

RECENT DEVELOPMENTS IN GEORGIA AUTOMOBILE INSURANCE LAW

A. Uninsured Motorist Coverage

1. Exception to the rule that the insured must be legally entitled to recover from the uninsured motorist in order to obtain coverage

As a general rule, an insured may recover under an uninsured motorist policy only if the insured is legally entitled to recover from the uninsured motorist.¹ However, Georgia courts have carved out an exception to the general rule: “[U]ninsured motorist coverage is available where the alleged tortfeasor is insured, but for some reason no recovery can be obtained against her insurance carrier.”² However, it must be “impossible for the plaintiff to obtain a judgment against an insured motorist for reasons unrelated to the facts of the accident.”³

Recently, the Court of Appeals considered applying the exception in three cases. The Court of Appeals of Georgia applied

1 *Ward v. Allstate Ins. Co.*, 265 Ga. App. 603, 604 (2004).

2 *Ga. Farm Bureau Mut. Ins. Co. v. Williams*, 266 Ga. App. 540, 541 (2004).

3 *Id.* at 541-542; *see Wilkinson v. Vigilant Ins. Co.*, 236 Ga. 456, 457 (1976) (holding that plaintiff’s action was allowed to proceed as a John Doe action where the tortfeasor’s liability was discharged in bankruptcy); *Tinsley v. Worldwide Ins., Co.*, 212 Ga. App. 809, 811 (1994) (holding that the plaintiffs were not barred from seeking damages from their uninsured motorist carrier where the tortfeasor was protected by sovereign immunity).

the exception in *Ga. Farm Bureau Mut. Ins. Co. v. Williams*.⁴ However, the Court refused to apply the exception in both *Ward v. Allstate Ins. Co.*⁵ and *Soley v. State Farm Mut. Automobile Ins. Co.*⁶ Each of these cases will be discussed below.

In *Ga. Farm Bureau Mut. Ins. Co. v. Williams*,⁷ Natalie Trenise Williams and Megan Habel collided in a motor vehicle accident in Florida.⁸ Although Ms. Hable had insurance, her insurance company would not pay Ms. Williams because Ms. Williams did not present evidence sufficient to satisfy the tort threshold of Florida's no-fault statute.⁹ Therefore, Ms. Williams filed suit against John Doe and served Farm Bureau as her uninsured motorist carrier.¹⁰

Ms. Williams contended that she was entitled to uninsured motorist benefits from Farm Bureau because Ms. Hable's insurance company "legally denied coverage" under its liability policy.¹¹ Farm Bureau, however, filed a motion for summary judgment arguing that Ms. Williams could not recover uninsured motorist benefits as a matter of law because she failed to prove that she was legally entitled to recover damages from the alleged uninsured motorist.¹² The trial court denied Farm Bureau's motion for summary judgment, and the Court of Appeals granted Farm Bureau's application for interlocutory appeal noting this was a case of first impression.¹³

4 266 Ga. App. 540 (2004).

5 265 Ga. App. 603 (2004).

6 267 Ga. App. 606 (2004).

7 266 Ga. App. 540 (2004).

8 *Id.* at 540.

9 *Id.*

10 *Id.* at 540-541.

11 *Id.* at 541.

12 *Id.* at 540.

13 *Id.* at 540-541.

The specific issue on appeal was “whether the uninsured motorist coverage of a family liability coverage policy issued in Georgia can benefit the policyholder when the insured cannot recover against a motorist who is insured by a liability insurance policy but is granted immunity by the no-fault act applicable in the jurisdiction where the accident occurred.”¹⁴

The Court noted that if the general rule applied, the answer to the question presented would be no: “At first blush, the answer would seem to be no, because generally, to recover under uninsured motorist provisions in Georgia, the injured party has to prove two things: (1) that the tortfeasor was uninsured; and (2) that the tortfeasor was liable.”¹⁵ In fact, Ms. Williams could not satisfy either requirement: “[T]he affidavit of [Ms. Hable’s insurer] plainly states that the alleged tortfeasor was insured and ...under Florida law, the alleged tortfeasor cannot be sued and found liable because of the no-fault provisions of the Florida statute.”¹⁶

Nevertheless, the Georgia Court of Appeals did not require Ms. Williams to satisfy either requirement. The Court applied the exception to the general rule that the insured must be legally entitled to recover from the uninsured motorist in order to obtain coverage and holding that the plaintiff was entitled to collect uninsured motorist benefits: The plaintiff “must be allowed the opportunity to ‘establish all sums which [she] shall be legally entitled to recover as damages, caused by the uninsured motorist.’”¹⁷

14 *Id.* at 541.

