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JOHN B. GALVIN
Of Counsel

September 1, 2009

Re: LandAmerica Class Action - Possible Negligent Referral Claim

To LandAmerica Commingled Exchangers:

Our firm represents Angela Arthur, as Trustee of the Arthur Declaration of Trust, as well as several other LandAmerica Exchange Services, Inc. ("LES") clients in a class action against SunTrust Banks, Inc. and other defendants in an effort to recover funds deposited in trust at LES in Richmond, Virginia. This action, *Arthur, et al. v. SunTrust Banks Inc., et al.* (U.S.D.C. S.D. Calif. Case No.09-54), was recently consolidated with the *Terry, et al. v. SunTrust Banks, et al.* matter (U.S.D.C., Dist. of S.C.). The consolidated matter (the "MDL Class Action") is styled *In Re: LandAmerica 1031 Exchange Services, Inc. Internal Revenue Services § 1031 Tax Deferred Exchange Litigation*, and is pending before the United States District Court for the District of South Carolina before the Hon. Joseph F. Anderson, Case No. MDL No. 2054. On August 3, 2009, Plaintiffs filed an Amended Consolidated Complaint, which may be viewed at www.hbsb.com (click on "Class Actions" and see under the "LandAmerica" heading).

The Amended Consolidated Complaint (the "Complaint") names defendants who we believe injured each and every member of the class as defined in the Complaint. There may be other persons or entities that contributed to your loss who are not named in the Complaint because (i) we have not been made aware of them and the role they played; or (ii) their conduct injured you and not other members of the class so the claims against them would not be typical to claims of each member of the class.

For instance, you may have a cause of action for negligent referral against your real estate agent or other professional employed by you if an imprudent referral was made to LES by the professional without adequate due diligence. I am attaching as Exhibit 1 a copy of *Williamson v. Abellera*, 245 Ga. App. 312 (2000), which is a negligent referral case against an attorney who guided his client to an unscrupulous 1031 exchange. These individual types of cases cannot be prosecuted as part of the class action so you will need to pursue these cases on your own. I bring this to your attention now so you may preserve your rights as to these individual claims. Beware that time limitations apply to these claims and immediate action may be needed. If, in fact, you do believe you have a viable negligent referral case, I suggest you contact an attorney and be sure


LES Commingled Exchangers
Re: Negligent Referral
September 1, 2009
Page 2

to alert your potential defendant professional to the facts giving rise to the existence of this potential claim so he may tender a claim to his Error & Omissions carrier before the expiration of the term of his policy.

We are not providing tax advice, although there may be tax consequences arising out of the theft of your 1031 exchange funds.

Very truly yours,

HOLLISTER & BRACE

By: 

ROBERT L. BRACE

RLB\sw
enclosure

EXHIBIT 1

Service: Get by LEXSEE®
Citation: 245 Ga. App. 312

*245 Ga. App. 312, *; 537 S.E.2d 130, **;
2000 Ga. App. LEXIS 883, ***; 2000 Fulton County D. Rep. 3092*

WILLIAMSON et al. v. ABELLERA et al.

A00A0918.

COURT OF APPEALS OF GEORGIA

245 Ga. App. 312; 537 S.E.2d 130; 2000 Ga. App. LEXIS 883; 2000 Fulton County D. Rep. 3092

July 7, 2000, Decided

SUBSEQUENT HISTORY: [***1] Reconsideration Denied July 25, 2000. Certiorari Applied For.

PRIOR HISTORY: Legal malpractice. Gwinnett Superior Court. Before Judge Conner.

DISPOSITION: Judgment reversed.



CASE SUMMARY


PROCEDURAL POSTURE: Appellants challenged a grant of summary judgment for appellees by the Gwinnett Superior Court (Georgia) in appellants' action for legal malpractice; the trial court found that there was an unforeseeable intervening act between appellees' actions and the injury.


