

DAILY REPORT

A SMART READ FOR SMART READERS



DAILY REPORT
BUSINESS MATTERS

Billionaire Warren Buffett wants Congress to raise taxes on the nation's wealthiest to help cut the U.S. budget deficit. **Story, page 6.**

An ALM Publication

1B OPINIONS
Read summaries of recent opinions from Georgia's high court and Court of Appeals.

WHO'S STOP DOG?
Legal beef: Sara Lee, Kraft escalate wiener war. More at DailyReportOnline.com.

6 AAA CRISIS
America's AAA crisis could mean better economies for Asian nations.

4 ELECTION LAWS
The 1st Circuit upholds Maine and Rhode Island's campaign finance disclosure laws.

Newsreel

Starting gun sounds at SEC

Whistleblower office

• Corporate law departments have had most of the summer to get up to speed on the Securities and Exchange Commission's new whistleblower rules, and now it's game time.

In a Friday post on *The New York Times* DealBook blog, Ben Prosser wrote, "The Securities and Exchange Commission's whistle-blower office opened its doors on Friday, much to the delight of plaintiffs' lawyers and the consternation of corporate America."

As mandated by the Dodd-Frank financial overhaul law, the new Office of the Whistleblower is a central clearinghouse for tipsters to report corporate fraud, with whistleblowers poised to share in a portion of any fines collected by the SEC as a result of an employee tip.

The SEC has set up a Web page for potential whistleblowers at sec.gov/whistleblower that lays out the rules and methods for submitting a tip, along with information on applying for and collecting award money.

In a statement released by the SEC, Robert Khuzami, director of the Commission's Division of Enforcement, said, "Early and quick law enforcement action is the key to preventing securities fraud and avoiding investor losses, and the whistleblower program gives us the tools to help achieve that goal."

While regulators and victims of past securities frauds may be enthusiastic about the new program, not everyone was on board with the new rules announced this past May. According to the DealBook post:

"In approving this new whistle-blower rule, the S.E.C. has chosen to put trial lawyer profits ahead of effective compliance and corporate governance," David Hirschmann, president and chief executive of the [United States Chamber of Commercial Center for Capital Markets Competitive-ness, said at the time. "This rule will make it harder and slower to detect and stop corporate fraud."

—Corporate Counsel



05105172609

Med-mal case ends in mistrial

COBB JURY FINDS for hospital, but can't decide on doctor's liability

KATHERYNN HAYES TUCKER

ktucker@alm.com

AFTER TWO WEEKS in a Marietta courtroom where he asked for a \$50 million medical malpractice verdict, Thomas W. "Tommy" Malone went home Friday evening with only a mistrial and the disclosure by jurors that they weren't convinced a doctor and hospital were responsible for an infant's birth injuries.

The jury decided for WellStar Health System Inc. but couldn't reach agreement on a doctor's liability, leading to the mistrial.

"It was an expensive focus group, but we learned from it and we will try it again," Malone said to his trial team and his clients as they left the courthouse just before 7 p.m. "We've got a good case. It was just the wrong jury." Malone told the judge he spent \$300,000 preparing the case, which he filed in 2009.

Defense lawyers David A. Sapp of Green & Sapp and Daniel J. Huff of Huff, Powell & Bailey declined to discuss the case with the *Daily Report*.

Cobb County State Court Judge Kathryn J. Tanksley called the mistrial at 6 p.m. Friday after the jury reported being unable to reach agreement. It was the tenth day of the trial over the cause of birth injuries that left Tucker Sutton, now 3, severely brain

See *Med-mal*, page 8



Daniel Huff suggested that a C-section would not have made a difference.



David Sapp contended that nurses met the "standard of care."



Tommy Malone: "We've got a good case. It was just the wrong jury."

Litigator, divorce lawyer to run for Supreme Court

FIELD EXPECTED TO EXPAND: Judge Anne Elizabeth Barnes says she is 'giving it serious consideration'

ALYSON M. PALMER | apalmer@alm.com

WITH A RARE OPEN race in the offing, would-be state Supreme Court justices are gearing up to run. Atlanta litigator Scott L. Bonder and Gwinnett County divorce lawyer Tameia L. Adkins both have confirmed for the *Daily Report* that they plan to run for the seat expected to be vacated by Presiding Justice George H. Carley.

And on Monday, Presiding Judge Anne Elizabeth Barnes of the state Court of Appeals said she is considering joining the race.

"I am not in a position to say that I will be running, only that many of my friends and supporters have encouraged me to do so," she said in an email to the *Daily Report* responding to an inquiry about Carley's seat. "I am giving it serious consideration."



Scott L. Bonder: "I plan on running for the open seat."



JOHN DISNEY
Tameia L. Adkins: "I will be campaigning this time around, more actively."

The field is likely to expand in the coming months: open seats on the Court of Appeals of Georgia in 2008 and 2010 drew seven and six candidates, respectively.