15 *Id.*

16 *Id.*

17 *Id.* at 542.

The Court based its holding on the reasoning of *Wilkinson v. Vigilant Ins. Co.*¹⁸, *Tinsley v. Worldwide Ins. Co.*,¹⁹ and the legislative intent of uninsured motorist coverage: to protect innocent victims from the negligence of irresponsible drivers.²⁰ The Court noted that in *Wilkinson*, the plaintiff's action was allowed to proceed as a John Doe action even though the tortfeasor's liability was discharged by bankruptcy.²¹ Furthermore, the Court pointed out that in *Tinsley* the plaintiffs were not barred from seeking damages from their uninsured motorist carrier even though the tortfeasor was protected by sovereign immunity.²² Finally, the Williams' Court stated that under *Wilkinson* and *Tinsley*, "uninsured motorist insurance is available where it is impossible for the plaintiff to obtain a judgment against an insured motorist for reasons unrelated to the facts of the accident."²³ Based on *Wilkinson* and *Tinsley*, the Court concluded that it was impossible for Ms. Williams to obtain a judgment against Ms. Hable for reasons unrelated to the facts of the accident, i.e., "because of the public policy and statutes of the place where the accident occurred."²⁴ Furthermore, the Court stated that "[b]ecause uninsured motorist statutes are remedial in nature, they must be broadly construed to accomplish the legislative purpose" of protecting "innocent victims from the negligence of irresponsible drivers."²⁵ Accordingly, the Court determined that they were "unwilling to allow Farm Bureau to escape liability based on considerations unrelated to the accident."²⁶

18 236 Ga. 456 (1976).

19 212 Ga. App. 809 (1994).

20 *Ga. Farm Bureau Mut. Ins. Co.*, 266 Ga. App. at 541-542.

21 *Id.* at 541.

22 *Id.*

23 *Id.* at 541-542.

24 *Id.* at 542.

25 *Id.*

26 *Id.*

In *Ward v. Allstate Ins. Co.*²⁷, the Georgia Court of Appeals held that the general rule applied, not the exception.²⁸ In *Ward*, Mr. Ward's vehicle was struck by a Houston County sheriff's deputy's vehicle during the course of a police chase.²⁹ Due to the force of the impact, Mr. Ward suffered personal injuries. Plaintiff filed suit naming the deputy in his personal capacity, but not in the deputy's official capacity.³⁰ Deputy Dodson filed for Summary Judgment. The trial court ruled that official immunity barred the action and granted the motion.³¹

In an interesting turn of events, Ward then sued the deputy in his official capacity.³² However, the trial court granted summary judgment to the deputy because the statute of limitation had expired.³³ As a result, Mr. Ward amended his complaint, naming Allstate Insurance Company as his uninsured motorist carrier and attempted to proceed under John Doe Theory.³⁴

Mr. Ward contended that the trial court should allow him to proceed to trial as in a John Doe action to establish the amount he would be legally entitled to recover as damages caused by the deputy.³⁵ Allstate, however, moved for summary judgment on the ground that Ward was not entitled to proceed against it as his uninsured motorist carrier.³⁶ The trial court agreed with Allstate, and Ward appealed.³⁷

27 265 Ga. App. 603 (2004).

28 *Id.* at 605.

29 *Id.* at 603.