OVERVIEW: Appellants agreed to sell certain real property. The purchaser financed the property through a mortgage lender. Appellee law firm represented the lender, and appellee attorney was the closing attorney. At the closing, appellee attorney stated that a tax-free like-kind exchange of property could be done to avoid capital gains taxes. The parties agreed, and appellee attorney handed appellants a letter and brochure from a facilitator who specialized in handling such exchanges. Appellee attorney knew nothing about the facilitator. Thereafter, appellants signed the check they received at closing over to the facilitator to effect the tax-free exchange. The facilitator then fled the country, taking appellants' funds. Trial court granted summary judgment to appellees, finding that the facilitator's theft was an intervening criminal act. Judgment was reversed because it was reasonably foreseeable that failure to use ordinary care in recommending a facilitator could have led to the loss of funds.


OUTCOME: Judgment reversed; it was reasonably foreseeable that appellants' funds might have been lost when appellee attorney failed to exercise ordinary care, skill, and diligence in selecting or recommending a facilitator to hold the funds prior to the completion of a tax-free exchange of appellants' real property.


CORE TERMS: summary judgment, intervening act, facilitator, criminal act, attorney-client, intervening, purchaser, escrow, relationship existed, proximate cause, brochure, matter of law, law firm, foreseen, real estate agent, causal connection, trust account, unforeseeable, recommending, anticipated, wrong-doer, doctorate, omissions, package, mailed, lender, sellers, theft


LexisNexis(R) Headnotes + [Hide Headnotes](#)[Civil Procedure](#) > [Summary Judgment](#) > [Standards](#) > [Genuine Disputes](#) [Civil Procedure](#) > [Summary Judgment](#) > [Standards](#) > [Materiality](#) 


HN1  Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. [Ga. Code Ann. § 9-11-56 \(c\)](#). [More Like This Headnote](#)


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HN2  A de novo standard of review applies to an appeal from a grant of summary judgment, and an appellate court views the evidence, and all reasonable conclusions and inferences drawn from it, in the light most favorable to the nonmovant. [More Like This Headnote](#)


[Torts](#) > [Negligence](#) > [Causation](#) > [Proximate Cause](#) > [General Overview](#) 

HN3  Generally, an independent, intervening criminal act of a third party, without which the injury would not have occurred, will be treated as the proximate cause of the injury superseding any negligence of a defendant unless the intervening criminal act is a reasonably foreseeable consequence of the defendant's negligent act. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Torts](#) > [Negligence](#) > [Causation](#) > [Proximate Cause](#) > [Intervening Causation](#) 

HN4  If the character of the intervening act claimed to break the connection between the original wrongful act and the subsequent injury was such that its probable or natural consequences could reasonably have been anticipated, apprehended, or foreseen by the original wrong-doer, the causal connection is not broken, and the original wrong-doer is responsible for all of the consequences resulting from the intervening act. [More Like This Headnote](#)

[Torts](#) > [Negligence](#) > [Causation](#) > [Proximate Cause](#) > [General Overview](#) 

HN5  Proximate cause is properly reserved for the jury and can only be appropriately addressed on summary judgment in plain and indisputable cases. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

COUNSEL: Crowley, Appel, Starkey & Holbrook, Carl A. Crowley III, James L. Ford, Sr., for appellants.

Troutman Sanders, Daniel S. Reinhardt, William M. Droze, for appellees.

JUDGES: JOHNSON, Chief Judge. Smith, P. J., and Phipps, J., concur.

OPINION BY: JOHNSON

OPINION: **[**131]** **[*312]** JOHNSON, Chief Judge.

Elaine Williamson and her mother, Lucille Morris, sued attorney Ronald Abellera and his employer, the law firm of Blackburn, Walther & Sloan, LLC, for legal malpractice. The trial court granted Abellera and the law firm summary judgment on the ground that there was an unforeseeable intervening act between their actions and the injury. Because the record contains evidence that the intervening act could reasonably have been foreseen, summary judgment was not appropriate, and therefore, we reverse.

