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Insurer avoids \$10M payment

FEDERAL JUDGE RULES that insurer is not liable for verdict over toddler's death by drowning in pool at home day care

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A FEDERAL JUDGE has ruled that an insurance company is not liable for a \$10 million judgment, plus punitive damages and attorney fees, from a lawsuit over the death of a toddler who drowned in a swimming pool at a home day care center.

The decision relieves Cincinnati Insurance Co. from a potential \$15 million exposure, according to the insurer's attorney, James Brieske of Gray, Rust, St. Amand, Moffett & Brieske.

"I hope I get a nice little Christmas card and some more business," said Brieske.

However, the dispute is not over. Lawyers from Harris Penn Lowry, who represent the toddler's family, are asking the judge to reconsider the decision. If that fails, the operators of the day care center will appeal the judge's ruling, arguing that the insurer should pay the verdict.

"We plan to appeal when the time is right to do so," said Richard Dolder Jr., who with James Sadd of Slappey & Sadd represents the operators of the day care center.



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James Brieske, representing Cincinnati Insurance Co., said the homeowner had settled out of the case with the company, and the actual residents of the house were not covered.

It's a dispute that involves multiple lawsuits in three courts handled by a string of attorneys. At this point, "it's a lawsuit about a lawsuit," said Dolder, who specializes in bad faith claims against insurance companies.

U.S. District Court Judge Thomas

Thrash Jr. of the Northern District of Georgia ruled Sept. 23 that the insurance company is not responsible for the judgment from a 2011 verdict in Gwinnett County State Court.

Thrash's decision is important, lawyers for the insurer and the day care operators

said, because it addresses what happens when lawyers seek to collect on jury verdicts that exceed an insurance policy's coverage by claiming the insurance company acted in bad faith.

The story began in 2009 when Abiola Bankolemoh, just a few weeks shy of his second birthday, wandered away from his sleeping baby sitter and fell into a dark, dirty, unfenced swimming pool behind the home in Buford. His 3-year-old brother was the only person to see what happened to him. The brother woke the baby sitter, who had fallen asleep after working the night shift at a local retail store. She struggled to find the toddler under the dark water. When she pulled him out, it was too late, according to the narrative in the lawsuit filed later that year by the boys' parents, Kimi Green and Gbolahan Bankolemoh.

The parents sued the baby sitter, Tanya Moon; her husband, Shawn Moon; and Shawn's father, Terry Moon, who owned the home where Shawn and Tanya lived and where Tanya ran the day care business. In a November 2011 trial, the jury delivered a \$10 million verdict and apportioned fault among the three defendants: 50 percent for Tanya Moon, the baby sitter; 28 percent for Shawn Moon, the husband; and 22 percent for Terry Moon, the home owner.

Terry Moon had homeowner's insurance with Cincinnati. However, he settled out of the case for \$1.1 million through a high/low agreement, according to Brieske.

Tanya and Shawn were not listed as insured. But the lawyers for the boy's parents believed Cincinnati was responsible for the verdict. Part of their reasoning was that the Moon couple lived in and were responsible for the

maintenance of the home. Another point was that Cincinnati had defended the couple for about a year, then dropped them because they weren't named in the insurance policy.

“Cincinnati had reasonable grounds to contest coverage because it did not believe Shawn and Tanya Moon were acting as ‘real estate managers’ at the time of the accident.

—Judge Thomas Thrash,
U.S. District Court

To collect the funds they owed from the verdict, Shawn and Tanya Moon filed a bad faith claim against Cincinnati in DeKalb County Superior Court. Cincinnati had the case removed to federal court and added a third-party claim against the boy's family, arguing that Shawn and Tanya Moon were not covered by insurance.

Thrash wrote that the Moons had no basis for their bad faith claim because they were not insured under the policy. He rejected their effort to prove they should have been insured because they were acting as real estate managers for the home owner, Terry Moon.

“Cincinnati had reasonable grounds to contest coverage because it did not believe Shawn and Tanya Moon were acting as ‘real estate managers’ at the time of the accident,” the judge wrote. “Accordingly, Cincinnati cannot be liable for bad faith. Its motion for summary judgment should be granted.”

The tragic story is a cautionary tale on many levels, according to lawyers for the insurer and the Moons.

“I've had a lot of pool cases, and none of them end well,” Brieske said. He advised that no one should place their child in the care of a baby sitter who has a swimming pool.

He added that Terry Moon had exposed himself to the liability of the child care operation in a home with a swimming pool where he did not live and exercised no control because he was trying to help his son, daughter-in-law and grandchildren. The couple had gotten into trouble with payments on their mortgage, so he bought the house to help them avoid losing their home.

As for what happens with the \$10 million judgment and related bad faith claim for attorney fees and punitive damages, Dolder said the Moons will ask the U.S. Court of Appeals for the Eleventh Circuit to review the case if Thrash rejects the motion to reconsider already filed for the boy's parents.

Referring to the Moon couple, Dolder said, “What my clients want is for Abiola's family to made whole.”

If they were to succeed in their appeal, the Moon couple would be making an additional claim of their own for the bad faith case.

Brieske said this case is unusual because defendants from original verdicts typically assign the claim to the original plaintiff. In this case, though, part of the battle is the Moons' efforts to establish the right to an insurance claim.

The federal case is *Moon v. Cincinnati*, No. 1:12-CV-3112-TWT. 