

THARPE & HOWELL

GENERAL LITIGATION NEWSLETTER

NOVEMBER 2009 EDITION

APPRAISER HIRED BY LENDER CAN BE LIABLE TO BORROWER FOR APPRAISAL MISTAKES

In *Shari Sage v. Blagg Appraisal Company*, plaintiff Shari Sage made an offer to purchase a home in Scottsdale, Arizona for \$605,200. The offer was “contingent upon an appraisal of the Premises by an appraiser acceptable to the lender for at least the sales price.”

After her offer was accepted, Sage asked her lender, Security Mortgage Company (“Security”), to retain Blagg Appraisal Company to perform the appraisal. In the course of performing the appraisal, Blagg spoke to Security representatives but not to borrower Sage. When the appraisal was finished, it was submitted to Security. Sage had signed a form requesting that Security provide her with a copy of the appraisal upon completion - which she received prior to closing. The appraisal cited the livable area of the home as 2,400 square feet and estimated its market value at \$620,000.

A year and a half later, during a period of rapidly rising home prices, Sage obtained another appraisal in connection with a refinancing. This appraisal stated the livable area of the home was 1,871 square feet, 569 fewer square feet than stated in the Blagg appraisal, and concluded the fair market value at that time was \$700,000.

Sage filed suit against Blagg, alleging its appraisal negligently misrepresented the value of her home at the time of purchase. Sage alleged that if Blagg’s appraisal had calculated the home’s value based on the correct amount of livable space, she would have realized the home was then worth less than she had contracted to pay for it and would have exercised her right to cancel.

Blagg moved for summary judgment, arguing that because it had been hired by Security and not Sage - it owed Sage no duty of care. Sage filed a cross-motion for summary judgment on the issue of care and argued her home was only worth \$350,000 at the time Blagg had appraised it for \$620,000 in 2004. The Superior Court found in favor of Blagg, determining that, in these circumstances, the appraiser owed no duty to a Sage as the buyer of the home. Sage appealed.

The Court of Appeal held an appraiser retained by a lender in connection with a purchase-money mortgage transaction *does* owe a duty of care to the prospective buyer. Accordingly, it reversed the Superior Court’s decision allowing the case to proceed toward trial.

DOES IME PHYSICIAN OWE THE PATIENT A DUTY OF REASONABLE CARE?

In *William Ritchie, et al. v. Scott Krasner, M.D.*, Jeremy Ritchie injured his back while at work. Jeremy felt pain and numbness and sought treatment within two days of the incident. He reported his symptoms to Dr. Robinson at HealthSouth Occupational Medicine, but disagreed with Dr. Robinson's diagnosis and next went to Emergency Chiropractic. The chiropractors recommended to Jeremy's Worker's Compensation carrier Paula Insurance ("Paula"), that Jeremy visit a specialist to evaluate his symptoms.

The carrier retained Dr. Krasner to perform an IME. In its request to Dr. Krasner, Paula described Jeremy's injury as "a cervical and lumbar strain as a result of [a workplace] accident Ritchie complained of stiffness and pain in his neck and lower back, tingling in fingers, arms and legs. He was diagnosed with cervical and lumbar strains." Paula asked Dr. Krasner to conduct an evaluation and answer specific questions relating to his condition and any treatment needed. Prior to the examination, Jeremy signed a notice which stated "It is very important that you realize that no Doctor/Patient relationship exists between you and Dr. Krasner. . . . This is done to insure that all findings will be neutral, and that the evaluators are completely independent and not involved in your disability claim or source."

Dr. Krasner examined Jeremy, ordered and reviewed an MRI of the lumbar spine, and reported to Paula that Jeremy's "injury is stationary," "[t]here is no indication for supportive care," and "[t]here is no indication for any work restrictions . . . and I feel he is medically able to perform unrestricted work." In reliance on Dr. Krasner's report, Paula terminated Jeremy's benefits. In an affidavit, Jeremy stated: "I was advised that my condition was stable, that I did not need further medical treatment, and that I could go back to work without restriction . . ."

Jeremy's condition continued to worsen and he sought further medical treatment. Eventually, he saw Dr. Solomon, a neurologist, who diagnosed Jeremy with a cervical spinal cord compression and ordered immediate spinal cord surgery. Although the surgery halted further deterioration of Jeremy's spinal cord, during the eight months before his spinal cord decompression surgery, the undiagnosed spinal cord compression contributed to an increasing and ongoing injury to Mr. Ritchie's spinal cord, causing part of the cord to die.

Jeremy developed Central Pain Syndrome, which caused constant pain and discomfort. Dr. Solomon prescribed oxycontin and oxycodone (narcotics) for the central pain syndrome. She also prescribed medications to aid his sleep and to reduce his nerve and muscle spasms. Jeremy later died of an accidental overdose, characterized as "the synergistic effects of various medications he was taking for his spinal cord injury." Prior to his death, Jeremy had filed a medical malpractice suit against the IME physician Dr. Krasner and others. After his death, his parents and son amended the Complaint to reflect a medical malpractice and wrongful death case.