~~HN1~~ Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. n1 ~~HN2~~ A de novo standard of review applies to an appeal from a grant of summary judgment, and we view the evidence, and all reasonable **[***2]** conclusions and inferences drawn from it, in the light most favorable to the nonmovant. n2

----- Footnotes -----

n1 O.C.G.A. § 9-11-56 (c).

n2 Matjoulls v. Integon Gen. Ins. Corp., 226 Ga. App. 459 (1) (486 S.E.2d 684) (1997).

----- End Footnotes -----

The record reveals that on May 12, 1997, Williamson and Morris agreed to sell certain real property. The purchaser financed the property through a mortgage lender. Blackburn, Walther & Sloan represented the lender, and Abellera was the closing attorney.

During the closing on June 6, 1997, Williamson received a check in the amount of \$ 209,010.11. After the parties to the transaction had signed the closing documents, a conversation ensued in the conference room regarding the payment of capital gains taxes. The purchaser, the purchaser's fiance, the purchaser's real estate agent, Williamson, Morris, Williamson and Morris' real estate agent, and Abellera were in the room, and Abellera stated that a tax-free like-kind exchange of property, pursuant to section 1031 of the Internal Revenue Code, **[***3]** could be done if the parties were willing to resign documents. Everyone agreed to do so, and Abellera handed Williamson a letter and brochure from Section 1031 Services, Inc. The material described the company as an "Exchange Facilitator" and "Licensed Escrow" and named James Gideon as the company's president. Abellera told Williamson, "you can call him."

On June 9, 1997; Williamson called Section 1031 Services and **[*313]** spoke with a person who identified himself as James Gideon. Gideon defined a section 1031 exchange, explained that Section 1031 Services could serve as the facilitator of such an exchange, and assured her that her money would be safe in a trust account at Wachovia Bank. Williamson and Morris decided to proceed with an exchange and to use Section 1031 Services as the facilitator.

Abellera soon received a package from Gideon that included an exchange agreement, an escrow agreement, instructions to complete the documents, and instructions to wire funds to a bank account used by Section 1031 Services. Accompanying the package was a cover letter that indicated that Section 1031 Services was an "Exchange Facilitator" and a "Licensed Escrow" and that Gideon possessed a juris **[***4]** doctorate degree. Abellera prepared the exchange forms and new closing documents that reflected that the sellers desired a section 1031 exchange.

[132]** On June 16, Williamson went to the law firm, returned the \$ 209,010.11 check, and signed the necessary documents, including the escrow agreement that provided that Williamson and Morris would deposit funds with Section 1031 Services to effect the exchange, which funds Section 1031 Services would hold in escrow in its account at Wachovia. Abellera later mailed documents to Morris and to the purchaser for their signatures and wired the proceeds to Section 1031 Services' account on July 17, 1997. When Williamson later reported to Abellera that she was repeatedly unable to contact Gideon, Abellera sent a fax to "James Gideon or anyone at Section 1031 Services," stating "Your phone is disconnected and one of our sellers that used your services is extremely worried. Please call me. . . ." Abellera never

received a response. Shortly thereafter, Williamson and Morris discovered that Gideon had fled the country, taking their funds, along with the funds from several other victims.

Williamson and Morris sued Abellera and Blackburn, Walther & Sloan, [***5] alleging that an attorney-client relationship existed and that they breached the duty of care by, after the original purchase and sale agreement had closed, providing legal advice to effect a section 1031 exchange, recommending Gideon and Section 1031 Services, and rendering legal services that resulted in their loss. Abellera and Blackburn, Walther & Sloan moved for summary judgment on the grounds that no attorney-client relationship existed and that Gideon's theft of the funds was an intervening criminal act. The trial court granted summary judgment, ruling

there may be a jury issue as to whether or not an attorney-client relationship existed between the parties. However, construing the facts most favorably to the Plaintiffs, and even assuming that there was an attorney-client relationship [***6] between the parties, this Court finds that as a matter of law, any negligence of the Defendants was not the proximate cause of the Plaintiffs' damages, due to an intervening criminal act.

Williamson and Morris appeal.

