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'Tyger River' key element in \$2.2M ATV settlement

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A man whose leg had to be amputated from the knee down after an ATV rollover has settled an out-of-court negligence claim against the driver for \$2.2 million.

Plaintiff Kenneth Boissoneault concluded the settlement after making a *Tyger River* demand on the defendant's insurer, said Charleston lawyer David Yarborough, who represented Boissoneault. No suit was filed.

"This is another example of what a powerful tool that *Tyger River* doctrine is that we have in South Carolina," Yarborough said.

The doctrine, defined by the 4th Circuit in *Smith v. Maryland Casualty Insurance Co.*, 742 F. 2d 167 (1984), says an insurer has a duty to an insured to settle a personal injury claim covered under a policy when reasonable. The insurer is liable to the insured if its failure to settle results from fraud, bad faith or negligence.

Moreover, an insured can assign his claim to a third party — in this case, the plaintiff, Yarborough said.

The case didn't get that far, however, because the insurer, Fireman's Fund Insurance Co., paid up after Yarborough, relying on the doctrine, set a deadline for payment under the defendant's policy. The limit on the policy was \$2.5 million, and Yarborough believed the insurer would prefer to make a payment within that limit rather



This all-terrain vehicle was at the heart of a negligence claim that ended in a \$2.2 million out-of-court settlement.
Photo provided by Yarborough Applegate Law Firm

than risk a trial and damages that might exceed the limit.

The reason: The plaintiff had about \$1.5 million in past and future economic losses. Plus, he had lost his lower right leg and, as a result, his job, Yarborough said.

"He had a 30 percent whole-person impairment rating and he was going to have to wear a prosthetic device for the rest of his life. In a case of clear liability, which we believed this was, with potential for punitive exposure, the damages clearly could have exceeded the available policy limits," he said.

Yarborough declined to reveal the defendant's identity on the record. James C. Cox III, a lawyer for the insur-

er, did not return a phone call seeking comment prior to deadline.

The rollover

There was one problem for the plaintiff: Evidence that he and the defendant had been drinking alcohol on the day of the rollover, Yarborough said.

The incident happened at an Edisto Island farm in 2010 when the defendant, driving a Kawasaki Mule with the plaintiff in the front passenger seat, made a turn. The vehicle tipped over, and the plaintiff's right leg was caught underneath, Yarborough said. He suffered multiple fractures.

Yarborough's client contended that the defendant made the turn too sud-

■ See **ATV** on next page

denly and that warning labels in the ATV and in the owner's manual included instructions against sharp turns and abrupt maneuvers. He claimed the defendant was negligent because he didn't adequately control the ATV.

Evidence that both had been drinking gave the insurer the opportunity to raise comparative negligence. But it also gave the plaintiff some extra ammunition, Yarborough said.

"It cut both ways because the driver, obviously, should not have been operating the vehicle under the influence of alcohol," he said. "We believed that a jury would or could potentially bring back an actual damages verdict that exceeded the available policy limits as well as a punitive damages verdict that would have put the defendant's assets at great risk."

He said he believed the defense might have taken the case to trial if he hadn't had the *Tyger River* doctrine to rely on.

"Given the facts as they existed, with them having information that my client had been drinking that day, if we didn't have that *Tyger River* doctrine, I don't know that they would have had any interest in resolving the claim at this stage," he said. "It's very doubtful that they would have."

Settlement Report

Brief statement of claim: The plaintiff and defendant were good friends who were spending the weekend at the defendant's farm. The defendant had recently purchased a new all-terrain vehicle, a Kawasaki Mule. The plaintiff claimed the defendant was operating the ATV at an excessive rate of speed and made too sharp of a left-hand turn, causing the vehicle to roll over. When the ATV rolled over, the plaintiff was ejected from the passenger seat, and the ATV landed on top of his leg.

The plaintiff contended that warning labels on the ATV as well as in the owner's manual instructed the operator that "sharp, high speed turns or abrupt maneuvers can cause the vehicle to roll over or go out of control." Also, the manual stated that "it is critical not to make sharp turns in order to avoid loss of control or tipping" and that "it is important to reduce vehicle speed before entering any turn in order to avoid loss of control or tipping." The plaintiff claimed the defendant did not maintain adequate control of the ATV, entered the turn at an excessive speed and turned the wheels too sharply, causing the vehicle to tip over.

The plaintiff said he was a passenger and did not in any way contribute to the flipping of the vehicle or his own injury. The investigating officer indicated on a traffic collision report form that the defendant was the only person who contributed to the collision. There was going to be testimony from witnesses that both plaintiff and defendant had been drinking alcohol on the date of the incident prior to getting on the ATV.

Plaintiff's counsel made a pre-suit demand for the defendant's homeowners and umbrella insurance policy limits.

Principal injuries (in order of severity): Right tibia-fibula open fractures resulting in a below-the-knee amputation

Special damages: \$338,462 (medical bills); \$428,071 (lost wages and loss of earning capacity); and: \$866,464 (future medical care costs)

Tried or settled: Settled pre-suit

County and court where settled: Charleston County

Case name and number: Kenneth M. Boissoneault v. Confidential Defendant (no suit filed)

Date concluded: March 14, 2011

Amount: \$2.2 million

Insurance carrier: Fireman's Fund

Expert witnesses, areas of expertise and hometown: Sarah Lustig, RN, LNC, CLCP, life-care planner (Mount Pleasant); Oliver Wood Jr., Ph.D., economist (Columbia); Charles Vander Kolk, Ph.D., vocational rehabilitation (Columbia); and Ken Richardson, P.E., accident reconstruction (Mount Pleasant)

Attorney for plaintiff: David B. Yarborough Jr. of the Yarborough Applegate Law Firm (Mount Pleasant)

Other useful info: The defendant's personal counsel demanded that the defendant's insurer tender its policy limits prior to the commencement of a lawsuit to comply with the plaintiff's *Tyger River* demand.