

Courtrooms and Trials

By Joan M. Quade



Barna, Guzy & Steffen Ltd. lawyers have successes every day. Many of them are outside of the courtroom. Our lawyers are doing everything from putting together complicated real estate transactions to resolving difficult issues in a divorce or helping to do estate planning, corporate filings and mergers and sales, and representing those who have been injured, to just name a few. Many legal successes have nothing to do with a courtroom. However, in this issue of In Brief we have highlighted some of our recent courtroom successes to provide you with a window into our litigation world. We have the ability to be very successful in the courtroom, even though few civil cases actually ever go to trial. More than 95% of all civil cases settle before trial. Good lawyers work very hard to resolve cases without going to trial for two reasons. First, a trial is very expensive for litigants and secondly the trial outcome is unpredictable. Anyone who has been a litigator for any length of time will tell you that there is no such thing as a sure winner and any lawyer who tells you that they have never lost a case has either not tried many cases, or has never taken a tough case.

Even the simplest of cases are expensive to take to trial. It takes a lot of hard work and preparation to be successful at trial. It is not like the movies where they go into court and give a 5 minute closing argument and win the trial. There are numerous documents to be filed with the court prior

to trial, there is witness preparation, direct examination, cross examination, document review and closing and opening arguments. There is also a lot of preparation for the unexpected twists. If they present their evidence in a certain way or make certain arguments, you have to be prepared. Once the expense of preparation is concluded you have long days in trial. Most often an attorney in trial also has an associate or paralegal assisting with documents and witness coordinating. The expense of trial mounts quickly and in most cases one does not recover their attorney's fees from the other side even if they win the case.

Cases also settle many times because of the unpredictability of the outcome in a courtroom. In trial, either a Judge or a jury decides who wins and who loses. Trial lawyers will tell you that if you try the same case 10 times to different juries and judges you could get 10 different results. People see the same evidence differently and perceive the people involved differently. A jury may like your client or the lawyers or a jury may decide that they don't like someone or don't believe someone. The litigants are on the stand for a short time. Clients are nervous, even when telling the truth, yet that nervousness may be perceived as a result of not being truthful. Not being nervous at all may be perceived as arrogant.

All jurors and judges bring their own biases to the bench. Some people may not believe that others have a right to compensation when they have been wronged. Others may believe that wealthy corporations should pay because it seems to be a faceless entity.

In twenty years of practice, I have seen some interesting things happen during trial that one would never expect. In one case, I had an expert witness die of a heart attack on the courthouse steps prior to testifying. I had a jury trial in a small county outside of the metropolitan area where everyone was from the area except my client and I and the opposing counsel argued to the jury (referring to us) to send a message to "those people, that if they come down here..." I felt like I was in a bad movie. We were only an hour and a half from the metro, not even another part of the country. I try cases all over the state. I made a joke of it when it was my turn to speak and I ended up winning the case. However, he was probably using that line because it had worked for him before in a case. I have seen witnesses unpredictably change their stories and others crumble on cross examination.

With all of these costs and unpredictably issues, there are still some cases that must go to trial. When we have exhausted our avenues to obtain a fair and equitable settlement for our clients we are pleased to move forward and represent the client in trial. It is an exciting challenge for us as litigators and we do our best to represent our client's interests with the right amount of finesse, confidence and aggressiveness to obtain the best result possible.

Joan Quade is the practice group leader for the Employment Law/Commercial Litigation group at BGS. If you have questions regarding a business, construction or commercial litigation issue, please contact Joan directly at 763-783-5138.

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BGS Paralegal Eny Maldonado-Johnson joined the firm in January 2008 as part of a firm wide effort to increase our abilities to serve our greater community. She speaks fluent English and Spanish and offers translation skills within our firm, especially within our Personal Injury and Criminal Law practice areas.

Eny moved to the United States from Ecuador and now makes her home with her family in Andover, Minnesota. She is currently attending college at North Hennepin Community College where she maintains a perfect 4.0. She will graduate in the Spring of 2009.

Eny offers Spanish/English translation services to all BGS areas of practice, however, she works most closely with Criminal/Personal Injury Attorney Adriel Villarreal who is also fluent in both Spanish and English.

