

## **Georgia Supreme Court Holds Surety not Liable for Principal's Punitive Damages**

By Tim Burson May 7, 2018

Bovis Kyle won for the surety in a landmark decision from the Georgia Supreme Court holding that, without specific statutory authority, a surety cannot be assessed liability for its principal's punitive damages.

In *Estate of Gladstone*, No. S17G1472 (Ga. May 5, 2018), the court reversed an award of punitive damages against The Ohio Casualty Insurance Company. The decision not only benefits commercial probate sureties but reinforces existing law applicable to contract bond sureties as well.

### **Background**

Ohio Casualty issued a large conservator's bond for an adult who had developed Alzheimer's. The bonded conservator had difficulty from the outset completing inventories and management plans. The probate court appointed an independent attorney for the ward, who discovered the conservator was spending the ward's money without prior court approval. The day before the hearing on possibly removing the conservator, he invaded the ward's accounts by issuing several checks payable to himself but did not mention these withdrawals at the hearing. They were discovered and reported by a temporary substitute conservator.

At the subsequent hearing to assess damages against the conservator, no one requested any punitive damages—not the ward, not her children, not the ward's attorney, and not the temporary substitute conservator. The court order setting the hearing had not indicated punitive damages might be assessed. Nevertheless, the probate court issued a judgment against the bonded principal and the surety not only for the unapproved expenditures and withdrawals but also for \$150,000 in punitive damages, jointly and severally. The statutes requiring the bond do not mention punitive damages.

Ohio Casualty appealed, and the Georgia Court of Appeals affirmed the probate court after finding punitive damages were authorized to be entered against the conservator as "sanctions" and against the surety because the probate code provides that a surety is jointly and severally liable for all acts of the bonded principal.

### **Certiorari**

Ohio Casualty applied for and obtained certiorari from the Georgia Supreme Court. The surety urged that its bond covers only actual property lost or damaged, that Georgia law makes a surety liable for punitive damages only when the statute calling for a bond expressly provides for such, that punitive damages are

only available to punish and deter conduct of the person charged, and that punitive damages were not available in this case because they were not claimed at any time in the proceedings.

Ohio Casualty solicited amicus assistance from the industry, and the Surety and Fidelity Association of America filed briefs arguing that the only mechanism for extra contractual damages in Georgia is through the bad-faith statutory procedure set forth in O.C.G.A. § 10-7-30. The court granted certiorari and the case was presented to an active bench in January of 2018.

## **Decision**

The Georgia Supreme Court reversed the court of appeals and held that a probate bond surety is not liable for punitive damages for the acts of its principal.

*Gladstone* provides analytical authority that a conservator's bond only covers the loss of bonded assets caused by the principal's breach of his or her fiduciary duty. The court held in part that, because the bond is based on the value of the estate's property, the legislature intended to cover only actual damages and punitive damages are not available against the surety.

The decision has several applications beyond conservator bonds.

*Gladstone* reinforces the trend that Georgia courts are required to use "textual" analysis in construing statutory bonds. The court cites heavily to a recent decision that states, if the legislature wanted to include coverage for punitive damages, it can expressly say so—otherwise the construction will likely exclude extra contractual liability against the surety if not warranted for its own actions.

The court reaffirms strict construction in favor of the surety. There is no suggestion that a surety is the same as an "insurer" when construing the bond. *Gladstone* also favorably cites *Campbell v. Benton*, 217 Ga. 368, 371, 122 S.E.2d 223 (1961), so Georgia's read-in/read-out rule for statutory bonds remains good law.

Finally, *Gladstone* reinforces that sureties in Georgia should not be apprehensive of taking an appeal when justified merely because they might have "insurance company" in their names.

**Bovis Kyle attorneys Tim Burson, Jack Burch and Randy Bryant represented Ohio Casualty in the *Gladstone* case.**