

12-6-2005

Order (HOLCOMBE T. GREEN)

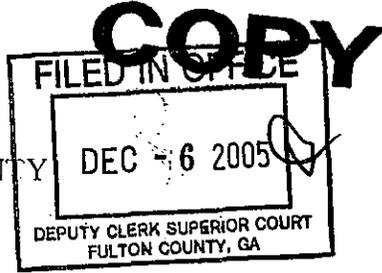
Elizabeth E. Long
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

HOLCOMBE T. GREEN and
HTG CORP.,

Plaintiffs,

v.

McKESSON CORPORATION f/k/a
McKESSON, INC., HBO & COMPANY,
n/k/a McKESSON INFORMATION
SOLUTIONS, LLC, ALBERT BERGONZI,
and JAY GILBERTSON,

Defendants.

Civil Action File No. 2002-CV-48407
(Business Case Division II --- EL)

HALL FAMILY INVESTMENTS,

Plaintiff,

v.

McKESSON CORPORATION f/k/a
McKESSON, INC., HBO & COMPANY,
n/k/a McKESSON INFORMATION
SOLUTIONS, LLC, ALBERT BERGONZI,
and JAY GILBERTSON,

Defendants.

Civil Action File No. 2002-CV-48612
(Business Case Division II - EL)

ORDER

The above-styled cases came before this Court on the following motions: (1) Plaintiff Holcombe Green's Motion for Partial Summary Judgment on Indemnification Claims; (2) Defendant McKesson Information Solutions, LLC's Motion to Exclude Inadmissible and Irrelevant Evidence from Summary Judgment Record; and (3) Plaintiffs' Motion to Exclude Evidence of Criminal Acquittal.¹ After considering the oral arguments made by counsel on

¹ Defendants' *Daubert* motion and the parties' summary judgment motions are also pending. The Court will hear oral argument regarding such motions on December 16, 2005.

November 30, 2005 and the briefs and pleadings filed by the parties, the Court finds as follows:

Plaintiff Holcombe Green's Motion for Partial Summary Judgment on Indemnification Claims

Plaintiff Holcombe Green seeks indemnification by Defendant McKesson Information Solutions, LLC ("HBOC") for attorneys' fees and all other expenses he incurred in defending himself against claims brought against him as a former director of HBOC. Specifically, Plaintiff Green seeks indemnification for his defense of a counterclaim and third party complaint filed against him by HBOC in this litigation and for his defense of an ERISA class action lawsuit brought against him and other corporate officers by HBOC pension plan participants.²

Plaintiff Green seeks summary judgment on liability for his indemnification claims. The Court hereby **DEFERS** ruling on Plaintiff Holcombe Green's Motion for Partial Summary Judgment on Indemnification Claims until after the trial of this case.

Defendant McKesson Information Solutions, LLC's Motion to Exclude Inadmissible and Irrelevant Evidence from Summary Judgment Record

Defendant HBOC objects to the admission of four categories of documents upon which Plaintiffs rely in support of their motion for partial summary judgment. Specifically, HBOC seeks to exclude the following matters: (a) the criminal guilty pleas of four of HBOC's former officers; (b) the indictments of two other former HBOC officers; (c) any inferences created by the invocations by a number of HBOC's former officers and employees of their Fifth Amendment rights against self-incrimination; and (d) the report of an investigation performed by Defendant McKesson's outside counsel, Skadden, Arps, Slate, Meagher and Flom (the "Skadden Report").

² Plaintiff Green has not yet asserted an indemnification claim related to the ERISA action in this case. At the November 30, 2005 oral argument, however, counsel for Defendants specifically conceded that Plaintiff may, as a matter of right, amend his pleadings to include the ERISA case indemnification claim. Counsel for Plaintiff Green expressed their intention to do so.

a. Guilty pleas

In support of their partial summary judgment motion against HBOC, Plaintiffs rely on four guilty pleas entered by Albert Bergonzi, Jay Gilbertson, Dominick DeRosa and Tim Heyerdahl, former officers of HBOC. Mr. Bergonzi and Mr. Gilbertson are parties to this litigation; Mr. DeRosa and Mr. Heyerdahl are not. HBOC contends that the guilty pleas are classic hearsay under O.C.G.A. § 24-3-1 and do not fall under any exception to the hearsay rule and are, therefore, inadmissible. Plaintiffs argue that the guilty pleas are admissible at summary judgment pursuant to O.C.G.A. § 9-11-56(e) and that, in addition, they fall under the admissions against interest and necessity exceptions to the hearsay rule. O.C.G.A. §§ 24-3-31, 24-3-35 and 24-3-1(b).