After trial, a Jury returned a verdict in favor of plaintiffs for \$5 Million Dollars, and found the IME physician, Dr. Krasner, to be 28.5% at fault. Krasner appealed.

In his appeal, Dr. Krasner contended that, as an IME doctor, he had no duty “to perform a thorough enough [IME] examination to discover every condition that could possibly be harmful to a patient’s health, when the condition that posed a risk to the decedent’s health was not discovered during the IME.” The Court of Appeal agreed. However, it held that an IME doctor *does* have a duty to conform to the legal standard of reasonable conduct in the light of the apparent risk; and found Dr. Kramer had assumed that duty toward Jeremy when he conducted the IME. Given that Dr. Krasner had such a duty, whether there was a breach of that duty was a determination left to the Jury. The Court also noted that one (such as Dr. Krasner) who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care. . . .”

In rendering its decision, the Appellant Court recognized the real concern that imposing a duty on Dr. Krasner to practice reasonable care under the circumstances might create a chilling effect within the IME community; and it did not hold that *every* IME physician has a duty of care in every situation. However, in this case, it determined Krasner was hired to determine the extent of Jeremy’s work-related injury and to make treatment recommendations. By agreeing to do so, he assumed a duty to conform to the legal standard of reasonable care in light of the apparent risk. Therefore, it upheld the Trial Court’s underlying ruling that Dr. Krasner did owe Jeremy a duty of reasonable care given the facts in this particular case.

RELAYING MESSAGES FROM THE DEAD COULD CAUSE
HOSTILE WORK ENVIRONMENT TO EXIST

In *Zachary Winspear v. Community Development, Inc., et al.*, the United States Court of Appeal has opined a hostile work environment may exist where a co-employee consistently attempts to relay messages from a deceased brother who she claims is suffering in hell.

In this case, Zachary Winspear began working for Community Development, Inc. (“CDI”) in March of 2003. Approximately four years earlier, Winspear’s brother Logan had committed suicide. Winspear refers to Logan as his best friend and his only “real” family member; and believes his close relationship with Logan was due in part to the brothers’ difficulties with their strict religious upbringing and respective rejections of organized religion. Winspear spent years grieving for his brother and was nearly incapacitated by his suicide.

When Winspear started with CDI in 2003, he was a personal assistant to Charles Schneider, a co-owner of the business. Winspear had a close working relationship with Schneider, and they spent significant time working together, often discussing their personal lives. Winspear even confided in Schneider about Logan’s suicide and the devastating emotional impact it had on him. While Winspear was at CDI, he received multiple promotions and ultimately served as CDI’s community manager.

In January of 2005, CDI hired Schneider's wife, Lana Sierra, as a receptionist. Winspear and Sierra had known each other through Schneider, and Sierra was aware of Winspear's background. Shortly after she began work, Sierra approached Winspear and told him she had the ability to speak with the dead and that she had been communicating with his brother Logan. She told Winspear that Logan wanted her to pass messages to him because Logan had been trying to contact Winspear, but that Winspear had not been listening. She advised Logan had said he was suffering in hell and that Winspear would also go to hell as well - if he did not "find God." Winspear became very upset and asked Sierra not to speak about his brother anymore. Although Winspear was very upset, Sierra repeatedly spoke to him about her "gift" throughout that day, hugged Winspear, and told him that she wanted to help him. Winspear told Sierra she was crazy, he did not believe her, and she needed to stop. Nevertheless, Sierra continued to tell Winspear he needed to "find God" so that he would not go to hell like Logan.

Over the next several weeks, Sierra, on a daily basis, repeatedly hugged Winspear, talked to him about Logan, and asked him if he had looked into communicating with the supernatural or finding God. Winspear frequently asked Sierra to stop, but she did not. Winspear claims Sierra's demeanor grew more demanding, causing him to become increasingly uncomfortable at work. He began staying in his office during work hours just to avoid Sierra and, after work, he would go home, contemplate suicide, and cry himself to sleep. After approximately three weeks of Sierra's behavior, Winspear spoke with Schneider about Sierra, even though Winspear feared repercussions for complaining about Schneider's wife. In response to Winspear's complaints, Schneider merely confirmed that Sierra *could* communicate with the dead, and advised Winspear to heed Sierra's advice. Although some of Sierra's direct references to his brother eventually stopped, she did periodically continue to ask Winspear about finding religion over the next several months. At some point, she told Winspear he needed to find God so that Logan would stop bothering her.

In August of 2005, Sierra and Winspear had a heated confrontation about an unrelated matter, after which Winspear left work. CDI notified Winspear he needed to return to work because he did not have permission for the time off. However, Winspear quit his job.

Winspear subsequently sued CDI, Schneider, and Sierra claiming religious-based hostile work environment discrimination, in violation of federal law. The defendants filed a Motion for Summary Judgment, which the District Court granted. Winspear appealed that decision as it related to his federal hostile work environment claim. In the end, the Court of Appeal held that Winspear may have, in fact, suffered hostile work environment discrimination as a result of Sierra's actions, and remanded the case back to the District Court.

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