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

On appeal, Ward relied on the exception to the rule that the insured can recover from his uninsured motorist insurance carrier only if the insured is legally entitled to recover from the uninsured motorist.³⁸ Specifically, based on the holding in *Tinsley*, *supra*, Ward contended that because the doctrine of official immunity barred the action against the deputy in his person capacity, Allstate should remain potentially liable as his uninsured motorist carrier.³⁹ The Court refused to accept Ward’s argument and affirmed the judgment.⁴⁰

The Court distinguished *Tinsley* and Mr. Ward’s facts: “In *Tinsley*, the key factor in refusing to allow the insurer to escape liability was ‘the impossibility of appellants ever obtaining a judgment against the uninsured motorist,’”...but “[h]ere, evidence shows that Houston County had provided an automobile liability insurance policy which would have waived Houston County’s sovereign immunity to the extent of its \$1,000,000 in coverage.”⁴¹ The exception does not apply when recovery was possible against the uninsured motorist: “Because insurance was potentially available to the motor vehicle driven by [the deputy], and because recovery for Ward’s injuries was legally possible but for Ward’s procedural missteps, we conclude that the reasoning behind *Wilkinson* and *Tinsley* does not hold, and that the general rule should apply.”⁴²

In a case of *déjà vu* for the Court of Appeals, *Soley v. State Farm Mut. Automobile Ins. Co.*⁴³, the facts were identical to *Ward* as Ms. Soley was a passenger in Mr. Ward’s vehicle when the

38 *Id.* at 604.

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.* at 605.

43 267 Ga. App. 606 (2004).

collision with the deputy's car occurred.⁴⁴ Furthermore, just like Mr. Ward, Ms. Soley sued the deputy in his individual capacity, but the doctrine of official capacity barred the suit.⁴⁵ Likewise, Ms. Soley finally sued the deputy in his official capacity, but she did not file the suit within the two year statute of limitation.⁴⁶ Therefore, in *Soley*, just like in *Ward*, the Court held that the exception did not apply: “[T]he exception to the rule that the insured must be legally entitled to recover from the uninsured motorist in order to obtain coverage only applies in instances in which it would have been impossible to obtain a judgment against the uninsured motorist based on a legal barrier unrelated to any procedural misstep of the injured party.”⁴⁷

2. Coverage: The meaning of “all sums” in O.C.G.A. § 33-7-11(a)(1)

O.C.G.A. § 33-7-11(a)(1) (West 2004) provides:

No automobile liability policy or motor vehicle liability policy shall be issued or delivered in this state to the owner of such vehicle...unless it contains an endorsement or provisions undertaking to pay the insured all sums which said insured shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle.

Recently, Georgia Courts have interpreted the meaning of the words “all sums” in O.C.G.A. § 33-7-11(a)(1) to mean just what it says: “All means all, every single one.”⁴⁸

44 *Id.* at 607.

45 *Id.* at 606.

46 *Id.* at 606-607.

47 *Id.* at 607.

48 *Gordon v. Atlanta Cas. Co.*, 2005 Ga. LEXIS 229 (2005).

In *Atlanta Cas. Co. v. Gordon*⁴⁹, the insured's minor son was struck and killed by an uninsured motorist.⁵⁰ As a result, the parents sued both the car owner and the driver for wrongful death, and served Atlanta Casualty as the father's uninsured motorist carrier.⁵¹ Atlanta Casualty moved for summary judgment contending that the boy's death was not covered under the terms of his father's policy because the boy did not live with his father, the named insured.⁵² Therefore, Atlanta Casualty argued, the boy was not a "covered person" under the contract.⁵³ The trial court denied Atlanta Casualty's motion, holding that the policy's definition of "covered person" was inconsistent with the coverage requirements of O.C.G.A. § 33-7-11(a)(1).⁵⁴ Indeed, that code section requires the insurer to "pay the insured all sums which said insured shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle."⁵⁵ Atlanta Casualty appealed.⁵⁶

On appeal, the Appellate Court reversed the trial court based on legislative intent: "Although the language in the statute appears clear on its face, we do not believe the legislature enacted O.C.G.A. § 33-7-11 (a) (1) with the intention of requiring insurance companies to pay damages for the death of a person not insured under the policy in question."⁵⁷ Judges Barnes and Eldridge dissented from the majority opinion. Judge Barnes issued a lengthy dissent.

