

FAMILY MATTERS

Judge rejects statute of limitations defense, awards \$1.5 million to plaintiffs in fraud suit

By Phillip Bantz

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A trial court judge recently entered final judgment in a case that has dragged on for six years and involves family turmoil, a multimillion-dollar lottery payout, a radio personality and an unanswered legal question that has piqued the Supreme Judicial Court's interest.

Suffolk Superior Court Judge Margaret R. Hinkle took a step toward closing the case on Oct. 18, when she

Hinkle disagreed, ruling that McMenimen's fraudulent concealment deprived him of any protection he had under the statute of limitations.

"McMenimen's repeated egregious acts of affirmative deception ... deprived the plaintiffs of actual knowledge of the amount of the Policy and of their opportunity to unravel what McMenimen had done," the judge wrote in her ruling.

The jury was not asked to determine Armstrong's negligence, but Hinkle concluded that he also was not entitled to a statute of limitations defense because of his ties to McMenimen and the misconduct allegations.

In a denial of Armstrong's motion for final judgment, Hinkle wrote that "the jury, or any fact-finder, could find that Armstrong's negligence ... tolled the limitations period."

Hinkle's determination that the tolling of the statute of limitations applied to both defendants is unprecedented, according to Charles M. Waters of Boston's Sheehan, Phinney, Bass & Green. Waters and his co-counsel, Michael J. Lambert, represented the plaintiffs.

Armstrong's attorney, Timothy O. Egan of

Continued on page 27



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— Charles M. Waters, Boston

signed an amended final judgment awarding more than \$1.5 million in damages and fees to the plaintiffs in *Pasatempo, et al. v. McMenimen, et al.*

The tangled case centers on an allegation that agent Frederick V. McMenimen III and his former supervisor, Barry Armstrong, host of WKRO's "Lunch Money" and president of the New England Advisory Group, hid the terms of a securities-backed life insurance policy for financial gain.

In July 2009, a Suffolk Superior Court jury found that McMenimen fraudulently concealed the fact that the death benefit on the life insurance policy he sold to his uncle was significantly lower than what the policy holder was led to believe.

The defendants argued that that the plaintiffs' claim was barred because it was filed long after the expiration of the four-year statute of limitations that is applicable to consumer protection actions under G.L.c 260, §5A.



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Continued from page 1

Peabody & Arnold in Boston, contends that the financial advisor had no knowledge of McMenimen's misrepresentations of the insurance policy.

"This case is a family tragedy that Armstrong became mixed up in," he said. "He had no knowledge of what McMenimen was telling his family."

Awaiting an answer

Despite the jury verdict and Hinkle's final judgment, the case is far from over.

"As the plaintiffs have long known, this dispute cannot be concluded unless and until there is a decision on the unsettled statutory question," McMenimen's attorney, William P. Corbett Jr. of Salem, wrote in an e-mail to *Lawyers Weekly*. He declined to be interviewed while the case is still unresolved.

The unanswered statutory question concerns G.L.c. 175, §181, which governs misrepresentations made by insurers. Corbett argues that the statute is one of repose rather than limitations, and that it provides a remedy exclusively against insurance providers, which means the defendants would be immune from suit.

A statute of repose bars a right of action after a specific amount of time, regardless of when an injury occurs. But the clock does not begin ticking on a statute of limitations until after an injury occurs.

The questions Corbett raises regarding §181 are issues of first impression, and he stated, "no court, at any level, [has] ever published an opinion assessing the statute's preemptive effect."

Two Superior Court judges have considered the statute, and they reached opposite conclu-

sions on how it should be interpreted. But both judges agreed that the statute does not protect the defendants.

First, on a motion to dismiss, now-retired Judge Allen van Gestel ruled that the statute offered an exclusive remedy against insurance policy-issuing companies. He also found that it was a two-year statute of repose and, since it had expired, dismissed the insurance provider from the case.

On a motion for summary judgment, Judge Ralph D. Gants, now a justice on the Supreme Judicial Court, found that the statute was not exclusive to policy-issuers, but that it was a statute of limitations. If the SJC agrees with Gants, the insurance provider in *Passatempo* could be brought back into the case.

The SJC has already had two opportunities to weigh in on the issue, but dismissed both appeals on procedural grounds.

"In McMenimen's case, the fact that no appellate court considered his immunity claim in an interlocutory appeal from the denial of his motion to dismiss was due to his own missteps," the court wrote in its second dismissal, issued Oct. 14.

The court went on to note that the case record was "rife with instances of litigiousness and delay" and warned that "any future conduct that unnecessarily derails the timely progress of post-judgment proceedings or the direct appeal may result in sanctions."

The court ordered any notice of appeal filed with the trial court to be entered directly with the SJC, "where it will proceed expeditiously."

The policy

In 1998, McMenimen duped Samuel and Patricia Pietropaolo, his uncle and aunt, into

dropping a \$500,000 life insurance policy in exchange for a risky securities-backed policy, according to the plaintiffs.

McMenimen is accused of repeatedly lying to the Pietropaolos about the value of the new policy, telling them it carried the same coverage as their original policy when it was actually for \$200,000.

McMenimen also allegedly did not tell the Pietropaolos that he worked for Provident Mutual, the company that issued the second policy, and had received more than \$8,000 in commissions on the transaction.

Armstrong was then an agency manager for Provident, and had hired McMenimen and acted as his direct supervisor. According to Waters, he was "intimately involved in the application, underwriting and issuing of Mr. Pietropaolo's policy."

In 2003, another agent called the Pietropaolos and told them the true nature of the insurance policy. They contacted McMenimen, who allegedly said he would have the policy converted to provide \$500,000 of coverage. When the plaintiffs learned this had not happened, they sued.

In 2005, McMenimen won \$2.3 million in the New Hampshire lottery. He subsequently rejected a \$400,000 settlement offer from the plaintiffs and vowed during a deposition that he would "spend every dime I have to prove that I did nothing wrong in this case."

'Intra-family bile'

During its complicated six-year history, the case has passed through Middlesex Superior Court, U.S. District Court, Suffolk Superior Court, the Appeals Court and the Supreme Judicial Court.

Fifty motions were filed during discovery, 30 more motions have been filed since the June 2009 trial and McMenimen has already filed five motions in the appellate courts.

Mr. Pietropaolo died before the trial. "In the 15 years I've practiced," Waters said, "I've never seen a case like this."

While Waters blames McMenimen for purposely delaying the case "with the macabre hope that his elderly widowed aunt will not live to see trial," Corbett contends that the hold-up is "largely due to the plaintiffs' steadfast resistance to having an appellate court determine" the unanswered statutory question tied to G.L.c. 175, §181.

"As the public record plainly establishes, Mr. McMenimen has for more than half a decade consistently taken the position that this statute affords him immunity from the plaintiffs' lawsuit," Corbett wrote in his e-mail.

Corbett also said the lawsuit is the byproduct of a "whirling vortex of intra-family bile" that has spawned another, unrelated suit involving Mrs. Pietropaolo, McMenimen's father and a beach house in Duxbury.

Meanwhile, Mrs. Pietropaolo has yet to receive the \$1.5 million judgment as she awaits the court's decision on five post-trial motions. Appeals are sure to follow.

"If Mr. McMenimen's motions are denied, there will be an appeal, for which there are numerous viable grounds for reversing whatever judgment ultimately emerges from Superior Court," Corbett said. **MLW**

For more information about the judges mentioned in this story, visit the Judge Center at www.judgecenter.com.

To read court documents in the case, visit www.masslawyersweekly.com.