Plaintiffs maintain that the guilty pleas are admissible at summary judgment pursuant to O.C.G.A. § 9-11-56(e) and cite the case of Abalene Pest Control Svc., Inc. v. Orkin Exterminating Co., 196 Ga. App. 463 (1990), to support their position. In that case, the trial court considered the criminal trial transcript of a former employee in deciding summary judgment motions in a case against the employer. Id. The Court of Appeals affirmed the trial court's consideration of the transcript, specifically holding that a trial court is authorized to examine a certified copy of a court transcript in deciding a summary judgment motion. Id. The Court explained that the transcript was admissible pursuant to O.C.G.A. § 9-11-56(e) because it reflected that the former employee was "competent to testify, that his testimony was made under oath, and that it was based upon his personal knowledge of what he did, what he ordered others to do, and what he told certain people . . ." Id. at 466.

This Court concludes, therefore, that the court *transcripts* of the former HBOC

employees' guilty pleas would be admissible at summary judgment. However, Plaintiffs do not rely upon the transcripts of the former HBOC officers' criminal pleas, but instead rely upon their written plea agreements. Nothing on the face of the plea agreements indicates that the former officers were competent to testify, that their testimony was made under oath, or that they were based upon personal knowledge.³ Therefore, the Court concludes that the guilty pleas are not admissible pursuant to O.C.G.A. § 9-11-56(e) and/or Abalene Pest Control, Id.

Plaintiffs further argue that the guilty pleas are admissible as admissions against interest. O.C.G.A § 24-3-34 provides that admissions by a real party in interest are admissible. The Court agrees that the guilty pleas of Defendants Bergonzi and Gilbertson are admissible as party admissions. State Farm Fire & Cas. Co. v. Moss, 212 Ga. App. 326 (1994).⁴

O.C.G.A. § 24-3-35 permits the admission into evidence of statements by a third party (a stranger to the suit) which are "against his interest, as to a fact collateral to the main issue between the litigants but essential to the adjudication of the cause." The guilty pleas of non-party former HBOC employees Heyerdahl and DeRosa are fundamentally different for purposes of this analysis. In his guilty plea, Timothy Heyerdahl pled guilty to insider trading, explaining that he used material nonpublic information in deciding to sell his own stock for his personal financial gain. In contrast, Dominick DeRosa pled guilty to aiding and abetting securities fraud, stating that he "participated in improper sales practices that [he] knew were designed to artificially inflate company revenues" and that "[a]s a result of these practices, HBOC appeared to the public

³ Presumably, the transcripts of the plea colloquies would contain such assurances, as would an affidavit.

⁴ Although HBOC concedes that the guilty pleas of Bergonzi and Gilbertson are admissible against each of them, HBOC argues that the guilty pleas are not admissible as party admissions for purposes of summary judgment because neither Bergonzi nor Gilbertson are parties to Plaintiffs' summary judgment motion. HBOC does not cite any law to support this position and this Court is not persuaded by it.

to be a more financially successful and faster-growing company that it actually was.” (DeRosa Plea Agreement, Paragraphs 2(c) and 2(j)). In the instant case, Plaintiffs assert claims for fraud and RICO, alleging that HBOC made materially false statements to the Plaintiffs and others regarding its financial status in order to increase and maintain HBOC’s share price and to induce Plaintiffs to maintain their stock. Therefore, this Court concludes that the guilty plea of Mr. Heyerdahl is collateral to this litigation and therefore admissible under O.C.G.A. § 24-3-35. The guilty plea of Mr. DeRosa is inadmissible because it is not collateral.

Finally, Plaintiffs maintain that the guilty pleas of all four of HBOC’s former officers are admissible under the necessity exception to the hearsay rule. O.C.G.A. § 24-3-1(b). In order to admit the guilty pleas under the necessity exception, Plaintiffs must establish that the pleas are necessary, that they have particular guarantees of trustworthiness, and that they are probative.

Chapel v. State, 270 Ga. 151 (1998). Because there is ample other evidence available for Plaintiffs to establish the same events set forth in the guilty pleas, the Court declines to admit the guilty pleas under the necessity exception to the hearsay rule.

b. The indictments of two other former HBOC officers

Defendants move to exclude the admission of the criminal indictments of two former non-party HBOC officers. In sole support of their attempt to admit the criminal indictments, Plaintiffs cite the case of Caldwell v. State, 253 Ga. 400 (1984), which is readily distinguishable from the instant case. In Caldwell, the Georgia Supreme Court upheld the entry of an emergency temporary injunction freezing the defendant’s assets based upon a criminal indictment of the defendant. The reliance upon a criminal indictment to determine whether to enter an emergency temporary injunction is a very different matter from relying upon an indictment in deciding

summary judgment motions. This Court is not willing to consider the indictments and therefore **GRANTS** HBOC's motion to exclude evidence of indictments.

c. Any inferences created by the invocations by a number of HBOC's former officers and employees of their Fifth Amendment rights against self-incrimination

In support of their motion for summary judgment, Plaintiffs seek to rely upon the adverse inferences created by the invocations by multiple former HBOC officers of their Fifth Amendment rights against self-incrimination during their depositions. HBOC objects and seeks to exclude at summary judgment any inferences created by those invocations.