49 266 Ga. App. 666 (2004).

50 *Id.* at 666.

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.* at 667.

The Supreme Court of Georgia granted a writ of certiorari to determine “whether Georgia's uninsured motorist statute requires an insurer to pay damages for the death of an insured's son when the insured's son is not a ‘covered person’ under the terms of the insurance policy.”⁵⁸ The Georgia Supreme Court, citing Judge Barnes dissent, held that under these circumstances, the uninsured motorist statute does require an insurer to pay damages.⁵⁹ Furthermore, the Court pointed out that “[t]he language of the statute...clearly states that the insurer is to pay ‘all sums’ which [the] insured shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle.”⁶⁰ Indeed, the Court pointed out the precise meaning of the word “all”: “All means all, every single one.”⁶¹ The Court applied the rule to the facts: “Since the insured in this case is entitled to recover damages for the death of his son against the owner or driver of the uninsured vehicle, he is entitled to recover those damages against his insurer.”⁶²

3. UM Limits: Whether subrogation liens enforced by the Federal Government are counted in the calculation of “available coverages” for purposes of O.C.G.A. § 33-7-11

In *Thurman v. State Farm Mut. Automobile Ins. Co.*⁶³, the Supreme Court of Georgia held “that when a federal employee is required by [the Federal Employees Compensation Act] or [the Federal Employees Health Benefits Act] to reimburse the provider

58 2005 Ga. LEXIS 229 (2005).

59 *Id.* at *1.

60 *Id.* at *3.

61 *Id.*

62 *Id.*

63 278 Ga. 162 (2004).

of benefits and the federal employee has not been fully compensated for injuries sustained, the amount reimbursed to the benefits providers constitutes a reduction in the "limits of coverage [of the tortfeasor's liability insurance] ... by reason of ... or otherwise."⁶⁴

In *Thurman*, Gail Thurman, a postal carrier for the United States Postal Service, was injured on the job when Mamie Brown's vehicle struck Ms. Thurman's postal truck.⁶⁵ Consequently, Ms. Thurman and her husband sued Ms. Brown for more than Ms. Brown's insurance policy limits of \$100,000.⁶⁶ Eventually, the Thurmans settled with Ms. Brown for \$95,554.19, which was Ms. Brown's \$100,000 policy limit minus the \$4,445.81 Ms. Brown's insurance company paid for damaging the postal truck.⁶⁷

Prior to the settlement, Ms. Thurman received a total of \$34,666.32 for lost wages and medical expenses from her employer's workers' compensation carrier in accordance with the Federal Employees Compensation Act and her employer's group medical insurance carrier in accordance with the Federal Employees Health Benefits Act.⁶⁸ Both carriers claimed subrogation rights from the \$95,554.19 settlement proceeds.⁶⁹

Pursuant to 5 U.S.C.A. § 8132, the Federal Government must be reimbursed before the Thurmans could receive the settlement proceeds.⁷⁰ Therefore, Ms. Brown's insurance company issued three checks: one to the Thurmans, one to Ms. Thurman and the workers' compensation carrier as co-payees, and one to Ms.

64 *Id.* at 165.

65 *Id.* at 162.

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.*

Thurman and the group medical insurance carrier as co-payees.⁷¹ The workers' compensation carrier and the medical insurance carrier received checks totalling \$34,666.32 with Ms. Thurman as a co-payee.⁷² That left \$60,887.87 for the Thurmans, out of the \$95,554.19 settlement.⁷³

The Thurmans had \$75,000 uninsured motorist coverage with State Farm.⁷⁴ Because their \$75,000 UM coverage exceeded the \$60,887.87 settlement proceeds, the Thurmans served State Farm as their UM carrier contending that Ms. Brown was \$14,112.13 underinsured.⁷⁵

The Thurmans relied on the fact that "O.C.G.A. § 33-7-11(b)(1)(D)(ii) defines an uninsured motor vehicle as one where the tortfeasor has liability insurance but the 'available coverages' are 'less than the limits of the uninsured motorist coverage provided under the insured's insurance policy. ...'"⁷⁶ "Available coverages" means "the limits of coverage less any amounts by which the 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."⁷⁷ In short, if the Thurmans only have \$60,887.87 available coverage, then Ms. Brown is underinsured \$14,112.13, i.e., \$75,000 UM coverage minus \$60,887.87 available coverage.

