NOT JUST THE MONEY: *LEE V. STATE FARM MUTUAL INS. CO.*

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Clark H. McGehee practices in Atlanta, Georgia. He is a graduate of Emory Law School and was admitted to the Georgia Bar in 1977. He is one of the founding partners of Lanham & McGehee, P.C., an incorporated member of the litigation firm, Johnson & Ward. He credits his former partner, the late Cullen M. Ward, one of the founders of GTLA, and his uncle, the late Francis H. Hare of Birmingham, Alabama, a founding member of ATLA, with mentoring him in Plaintiff's civil litigation. He has been involved in all aspects of Plaintiff's litigation for almost 25 years, including product liability, medical negligence, architectural/engineering liability, highway design, aviation, railroad, trucking and other issues involved in Plaintiff's personal injury and wrongful death representation. He has been a longtime member of GTLA and ATLA, and has lectured and written on many issues involved in Plaintiff's civil litigation.

On July 10, 2000, the Georgia Supreme Court decided *Lee v. State Farm Mutual Insurance Company, et. al.*, ___ Ga. ___ (Case No. S99G1523). This important decision re-established the "impact rule," permitting certain parents to pursue claims for negligent infliction of emotional distress resulting from witnessing the injury or death of their children. It reaffirms a cause of action that had previously been abrogated in a confusing series of opinions which culminated almost 10 years ago in *OB-GYN Associates of Albany v. Littleton*, 261 Ga. 664, 410 SE2d 121 (1991) (routinely referred to as "*Littleton IV*," because there had been three prior appellate opinions in that same case).

We had the honor of representing Jerome and Bridget Lee in what started out as a relatively straightforward, simple uninsured motorist claim, but subsequently evolved into a lengthy five-year litigation and high-stakes gamble that finally ended with the recent decision of the Supreme Court.

This case began on Saturday afternoon, February 18, 1995, when Bridget Lee was involved in a violent collision that resulted in the death of her daughter. Bridget was driving on U.S. Interstate Highway 20 in DeKalb County, Georgia. Her husband, Jerome Lee, a high school coach and teacher in DeKalb County, was driving his car in front of her. They were taking Jerome's automobile to the shop for service, and their 5-year-old daughter, Britnie Lee, was riding as a front seat passenger with Bridget. As they neared U.S. Interstate Highway 285, an unidentified vehicle changed lanes directly into the path of Bridget's automobile, striking it and causing her to spin out of control into the adjacent lane of traffic. Her car was hit violently, directly on the passenger side, by an approaching truck. The never-identified vehicle that caused the collision left the scene.

Bridget was not seriously injured in the collision, suffering primarily soft tissue injuries to the neck and head. Her daughter Britnie suffered severe head injuries, however, as the impact to the passenger side door caused intrusion into the passenger compartment. Bridget saw the bleeding and the cuts, gashes, and other severe injuries to her daughter's head, and in horror removed Britnie from the vehicle. She held her daughter bleeding in her arms while others called for an ambulance. She was with her for almost an hour at the scene while witnesses (including an off-duty nurse) and later ambulance attendants frantically provided CPR and

undertook other efforts to save her daughter's life. She watched as her daughter's heart rate slowly dropped, and medics were unable to stabilize her. Britnie was taken from the scene by ambulance to a local hospital, where later that afternoon she was declared dead.

Bridget herself was treated for her soft tissue injuries in the emergency room that afternoon and released. Although she subsequently recovered from her physical injuries, she never fully recovered from her emotional scars. Over the ensuing months, she required counseling and psychotherapy due to severe depression and the emotional distress she suffered from witnessing the death of her daughter. To this day, she continues to suffer emotionally from the trauma of watching her only daughter die.

Several months after the tragedy, Mr. and Mrs. Lee requested that we assist them in their uninsured motorist claim. We conducted an extensive investigation with the assistance of local law enforcement agencies, but were unsuccessful in locating or identifying the motorist who had caused the collision. Accordingly, a timely claim was made upon Mr. and Mrs. Lee's uninsured motorist carriers, State Farm Mutual Automobile Insurance Company and Allstate Insurance Company, which each provided UM coverage of $25,000/$50,000 at the time of this incident. The policies were "stacked," so that total UM coverage consisted of $50,000/$100,000.