Adkins has twice run for the state's appellate courts, most notably forcing a runoff against incumbent Justice David E. Nahmias last year despite having done virtually no campaigning. Bonder was a finalist for an appointed position on the DeKalb

See *Race*, page 9

Bank of America sued for outsourcing customer calls

ZOE TILLMAN | ztillman@alm.com

A CLASS ACTION FILED Wednesday accuses Bank of America Corp. of putting the privacy of its customers' financial data at risk of U.S. government surveillance by transferring service calls to overseas call centers.

According to the complaint, which was

filed on behalf of Bank of America customers in Washington and nationwide, service calls to the bank are often transferred abroad without any notice to customers. When that happens, the customers' digitized financial records are sent electronically to the call center. The suit was filed in U.S. District Court for the District of Columbia.

Outsourcing to foreign call centers is a common practice, but the problem, according to the lawsuit, is that the financial information being transferred electronically isn't protected against U.S. government collection or surveillance in the same vein as domestic electronic transfers of the same information.

See *Bank of America*, page 9

Med-mal case ends in mistrial in Cobb County

Med-mal, from page 1

damaged. His parents, Lori and Landon Sutton—Malone's clients—contended their 11-pound baby—whose shoulder became trapped in the birth canal for two minutes while his head was out and his umbilical cord compressed—would have been born healthy if nurses had reacted to signs of trouble and their doctor had delivered the baby three hours earlier by Cesarean section. Instead, the baby was born dead. After 19 minutes of resuscitation efforts, his heart started beating again.

Sapp, representing WellStar, contended that a C-section was not indicated and that nurses met the “standard of care.” He also said they worked heroically to save the baby's life. Huff, representing Dr. Gregg Alan Bauer and Marietta OB-Gyn Affiliates, suggested that a C-section would not have made a difference because the mother had an infection that started the baby's brain damage before birth.

Huff and his trial team used an animation to demonstrate their theory of brain damage starting before birth. Malone called it a “fantasy defense,” but it was the doctor's side that led to the jury's deadlock. Both defendants and the plaintiffs used several medical experts to support their arguments. Jurors disclosed later that they were divided on which expert to believe. At 3 p.m. Friday, following a day and a half of deliberations, the jurors sent the judge a cryptic note saying they had reached an agreement as to one of the defendants but were unable to agree on

the other. The note did not disclose which side was the beneficiary of the agreement.

For the next three hours, the judge tried repeatedly to reach a resolution that would avoid the mistrial.

First, to encourage the jurors to reach a decision, the judge called them back into the courtroom and gave them an Allen charge, also known as a dynamic charge. The court's instructions included directions to “scrutinize your opinions more closely,” “re-examine evidence” and “in a spirit of fairness, try to arrive at a verdict.”

As soon as the jury left, the judge discussed the jury's note with the attorneys. Tanksley delayed showing the lawyers the note until the end of the day, saying she feared it was “too specific.” At first, she did not tell them which party the jury said they had reached agreement over, although later she revealed it was the hospital. Tanksley said she would not take the verdict from the jury on just one of the defendants because she feared the state's apportionment requirements would lead to a reversal on appeal. “We're in uncharted territory,” Tanksley said. A verdict on only one defendant without agreement on the other would not fulfill the requirement to apportion damages between the two. “We could have a mess,” Tanksley said.

Malone tried to convince the judge to take the verdict on the one defendant—whatever the verdict was. He suggested a “motion in arrest of judgment” to place the damages award on hold until the Georgia Supreme Court could offer guidance on how to handle the apportionment issue. Tanksley and the defense counsel said they were not familiar with that tactic. Malone quoted the late Melvin Belli, the famed trial lawyer who Malone considers his mentor, as saying the concept

was “hoary with age but modern as tomorrow.” Still, the judge declined.

The judge did push the lawyers to try again for a settlement. That didn't work, either. “These scenarios have been explored by all,” said Huff, representing the doctor.

Although Huff and Malone did not settle, Malone offered to release the doctor from the case in order to take a verdict on the hospital. The judge declined. Malone turned to Huff and said, “There's no reason we can't go ahead and tell the court.” Then Malone and Huff approached the bench and spoke to the judge. They did not disclose their agreement publicly. Asked in the hallway whether he ever makes high-low agreements, Malone said, “sometimes.” He did say he had no agreement in place with the hospital's lawyer, Sapp.

Malone and Sapp battled contentiously throughout the trial, while Huff appeared to be working congenially with both sides.

When the judge directed Sapp to try again to settle, he replied, “Your honor, we have made three separate overtures to the plaintiffs.”

“When was the last one?” the judge asked.

“The Thursday before the trial began,” Sapp said.

The judge directed Sapp to contact his client and try again.

“I'll see if our offer still stands,” Sapp told the judge.

The judge replied, “If he [Malone] had wanted to accept that offer, he'd have already done that. I suggest you ask your clients if they wish to change their offer.”

Sapp left the courtroom.

When he returned, he asked the bailiff, “Can we talk to the judge—Mr. Malone and I alone—privately?”