The Supreme Court of Georgia addressed the issue of "whether the subrogation payments made by the tortfeasor's liability insurer

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.* at 163.

75 *Id.*

76 *Id.*

77 O.C.G.A. § 33-7-11(b)(1)(D)(ii) (West 2004) (emphasis added).

pursuant to 5 USCA § 8132 to the workers' compensation carrier and pursuant to the contractual provision of the group medical insurance carrier which provided benefits to the injured federal employee constituted 'payment of other claims or otherwise,' thereby reducing the amount of available coverage under tortfeasor Brown's insurance policy to less than the amount of UM coverage the Thurmans had with State Farm."⁷⁸

In its analysis, the Court first considered Georgia's complete compensation rule: "[A]n insurer is prohibited from obtaining reimbursement for amounts paid under medical payments coverage unless and until the insured has been completely compensated for her loss."⁷⁹ Furthermore, the Court indicated that if Georgia law applied, and not Federal law, as in this case, the decision would be simple: "[W]hen Georgia law is applicable, an injured party's medical insurer and the workers' compensation carrier of the injured party's employer are not permitted to seek reimbursement from the injured party unless and until the amount of the settlement received by or the judgment awarded to the injured party exceeds the injured party's economic and noneconomic damages."⁸⁰ However, in the case at issue, the Federal Government could enforce its subrogation liens despite Georgia's complete compensation rule: "[U]nder these federal provisions, the medical benefits insurer and the workers' compensation insurer had subrogation liens and were able to enforce them upon the injured party's receipt of a settlement from the liable third party, regardless of Georgia's requirement that such action be preceded by a determination that the injured person had been fully compensated."⁸¹

78 *Thurman*, 278 Ga. at 163.

79 *Id.* at 163-164.

80 *Id.* at 164.

81 *Id.*

The Court, however, found a way to completely compensate Ms. Thurman even though the federal government and its insurance carriers enforced their subrogation liens: “The legislature has provided the means by its use of the phrase ‘reduced by payment of claims or otherwise’ to describe payments that reduce the amount of ‘available coverages’ under the tortfeasor’s liability policy.”⁸² Accordingly, the Court held that “the vehicle driven by the tortfeasor qualifies under O.C.G.A. § 33-7-11 (b) (1) (D) (ii) as an uninsured vehicle since the “available coverages,” i.e., the tortfeasor’s policy limits (\$ 100,000) reduced by other claims paid (\$ 4,445.81) or otherwise (\$ 34,666.32) is \$ 60,887.87, which is \$ 14,112.13 less than Brown’s \$ 75,000 UM coverage.”⁸³

4. Stacking: O.C.G.A. § 33-7-11(b)(1)(B)’s two categories of “insureds”

In *Beard v. Nunes*, Cherish Beard, a minor, was injured when Michael Nunes’ truck collided with the truck Ms. Beard was driving.⁸⁴ Cherish Beard is Charlotte Beard’s daughter. Cherish Beard lost four permanent teeth and broke another tooth in the collision.⁸⁵ Charlotte Beard, as next friend of her daughter, sued Mr. Nunes.⁸⁶

David Cordle, Beard’s brother-in-law, owned the truck that Ms. Beard was driving when the accident occurred.⁸⁷ It was without question that Mr. Cordle gave Cherish Beard permission to drive his truck.⁸⁸ Mr. Cordle owned five vehicles, including the

82 *Id.* at 165.

83 *Id.*

84 *Beard*, 269 Ga. App. at 214.

85 *Id.* at 214.