Not surprisingly (remember, we were dealing with State Farm and Allstate), initial efforts to resolve the UM claims were unsuccessful. After many months of legal haggling, we finally resolved Mr. and Mrs. Lee's wrongful death claim for the death of Britnie for the limits of coverage in the amount of $50,000. However, we specifically reserved the right to proceed with their individual claims. State Farm and Allstate thereafter refused to negotiate either Mrs. Lee's individual claim, including her claim for the emotional distress she suffered in witnessing the death of her child, or the derivative claim of her husband for loss of consortium. Accordingly, suit was filed on February 15, 1996.

After many months of discovery and motions, it became clear that the UM carriers would not make a good faith offer to settle Mrs. Lee's individual claim They contended as a matter of law that she could not assert a claim for emotional distress or other damages arising from witnessing her daughter's death. Without regard to the legal viability of her claim, the UM carriers further insisted that the language of their policies precluded payment for Mrs. Lee's emotional distress damages, since these damages "arose out of" the death of her daughter, and the limits of coverage had already been paid in the wrongful death claim.

After several months of further legal wrangling, a pre-trial hearing was held on January 31, 1997. The parties agreed to stipulate to the pertinent facts of the case, and to resolve on cross-motions for summary judgment the issue of whether Bridget Lee could assert an emotional distress claim under the Georgia "impact rule." To demonstrate the difficulty presented by *Littleton*, after we argued strenuously to the trial court during the subsequent hearing on the motion that the impact rule had been the law of Georgia for over 100 years, the Judge candidly looked down and said, "Yes, but how do I get around the one sentence in *Littleton* that refers to this issue?" (The trial court was referring to a footnote authored by Judge Andrews in his Court of Appeals opinion in *Littleton III*, 199 Ga. App. 44, 403 SE2d 837 (1991), which had been adopted by the Supreme Court in its opinion in *Littleton IV*.) To our reply that this was only an aberration, the Judge said (not surprisingly), "It may be an aberration, counsel, but this is the Supreme Court and I have to follow it." After taking the motion under advisement for several months, on October 26, 1998 the trial court granted summary judgment to State Farm and Allstate, holding that pursuant to *Littleton IV*, no claim for emotional distress could be asserted by Bridget Lee, even though she had received an impact and injury in the same collision which had resulted in the death of her daughter.

An appeal was filed in the Court of Appeals the following day. Lengthy appellate briefs were filed, and the case was set down for oral argument on February 5, 1999. The facts of the case presented an ideal opportunity for appellate clarification to dispel the

significant confusion caused by *Littleton IV*, which had essentially abrogated the impact rule in Georgia. This confusion was reflected in several subsequent opinions of the Court of Appeals, such as *Thomas v. Carter*, 234 Ga. App. 384, 506 SE2d 377 (1998), in which the Court struggled to reconcile *Littleton IV* with prior law. (*Thomas v. Carter* adopted a hybrid "common force" impact rule which permitted recovery of emotional distress damages only by a mother carrying a child *in utero* and receiving injury to the placenta).

We advised Mr. and Mrs. Lee that this could be an important test case which could establish significant precedent under Georgia law. We felt confident we could obtain a reversal on appeal. In fact, a review of cases throughout the country reflected that all other jurisdictions allowed some form of recovery of emotional distress damages under these circumstances. Indeed, most had rejected the restrictive "impact rule" and adopted one of the broader "zone of danger," "bystander," or "foreseeability" rules of recovery for negligent infliction of emotional distress. Absent clarification of the confusion caused by *Littleton IV* and its progeny, Georgia would be left as the only jurisdiction in the country that did not allow some form of recovery of emotional distress damages under these circumstances.

The Court of Appeals appeared to be very receptive to our case at oral argument. In fact, the arguments went so well that the following day, on February 6, 1999, counsel for both UM carriers indicated they could obtain authority to offer the limits of UM coverage, in order to avoid an appellate opinion on this issue. After great soul searching, we felt that an appellate opinion on this issue was important in order to reinstate some form of emotional distress recovery under Georgia law. In lengthy discussions with Mr. and Mrs. Lee, we talked about how in later years any money received would be long spent and forgotten, but an opinion rendered by the Court would not. We felt that this was an important issue, and we therefore recommended they reject the offer and await an opinion. They agreed to reject the settlement offer so that an appellate opinion on this issue could be rendered, because they felt this was a better memorial to their daughter than simply receiving the insurance proceeds, even though they felt those proceeds had been denied to them wrongfully earlier in the litigation. More than one of my colleagues advised that this was a foolish gamble under the circumstances.

The Court of Appeals rendered its initial decision in the case on April 1, 1999. Much to our dismay, it unanimously affirmed the trial court. Though this was disappointing and left a sick feeling in my stomach (particularly as we had rejected a limits offer), it was not totally unexpected in light of the confusing (but binding) precedent set by the Supreme Court in *Littleton IV*.

