The Underlying Verdict Report in Freeman v. Becker Law Office

4724 - Legal Negligence - A law firm was blamed for letting the statute of limitations run on a personal injury claim – the law firm defended that while the lawsuit was filed too late, the claim was not meritorious in any event – the jury in this "case within a case" made a factual finding that supported the law firm's defense in the first phase of the trial and thus did not reach the malpractice question

Freeman v. Becker Law Office,
07-10400
Plaintiff: R. Kenyon Meyer and
Caroline Lynch Pieroni, *Dinsmore & Shohl*, Louisville and Don Heavrin, Louisville
Defense: Gary M. Weiss and J. Allan
Cobb, *Weiss & Cobb*, Louisville
Verdict: Defense verdict on liability
Court: **Jefferson**, J. Maze,
2-8-12

Tonia Freeman, then age 44, was working as a volunteer for Toys for Tots on 10-14-04. She was the local chairperson in Ft. Knox for the charity. On this day a shipment of toys arrived and Freeman went to a Ft. Knox building to examine the shipment. The building was in poor shape. As Freeman left the building, she stepped on a wooden splinters protruding from the stairs.

Because of her diabetes and her already partly necrosed foot, she did not initially realize the splinters had punctured her foot. Only later that day at a beauty salon did her daughter point it out to her. Freeman got a tetanus shot and then followed with her family doctor (at the next appointment six days later) and the wound was cleaned of wood splinters. The next weekend Freeman developed a serious infection in her foot and it was partially amputated. This would not be the end, the continuing infection leading to Freeman losing her leg below the knee.

As Freeman recuperated in the hospital, she saw an advertisement on the television for the Becker Law Office. The law firm (acting through Kevin Renfro) filed a Federal Tort Claims Act notice against the government regarding the condition of the building at Ft. Knox. The government responded (through its lawyers) that there was no liability for the condition of the building.

Following the rejection of the federal claim at the administrative level, Renfro pursued a civil claim against the non-profit Toys for Tots. The insurer for Toys for Tots denied the claim and cited that the statute of limitations had run. Renfro and the law firm subsequently withdrew their representation. [During the course of the litigation, Renfro had transferred the case to the law firm of *Bubalo Hiestand & Rotman*. For purposes of this report and despite the assignment, the defendants (Renfro, Becker and the Bubalo firm) were indistinguishable and unified in their defense.]

Freeman then hired a second lawyer, Don Heavrin and Freeman learned for the first time that the statute of limitations had run on her claim against Toys for Tots. She then sued Becker Law Office and related attorneys alleging error in failing to sue Toys for Tots within a year.

Her liability expert, Larry Franklin of Louisville (and a famed plaintiff's lawyer) testified that Toys for Tots was the proper defendant and her claim was meritorious and extremely valuable but for the failure to present a timely claim. That the claim had merit, Freeman noted Becker had filed a $10,000,000 lawsuit – if it was worth filing at all, didn't it have merit? If Freeman prevailed she sought the damages she would have recovered from Toys for Tots. That represented medicals of $1,056,358 and lost wages of $1,126,578. Her life care plan was $1,177,086. She sought $6,639,977 more for pain and suffering.

Becker Law Office first moved for summary judgment and cited that as Freeman's status was a licensee in using the Fort Knox building, no duty was owed to her by Toys for Tots. The trial court granted summary judgment. The Court of Appeals reversed in June of 2010 and the matter returned for trial.

The law firm defended on the merits that Toys for Tots was not a proper defendant as it never controlled the premises at Ft. Knox. It would be on this issue that the case would turn. If Toys for Tots didn't control the Ft. Knox building, then there was no liability.

The defense postured that after it withdrew from the case, Freeman should have pursued the federal action against the military – as it controlled the premises, it was the proper defendant. [While the government had administratively denied the claim, Freeman could have still filed a Federal Tort Claims Act lawsuit.] Rather than doing this, the law firm argued, Freeman instead sued it for legal negligence. Becker Law Office also explained its initial pursuit of Toys for Tots as compared to its later position (when the statute of limitations had run and it was sued) that there was no claim. The answer: It had moved against Toys for Tots in an abundance of caution, but the primary and proper defendant remained the federal government.

The legal experts at trial for Becker Law Office were Edward Stopher, *Boehl Stopher & Graves*, Louisville and Hans Poppe, *Poppe Law Office*, Louisville. [Both Stopher and Poppe are highly regarded and experienced trial attorneys – Stopher is known for his defense work, while Poppe represents plaintiffs.] They noted that while the case against the military was weak, Freeman could have still pursued it. That the claim was limited, the defense additionally developed proof that the leg amputation was related to Freeman's advanced diabetes and not the wooden spike event at Ft. Knox.

As the case advanced to trial, Judge Maze made a decision to try the matter in two phases. The first phase (the case within a case) would address the underlying claim. Only if Freeman proved that she would have prevailed against Toys for Tots (and prove possession among other things including damages) would the second malpractice phase begin. Despite the so-called trial phase scheme Maze envisioned, as the case went to the jury almost all of the expert proof (which was irrelevant to the factual questions in the underlying case) was presented to the jury.

There was also a hiccup on the road to the trial. On the date the case was originally scheduled for trial (December 2011), the *Courier-Journal* ran a lengthy front page article describing the litigation. The article was well-read by the potential jury pool, 9 of the first 16 jurors in voir dire indicating they had seen and discussed the article while waiting in the jury pool room. Judge Maze declared a mistrial and reset the trial for February.

As the jury finally deliberated the case, it originally reported to the court that it was stuck at 6-6. It returned the next day to deliberate and asked the court a question: Should Toys for Tots have discovered the hazard in the exercise of ordinary care? Before the court could answer, the jury indicated it had a verdict.

The case was resolved on the first question: Did Toys for Tots possess the building? The jury said no and thus didn't reach an affirmative defense that the condition was open and obvious and the purported negligence by Toys for Tots in maintaining the premises. The jury could also have considered (but for the resolution of the possession question) comparative fault and Freeman's damages in the underlying case. A defense judgment has been entered.