86 *Id.*

87 *Id.*

88 *Id.* at 215.

truck involved in the accident, and State Farm insured all of them.⁸⁹ Each vehicle carried separate uninsured motorist bodily injury coverage in the amount of \$25,000.⁹⁰ Mr. Nunes was insured by Georgia Farm Bureau for \$25,000 in liability coverage.⁹¹ Because the Beards felt the injuries to Cherish exceeded the \$25,000 provided by Mr. Nunes insurance policy, the Beards wanted to stack Mr. Cordle’s State Farm policies.⁹²

The trial court concluded that the Beards “were not eligible to ‘stack’ or combine the [uninsured motorist] coverage provided in [the] five policies owned by [Mr. Cordle].”⁹³ Therefore, the Beards appealed the Trial Court’s ruling.⁹⁴

The sole issue on appeal was whether “the trial court erred in determining that Cherish was not entitled to stack Cordle’s insurance policies.”⁹⁵ The Beards argued that there was no distinction between the two classes of insured individuals set out in O.C.G.A. § 33-7-11(b)(1)(B).⁹⁶ The Georgia Court of Appeals did not agree and the Trial Court’s ruling was affirmed.⁹⁷

In its analysis, the Court first distinguished the two categories of “insureds” under O.C.G.A. § 33-7-11(b)(1)(B).⁹⁸ The first category consists of “the named insured and, while resident of the same household, the spouse of any such named insured and

89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.* at 214.

94 *Id.* at 215.

95 *Id.*

96 *Id.* at 216.

97 *Id.*

98 *Id.*

relatives of either, while in a motor vehicle or otherwise.”⁹⁹ On the other hand, the second category consists of “any person who uses, with the expressed or implied consent of the named insured, the motor vehicle to which the policy applies; a guest in such motor vehicle to which the policy applies.”¹⁰⁰ The Court noted that the first category was broader than the second: “Note that, unlike the first provision, [the second] one contains language that conditions status as an insured on the involvement of the ‘motor vehicle to which the policy applies.’”¹⁰¹ Furthermore, “this class of insured persons is covered ‘only when the insured automobile is involved.’”¹⁰²

The Court determined that Cherish did not fit into the first category of insureds because she was not named in the policy nor did she live with Mr. Cordle.¹⁰³ Furthermore, although Cherish did fit into the second category of insureds, she was the beneficiary of only one policy, that is, the policy that covered the truck involved in the accident: “O.C.G.A. § 33-7-11 (b) (1) (D) (ii) ‘is designed to protect the insured as to his actual loss, within the limits of the policy or policies of which he is the beneficiary.’”¹⁰⁴ Accordingly, the Georgia Court of Appeals held that Cherish could not stack Mr. Cordle’s other policies because she was the beneficiary of only one policy, that is, the policy that covered the truck involved in the accident: “Because Cherish was not a beneficiary of the other four Cordle policies, she was not entitled to stack them.”¹⁰⁵

99 O.C.G.A. § 33-7-11(b)(1)(B) (West 2004).

100 *Id.*

101 *Beard*, 269 Ga. App. at 215.

102 *Id.* at 215 (quoting *Gulf Am. Fire & Cas. Co. v. McNeal*, 115 Ga. App. 286 (1967)).

103 *Id.* at 216.

104 *Id.* at 216 (quoting *Ford v. Ga. Farm Bureau Mut. Ins. Co.*, 191 Ga. App. 735 (1989)).

105 *Id.* at 216.

5. Service by publication on a known, but unlocatable, uninsured motorist

On April 19, 2005, in *Dunn v. Kirsten*¹⁰⁶, the Court of Appeals applied the legal standard that they set out in *Wilson v. State Farm Mut. Automobile Ins. Co.*¹⁰⁷ for serving a known but unlocatable motorist: “Service by publication is necessary on a known but unlocatable uninsured motorist to satisfy the condition precedent of a nominal judgment under OCGA § 33-7-11 (d) before the uninsured motorist carrier may be liable under the insured's contract and the uninsured motorist statute.”¹⁰⁸