After catching additional grief from colleagues for not accepting the limits offer prior to the opinion (that offer having been withdrawn by the UM carriers), we prepared a lengthy motion for reconsideration, filed April 9, 1999. After several months of additional waiting, on June 30, 1999 the Court of Appeals substituted a whole court opinion. By a slim 4-3 majority, the Court again affirmed the trial court's grant of summary judgment. *Lee v. State Farm Mutual Automobile Insurance Company*, 238 Ga. App. 767, 517 SE2d 328 (1999). (Interestingly, the dissenters included two of the three Judges who had joined in the original unanimous opinion; the third Judge on that panel, who had actually authored the original opinion, had since retired and was not involved in the reconsideration.) Though we had now obtained some further clarification of *Littleton IV*, and had a strong dissent that supported our position, this was little solace. We now had the worst of all possible worlds — the loss of an outstanding offer to settle for the limits of coverage, and a whole court opinion of the Court of Appeals creating further binding precedent that no recovery of emotional distress damages under these circumstances was possible under Georgia law.

After significant late night second-guessing (and still additional grief from colleagues at my failure to "take the money and run"), we prepared our petition for certiorari to the Supreme Court, filed July 14, 1999. We held our breaths for several more months, awaiting some word from the Court. We had to advise Mr. and Mrs. Lee quite frankly that it was uncertain whether the Supreme Court

would grant our petition, and that if it did not, the case would be over. To their credit, they were totally supportive, and never second-guessed our recommendation to take this issue all the way to the Supreme Court.

On November 5, 1999, I opened the notice from the Supreme Court and read it with a tightening stomach. But it was good news! The Supreme Court had granted our petition for certiorari, by a precarious 4-3 margin. We felt we were hanging on by our fingernails, but at least we now had a fighting chance.

The Supreme Court had granted certiorari to address the following issue: "Under what circumstances may a parent recover damages for the parent's emotional distress caused not by injuries to the parent but by the parent's witnessing the receipt of injuries by the parent's child. See *OB-GYN Associates of Albany v. Littleton*, 261 Ga. 664 (1994); *Southern R. Con. v. Jackson*, 146 Ga. 243 (1916); *Thomas v. Carter*, 234 Ga. App. 384 (1998)."

Briefs were filed on November 23, 1999, and the case was argued orally on March 13, 2000. Once again, the arguments went extremely well. (In fact, my 16-year old daughter was able to attend, and got quite a kick out of it). We were quietly hopeful, based upon the Court's questioning, that a favorable opinion might be in the offing. Indeed, some of the Justices implied that not only did *Littleton IV* need further clarification (if not outright reversal), but the Court should consider broadening the potential scope of recovery of emotional distress damages beyond the restrictive "impact rule" to a "foreseeability" analysis.

Immediately after the oral argument, however, we were again placed on the horns of a dilemma: Both UM carriers again tendered their limits of coverage, in order to avoid an opinion by the Supreme Court on this issue. We were now under the gun for the second time in this case. Though settling at that point would have meant victory for our clients, it would have meant defeat for all others similarly situated, as it would have left terrible binding precedent on this issue. We obviously hoped that our clients would allow the Supreme Court to rule. Since we had already lost at the appellate level after a similar offer and a similarly encouraging oral argument, however, the decision was doubly difficult for Mr. and Mrs. Lee. After lengthy consultation with them, we were again pleasantly surprised that they were willing to fight to the end rather than settle the case. They authorized us to reject the offer and await an opinion of the Supreme Court.

We held our breaths for several additional months, awaiting an opinion. Our patience, and our clients' willingness to fight the good fight, finally paid off in a unanimous opinion rendered on July 10, 2000. That opinion not only reinstated recovery of emotional distress damages under the "impact rule," but included a strong concurring opinion implying that the Court might, in an appropriate future case, move toward the more mainstream "foreseeability" analysis adopted in most other jurisdictions. This opinion is not only important for others similarly situated in this State, but also wonderfully gratifying to Mr. and Mrs. Lee, who hung in there over the long haul.

The tortuous path of this case reflects how difficult it is, for both the lawyer and the client, to make a difference and change the law, particularly during those long, dark periods when it looks as though the odds are stacked against you (and you have rejected settlement offers that would have allowed you to "take the money and run").

It is during these times that it is important to remember what my uncle, Francis Hare, once told me: **"Sometimes it's not just about the money."** Or, as Winston Churchill said: **"Never, never, never, never, never surrender!"**