveals that offers of judgment orders are "starting to be a deterrence stick that must be dealt with by trial attorneys on both sides."

The case involved a May 2005 wreck in Alpharetta, in which a car driven by Richard X. Cardoza rear-ended Angela Newsom's Lexus.

According to trial documents, Newsom suffered an injured foot and claimed that she would need surgery, and also would need to be cared for while she recuperated from the procedure. She sought more than $80,000 in past and future medical expenses, up to $138,000 in special damages.

The defense admitted that Cardoza caused the wreck, but argued that "the minor impact accident involved in this case was not sufficient to cause the damages alleged by [Newsom]."

The case went to trial on March 29, and on March 31 the jury returned a defense verdict. In May, Cruser and Cruser & Mitchell senior associate R. Russell Grant II filed a motion for attorneys fees under §9-11-68, noting that the defense had served a $2,500 offer of judgment on Newsom in June 2008, to which the plaintiff did not respond.

The motion noted the statute's language that a defendant is entitled to recover attorneys fees and expenses "from the date of the rejection of the offer of settlement through the entry of judgment if the final judgment is one of no liability or the final judgment is obtained by the plaintiff is less than 75 percent of such settlement."

On Sept. 9, Fulton County State Court Judge Jay M. Roth signed an order granting the motion and ordering the plaintiff to pay $16,000 in defense fees and expenses.

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Robb Cruser, for the defense: Offers of judgment orders are "starting to be a deterrence stick."

The judge's order noted that the defense had offered evidence that the fees were actually over $23,000 but offered to accept a "round number" of $20,000 at a hearing. Why he lowered the sum to $16,000 is not mentioned.

"This case may not have been unique at the time of the March trial," said Cruser, but Roth's order made it so. "The plaintiff requested over $200,000 from the 12-person jury in a case where we admitted fault and, when all is said and done, she is the one that has to pay. That is unique and it was only possible because of the relatively new 9-11-68 offer of judgment statute."

Cruser said that he can't recall any offer of judgment he's made to a plaintiff being accepted.

"My general impression is, they think if I offer 'X' today, I'll offer more tomorrow," he said. "That can be a perilous decision if the case does go to trial."

Newsom's attorney, Blaine A. Norris of Bogart's Wiggins, Norris & Coffey said he is appealing Roth's order and could not discuss the details of the case, but disagreed with the applicability of the law in such a case.

"This is an example of an injured party in effect being punished for going to trial in what was not in any way a frivolous case," said Norris via e-mail.

"The problem with the statute is that it has nothing to do with a meritorious claim, or a meritorious defense for that matter, so it can cut both ways," Morris said. "It seems to turn the hallowed right of trial by jury into what I can only call a casino atmosphere disconnected from the case.

"The statute reminds me of an over-under wager on a football game which, in my opinion, is not exactly how we want the judicial system to operate," he said.

The case is *Newsom v. Cardoza*, No. 2007CV002252. DR