In *Dunn*, Neil Kirtsen sued both Jennifer Dunn and Ezimar Reis for injuries he sustained in a motor vehicle accident.¹⁰⁹ The defendants, however, could not be found at their last known address.¹¹⁰ Therefore, Mr. Kirsten served Allstate as his uninsured motorist carrier, and moved for service by publication on the defendants.¹¹¹ The trial court granted Mr. Kirsten's motion for service by publication.¹¹²

More than two years after Mr. Kirsten filed his complaint, the trial court granted Allstate's motion for appointment of a special process server.¹¹³ Two months later, the special process server served Ms. Dunn with the summons and complaint.¹¹⁴ Ms. Dunn filed an answer and moved to dismiss on the ground of insufficient

106 2005 Ga. App. LEXIS 398 (2005).

107 239 Ga. App. 168 (1999).

108 *Dunn*, 2005 Ga. App. LEXIS at *4 (quoting *Wilson v. State Farm Mut. Automobile Ins. Co.*, 239 Ga. App. 168 (1999)).

109 *Dunn*, 2005 Ga. App. LEXIS at *1.

110 *Id.* at *1.

111 *Id.* at **1-2.

112 *Id.* at *2.

113 *Id.*

114 *Id.*

service of process and expiration of the statute of limitation.¹¹⁵ The trial court, however, denied Ms. Dunn’s motion, but the Court of Appeals granted her application for interlocutory review.¹¹⁶

On appeal, the Court concluded that Mr. Kirsten failed to act in a diligent and reasonable manner to effect personal service on Ms. Dunn, and, therefore, the trial court abused its discretion in denying Ms. Dunn’s motion to dismiss.¹¹⁷ Nevertheless, the Court pointed out the Mr. Kirsten was not estopped from maintaining his action against Allstate as his uninsured motorist carrier because he “satisfied the condition precedent of serving Dunn and her codefendant by publication.”¹¹⁸

B. Common Carriers

1. Exempt from the definition of common carrier only if engaged “exclusively” in the transportation of agricultural products

In *Jarrard v. Clarendon Natl. Ins. Co.*¹¹⁹, the Court of Appeals considered the issue of whether the exemption in O.C.G.A. § 46-1-1(9)(C)(x) applies to a tractor-trailer carrying a load of plywood.¹²⁰ As a general rule, a person filing suit against a motor common carrier or motor contract carrier may join the insurance carrier in the same action under O.C.G.A. § 46-7-12 (c).¹²¹ Nonetheless, the legislature has provided an exception to the general rule:

115 *Id.*

116 *Id.* at *3.

117 *Id.* at *6.

118 *Id.*

119 267 Ga. App. 594 (2004).

120 *Id.* at 594.

121 *Id.* at 595.

“O.C.G.A. § 46-1-1 (9) (C) (x) provides an exemption from the definition of motor contract carrier and motor common carrier if the vehicle was engaged *exclusively* in the transportation of agricultural or dairy products, as defined therein, between farm, market, gin, warehouse or mill so long as the title of the products remains in the producer.”¹²² Furthermore, the party claiming the exemption has the burden of proving the exemption applies.¹²³

In *Jarrard*, James Jarrard was involved in an accident with a tractor-trailer driven by Steve Cook that was owned by Mr. Cook’s employer, Fairfield Trucking Company.¹²⁴ At the time, Clarendon National Insurance Company provided liability insurance coverage to Fairfield Trucking.¹²⁵ After suing several parties, Mr. Jarrard moved to add Clarendon as an additional party in accordance with O.C.G. A. § 46-7-12(c).¹²⁶ The trial court granted Mr. Jarrard’s motion.¹²⁷ Later, Clarendon moved for summary judgment contending that it was exempt from direct action as a hauler of agricultural products under O.C.G.A. § 46-1-1(9)(C)(x).¹²⁸ The trial court granted Clarendon’s motion, and Mr. Jarrard appealed.¹²⁹

On appeal, the Georgia Court of Appeals found that Clarendon failed to meet its burden of proving the exemption applied: “Because Clarendon only introduced evidence of what the tractor-trailer was carrying on the day of the accident, it did not meet its burden of showing that it was used exclusively to transport wood or lumber.” Apparently, Clarendon had to prove that the tractor-

122 *Id.*

123 *Id.*

124 *Id.* at 594.