At about 5 p.m., all three lawyers and their co-counsel entered the judge's chambers. At 5:15 p.m., Sapp quickly exited alone. “Unbelievable,” he said to himself. Asked if the case was settled, he said, “We've been in it this long. We can stay the course.”

Five minutes later, the other lawyers left the chambers.

The judge kept the jurors working until 6 p.m. Tanksley told the lawyers she asked the jurors to return Saturday and continue trying to reach a verdict on both defendants. But they said they could not agree.

In the first part of his closing Thursday morning, Malone suggested to the jury that the verdict should be “at least \$50 million.” He also reviewed a life care plan showing \$20 million of expenses to take care of Tucker. He noted the family has already incurred more than \$500,000 in medical expenses for the baby.

In the second part of his closing, Malone provided a context for such a large sum of money. He said he heard of a Picasso painting that sold for \$95 million. “That's mere oil on canvases,” Malone said. “We're dealing with the greatest work of the greatest master of them all. I don't know how you undervalue a life.”

He also cited severance pay for a Lehman Brothers executive—“one of the jerks who got our economy in the shape it's in”—of \$299 million. He gave salaries for CEOs of The Coca-Cola Co., Southern Co. and Aflac Insurance.

Malone told the jury that it was especially meaningful to him to be trying this particular case with his own son, Rosser A. “Adam” Malone, who also practices in the Malone

Law office. He alluded to the profound disability of his clients' son. He suggested that Tucker might someday be able to communicate with the help of a computer. “I hope an pray you will hear, ‘Hi, Dad, Hi, Mom.’”

But it was Sapp's argument that apparently swayed the jurors. He told them they were looking at two cases: “one based on the medicine, one case that's been made up.” A he asked the jury to return a verdict in favor of the hospital, Sapp told the jury, the plaintiffs “have not proved that any violation of anything by WellStar proximately caused the injury.”

In his closing, Huff told jurors there was no definitive link between the baby's injury and anything the doctors did. “The law in hindsight is not permitted,” Huff told the jury. “Simply because there's been a bad outcome is not evidence of malpractice. He told the jurors some doctors would have done a C-section and some would not. Huff noted the competing “equal theories” by both plaintiffs and the defense on what caused the brain injury. And he said the plaintiffs had “not met their burden of proof.”

As the jury exited the judges chambers the end of the day—after the judge declared the mistrial—Malone was waiting at the door to talk with them. As he waited, along with his trial team, he stood beside the parent and the baby in his stroller. At one point, the towering Malone reached down and held Tucker's hand—the only part of the baby's body that showed any movement during the days and hours he waited in the courtroom with his parents.

When the jury filed out, they began passing by the Malones and their clients without speaking or looking at the baby. Malone stepped up and gently said, “You don't have to talk to us. We would appreciate it if you would.”

About half the jurors stayed to talk. Four men gathered around Malone. “We know you reached an agreement on the hospital. Will you tell us what it was?”

“We found for the defense,” a juror answered.

“For the defense?” Malone repeated, calm but obviously surprised.

Malone asked the jurors whether they believed the plaintiffs had a right to know of the baby's distress in labor and whether they had a right to a C-section. The men replied that they didn't think the hospital was at fault.

“What about the doctor? Do you think it was responsible?” Malone asked. The men were quiet. A female juror stepped forward and said, “I did.”

There, Malone identified the split. A fifth the jurors got into the elevator and headed to the first floor—where the defense lawyer were waiting to talk with them—Malone said, “You'd almost have to have a jury of a women.”

Malone revealed one detail from the lawyers' conferences in Tanksley's chambers Friday before he headed down in the courthouse elevator himself: “I've asked the judge to schedule a new trial as soon as possible.”

The doctor and his practice were insured by MAG Mutual Insurance Co., according to court documents. The hospital was insured by Community Assurance Co. Ltd., Columbia Casualty Co., Illinois Union Insurance Co., Admiral Insurance Co. and Allied World Assurance Co. Ltd.

The case is *Sutton v. Bauer, N*

Why reinvent the wheel? You can now own the library of legal forms, letters and more, written by and used at a successful, experienced personal injury boutique.

Library of Georgia Personal Injury Forms, by Fried Rogers Goldberg LLC, gives you access to:

✓ Nearly 250 practice-oriented forms motions sample letters from the firm's library.

✓ Editor Michael L. Goldberg includes suggestions on when to use specific documents as well as step-by-step checklists.



✓ The anthology includes a CD-Rom of all the forms that can be customized for each firm and modified for each case.

✓ Your purchase also includes the 2011 online edition containing searchable text and index as well as one-click access to related material—cases, statutes and other authoritative content. The online version also features tools for organizing research.



AVAILABLE NOW!
INTRODUCTORY PRICE
\$199

Order your copies today at the introductory price of \$199! Visit <http://books.dailyreportonline.com> or call (877) 256-2472

DAILY REPORT
AN ALIANT COMPANY