

Preserving Premature Rulings

Tuesday, May 7, 2019

The jury was still deliberating over the personal injury case in *Showan v. Pressdee*, No. 1:16-cv-00468-ODE (N.D. Ga.), when the senior U.S. district judge decided to “get the ball rolling” on an expected motion for damages for frivolous claims.

Georgia law allows a prevailing party to bring a motion “at the time that the verdict or judgment is rendered” asking the finder of fact to decide whether an opposing party presented a frivolous claim or defense. O.C.G.A. § 9-11-68(e). The statute requires the court to hold a bifurcated hearing where the finder of fact determines: (1) whether the party asserted a frivolous claim or defense; and (2) what damages, if any, to award. *Id.*

The plaintiff planned to make a motion under O.C.G.A. § 9-11-68(e) if he prevailed at trial. But rather than wait for the verdict, the court heard arguments and “dismissed” the plaintiff’s claim preemptively. See *Showan v. Pressdee*, No. 17-15547, 2019 WL 1891785 at* 9 n.10 (11th Cir. Apr. 29, 2019).

A less alert lawyer might have left it there. Instead, plaintiff’s counsel renewed his motion — knowing the court had already denied it — after the jury rendered a \$330,000 verdict in his client’s favor. That was a good call.

The U.S. Court of Appeals for the Eleventh Circuit found the plaintiff had preserved his objection to the court’s ruling by making the motion a second time when the jury returned as required by O.C.G.A. § 9-11-68(e). *Showan*, 2019 WL 1891785 at* 9 n.10.

On appeal, the plaintiff won the reversal he sought solely on his objection to the court’s premature ruling. The Eleventh Circuit held that Georgia law required the district court in this diversity case to hold a hearing *after* the verdict. The jury would decide at the hearing whether the defendant’s claims or defense were frivolous and set damages. *Showan*, 2019 WL 1891785, at *14.

Practice Tip

When a statute requires a party to make a motion or take action at a particular time, do it at that particular time. If the court takes up the motion prematurely, renew the motion at the time required by law — even if you have already lost the motion. Otherwise, you will waive the right to appeal the court’s ruling.

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