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.* at 594-595.

129 *Id.* at 595.

trailer had always been used for transporting plywood or some other exempt product: “If at any time up to and including the time of the collision with Jarrard, the tractor-trailer was not used in the transportation of exempted products, [it] would not have been engaged 'exclusively' in the transportation of exempted products and would not qualify [Fairfield Trucking] for the exemption.”¹³⁰

C. Bad Faith: Failure to pay claim

In *Ga. Farm Bureau Mut. Ins. Co. v. Williams*¹³¹, *supra*, Ms. Williams, the plaintiff, was involved in an automobile accident in Florida.¹³² Although the defendant had insurance, defendant’s insurance company would not pay the plaintiff because the plaintiff failed to present evidence sufficient to satisfy the tort threshold of Florida’s no-fault statute.¹³³ Therefore, the plaintiff filed suit against John Doe and served Farm Bureau as her uninsured motorist carrier.¹³⁴

The plaintiff contended that she was entitled to uninsured motorist benefits from Farm Bureau because defendant’s insurance company “legally denied coverage” under its liability policy.¹³⁵ Farm Bureau, however, filed a motion for summary judgment arguing that the plaintiff could not recover uninsured motorist benefits as a matter of law because she failed to prove she was legally entitled to recover damages from the alleged uninsured motorist.¹³⁶ The trial court denied Farm Bureau’s motion for

130 *Id.* at 596 (quoting *Ga. Cas. & Surety Co. v. Jernigan*, 166 Ga. App. 872, 875 (1983)).

131 266 Ga. App. 540 (2004).

132 *Id.* at 540.

133 *Id.*

134 *Id.* at 540-541.

135 *Id.* at 541.

136 *Id.* at 540.

summary judgment, but the Court of Appeals granted Farm Bureau's application for interlocutory appeal.¹³⁷

On appeal, Farm Bureau contended that the trial court erred in denying its motion for summary judgment on the issue of bad faith damages under O.C.G.A. § 33-4-6.¹³⁸ The Court agreed: "There was no evidence of bad faith presented in this case"...and "due to the unique issue of law presented here, we cannot find that Farm Bureau's refusal to pay Williams's demand constituted bad faith."

The Court of Appeals addressed the bad faith issue in *Allstate Ins. Co. v. Smith*.¹³⁹ In *Smith*, the insured, Nedeidre Smith, sued Allstate Insurance Company claiming Allstate acted in bad faith by refusing to pay covered losses to her automobile caused by theft.¹⁴⁰ A jury awarded Ms. Smith \$12,000 for Allstate's bad faith refusal to pay the insurance claim.¹⁴¹ Allstate appealed contending that there was no evidence to support the bad faith award.¹⁴²

On appeal, the Court reversed the jury's verdict regarding the penalties for bad faith: "We also reverse the portion of the jury's verdict finding that Allstate refused to pay the claim in bad faith and awarding penalties under O.C.G.A. § 33-4-6 to Smith."¹⁴³ The Court pointed out that "under O.C.G.A. § 33-4-6, the insured bears the burden of proving that the refusal to pay the claim was made in bad faith."¹⁴⁴ Furthermore, the refusal to pay must be unreasonable: "Penalties for bad faith are not authorized

137 *Id.* at 540-541.

138 *Id.* at 542.

139 266 Ga. App. 411 (2004).

140 *Id.* at 411.

141 *Id.*

142 *Id.*

143 *Id.* at 412.

144 *Id.* at 413.

where the insurance company has any reasonable ground to contest the claim and where there is a disputed question of fact.”¹⁴⁵ The Court determined that the evidence showed that Allstate had a reasonable ground to contest the claim: “The evidence showed that there was a genuine conflict over whether Smith's insurance claim was legitimate, and that Allstate's grounds for refusing to pay the claim were reasonable and not frivolous or unfounded.”¹⁴⁶

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145 *Id.*

146 *Id.*