1. Williamson and Morris contend that the trial court erred in granting summary judgment, arguing that there was evidence of an attorney-client relationship and of [***6] a breach of the professional duty of care. Although the motion for summary judgment raised the issue of whether an attorney-client relationship existed, the trial court did not rule on that issue. Consequently, that issue is not properly before this Court, and we cannot consider it. n3

----- Footnotes -----

n3 Devins v. Leafmore Forest Condo. Assn. &c., 200 Ga. App. 158, 159 (3) (407 S.E.2d 76) (1991).

----- End Footnotes -----

2. Williamson and Morris contend that the trial court erred in finding that Abellera and Blackburn, Walther & Sloan were not the proximate cause of their damages due to an intervening criminal act.

HN3

Generally, an independent, intervening criminal act of a third party, without which the injury would not have occurred, will be treated as the proximate cause of the injury superseding any negligence of the defendant unless the intervening criminal act is a reasonably foreseeable consequence of the defendant's negligent act. n4

----- Footnotes -----

n4 Tucker Fed. Sav. &c. Assn. v. Balogh, 228 Ga. App. 482, 484 (491 S.E.2d 915) (1997); see

also Coleman v. Atlanta Obstetrics & C. Group, 194 Ga. App. 508, 510 (1) (390 S.E.2d 856) (1990).

----- End Footnotes----- [***7]

Williamson and Morris argue that the absconding of their funds was a foreseeable consequence of Abellera's advising them to use a facilitator about whom he knew nothing.

In the exchange that was anticipated here, Section 1031 Services was to serve as the facilitator and would hold over \$ 200,000 of Williamson and Morris' funds. Among the dangers of entrusting property to another is the risk of theft. Thus, it is reasonably foreseeable that such funds might be lost if the attorney fails to exercise ordinary care, skill, and diligence in selecting or recommending a facilitator for that role.

It is uncontroverted that Abellera made no efforts to ascertain or verify the identity, credentials, or trustworthiness of Gideon or Section 1031 Services. Abellera and Blackburn, Walther & Sloan do not dispute that [***133] they had no prior history with Gideon or Section 1031 Services, other than Abellera's receipt of the solicitation letter and brochure that Abellera assumed was mailed to him as part of a mass [*315] mailing to members of the real estate section of the Georgia bar.

Abellera and Blackburn, Walther & Sloan assert that there is no evidence in the record that Gideon's propensity to steal [***8] Williamson and Morris' money was known or reasonably available. But Williamson and Morris' expert witness stated in his affidavit that Abellera's failure to investigate Gideon and Section 1031 Services prevented him from discovering that "Gideon" was an alias, that Gideon had only recently arrived in the local area, that Gideon was not a holder of a juris doctorate degree, that neither Gideon nor Section 1031 Services was a "licensed escrow" agent, that neither Gideon nor Section 1031 Services had ever established a trust account at Wachovia Bank, and that Section 1031 Services had been incorporated for less than one year before Abellera received the company's brochure.

We therefore reject Abellera and Blackburn, Walther & Sloan's argument that Gideon's conduct constituted an unforeseeable intervening act that broke the causal connection between their negligence and the injury.

HN4

If the character of the intervening act claimed to break the connection between the original wrongful act and the subsequent injury was such that its probable or natural consequences could reasonably have been anticipated, apprehended, or foreseen by the original wrong-doer, the causal connection [***9] is not broken, and the original wrong-doer is responsible for all of the consequences resulting from the intervening act. n5

----- Footnotes -----

n5 (Citation and punctuation omitted.) Id. at 511 (1).

----- End Footnotes-----

Because the record contains evidence that Abellera and Blackburn, Walther & Sloan might have reasonably foreseen that the nature and character of their acts and omissions could result in injury, the trial court erred in ruling, as a matter of law, that those acts and omissions were not proximate causes of the injury due to an intervening act. n6

----- Footnotes -----

n6 See Schernekau v. McNabb, 220 Ga. App. 772, 773 (470 S.E.2d 296) (1996) (HNS
 proximate cause is properly reserved for the jury and can only be appropriately addressed on summary judgment in plain and indisputable cases).

----- End Footnotes-----

[***10]

Judgment reversed. Smith, P. J., and Phipps, J., concur.

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