In Georgia, "although a person does have a right to invoke the privilege in a civil case in order to protect himself when he does so, an inference against his interest may be drawn by the factfinder." Simpson v. Simpson, 233 Ga. 17, 21 (1974) (trial court was permitted to draw a negative inference based upon a party and a third party's refusal to testify). However, in the context of Plaintiffs' summary judgment motion, the Court is required to draw all reasonable inferences in favor of HBOC, the non-moving party. Service Merchandise, Inc. v. Jackson, 221 Ga. App. 897 (1996). Therefore, although the Plaintiffs *may* be ultimately be entitled to an instruction that the jury may draw adverse inferences against HBOC based upon the officers' invocations of their Fifth Amendment privileges, the Court declines to apply such inferences at summary judgment. See, Parsons & Whittmore Enterprises Corp. v. Schwartz, 387 F.Supp.2d 368 (S.D.N.Y. 2005).

d. The report of an investigation performed by Defendant McKesson's outside counsel, Skadden, Arps, Slate, Meagher and Flom (the "Skadden Report")

Plaintiffs seek to rely at summary judgment upon statements contained in the Skadden

Report, the report of an investigation performed by McKesson's outside counsel. HBOC maintains that the Skadden Report should be excluded as improper hearsay. The Court agrees that the Skadden Report constitutes hearsay and is therefore inadmissible, as it does not qualify under any exceptions to the hearsay rule. O.C.G.A. § 24-3-1.⁵ HBOC's motion to exclude the Skadden Report is therefore **GRANTED**.

Plaintiffs' Motion to Exclude Evidence of Criminal Acquittal

HBOC seeks to admit into evidence a copy of an acquittal order issued by a United States District Court in the Northern District of California in the criminal case of United States v. Hawkins, No. CR 04-106 MJJ ("the Hawkins order"). In that order, the judge commented upon the testimony of former HBOC officer Defendant Bergonzi. Defendants argue that they seek to introduce the Hawkins order to show that Defendant Bergonzi's plea is not credible. Plaintiffs seek to exclude the Hawkins order.

In Georgia, an acquittal in a criminal case is not admissible evidence in a subsequent civil action. Webb v. McDaniel, 218 Ga. 366 (1962). Moreover, it would be improper for the Court to consider one witness' credibility comments regarding another witness, as conclusions regarding a witness' veracity are the province of the factfinder. Accordingly, Plaintiffs' motion to exclude the Hawkins order is hereby **GRANTED**.

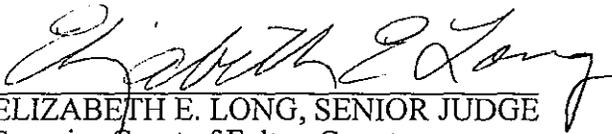
Conclusion

Plaintiff Holcombe Green's Motion for Partial Summary Judgment on Indemnification Claims is hereby **DEFERRED** until after trial. The Court rules upon Defendant HBOC's Motion to Exclude Inadmissible and Irrelevant Evidence from Summary Judgment Record as

⁵ The Court disagrees with Plaintiffs that the Skadden Report should be admitted as a party admission pursuant to O.C.G.A. § 24-3-34 or under the necessity exception to the hearsay rule pursuant to O.C.G.A. § 24-3-1(b).

follows: HBOC's motion to exclude the guilty pleas of Albert Bergonzi, Jay Gilbertson and Tim Heyerdahl is **DENIED**; HBOC's motion to exclude the guilty plea of Dominick DeRosa is **GRANTED**; HBOC's motion to exclude the indictments of two former HBOC officers is **GRANTED**; HBOC's motion to exclude any adverse inference from witness' Fifth Amendment right invocations is hereby **GRANTED**; and HBOC's motion to exclude the Skadden Report is hereby **GRANTED**. Plaintiffs' Motion to Exclude Evidence of Criminal Acquittal is hereby **GRANTED**.

SO ORDERED this 6th day of December, 2005.


ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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