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IN BRIEFSM



BGS Celebrates 70 Years

By Scott Lepak



Is an older law firm a better law firm? We think it is. As we celebrate our 70th anniversary, we reflect on what makes our law firm so special. In a time when medium sized firms are breaking up, we are growing. As small firms with highly specialized practices become more common, we are still a full service firm representing corporate, government and individual clients. Why are we thriving in the face of these trends? One answer is that we provide great service. This issue of In Brief focuses on recent cases that we have been involved in and highlights the skillful representation we provide to our clients. The reputation for excellent representation that began with our founder the

Honorable Joseph Wargo and grew with Peter Barna and Bob Guzy provides us with a strong foundation. Our representation sets the bar for the high expectations that the community has and should have when they encounter one of our lawyers.

Another reason for our success is that since 1938 we have remained firmly rooted in our community. Seventy years ago, lawyers were expected to be an important part of the community. Unfortunately, that part of the practice no longer seems as important to many law firms or the drive to compete leaves little time for service to the community. We have been and still are your neighbors. Our commitment and service to our community sets us apart from the mega firms. Whether it is the local chamber of commerce, business organization, nonprofit, church or habitat for humanity building project, our attorneys are a part of the community that we serve.

Seventy years of experience shows us that we are serving our clients the right way.

Finally, we recognize that we would not be as successful if it were not for our clients. Our relationship with many of our clients extends back for much of the time that we have been in existence. This continued representation over the years is the highest form of flattery that we receive as lawyers. A good relationship takes two and we are very grateful for the quality of clients that we have been privileged to serve. Thank you all for the great first 70 years. We hope the next 70 years will be as successful.

Attorney Scott M. Lepak is a shareholder at BGS and practices in the area of Government Law. He can be reached directly at 763-783-5129 or slepak@bgs.com.

Four Months, Four Trials, Four Victories

By Thomas P. Malone



Ever feel like you were on a roll? Like you could do nothing wrong? That's how some of the litigators at BGS feel after a string of incredible victories in a series of four jury trials. BGS attorneys know that winning a jury trial is a matter of skill, preparation and a little luck. Everything has to align together in the right way at the right time. The judge must view your case favorably. You have to get the right rulings from the judge in pre-trial motions. The composition of the jury has to be "right" for the case. Your witnesses must testify well and make a good impression on the jury. It is not an exaggeration to say that a jury often makes up its mind on things totally apart from the law or the facts. That is simply the way it is.

Many in our society have their concepts of our system of justice implanted by television. That's a bad place to learn about reality. Hollywood's version of reality simply does not comport with the real world. In Hollywood, right, justice and good inevitably prevail in under an hour (including

commercial breaks). The trial lawyers always ask only a few probing and incisive questions and the guilty parties are obvious. Oh yes, there is also nothing said about the fees and costs of the trial. Apparently the Hollywood lawyers are independently wealthy because they can work for free.

In reality, on the other hand, trials can be horrendously expensive. It is a maxim that even a bad settlement is often better than a good trial. It can be frustrating for clients to realize that it would be easier to take less or pay more than the client thinks is "fair" because the costs of trying the case are often worse. The problem is the immense amount of

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time that it takes to prepare and try a case. Twelve hour days are commonplace to a lawyer in trial. I tell my family that when I am in trial I sleep, eat and try the case. Period. That is the truth they have learned to deal with.

In addition to the cost is the uncertainty of the

result. Trying a case is a zero sum game: somebody is going to win and somebody is going to lose. Both sides think they are right. One must be wrong. And, as noted at the outset of this article, it really does not necessarily depend on the strength of your case. It is absolutely true that in any trial that goes to the jury the odds of losing are 50-50.

As a result of this not many cases go to trial. It is too expensive and uncertain. It is presently estimated that something less than 10% of all cases are tried and many of these go to court trials, tried to the judge, which are marginally less insane in cost and certainty.

Yet, in four consecutive cases, with four separate juries, in three different counties, with two civil and two criminal cases, BGS lawyers tried their cases and won. And it happened in less than twelve weeks. Not in 30 years of trying cases have I seen that happen.

My partners John Buchman (with Adriel Villarreal), Jon Erickson, Joan Quade and Doug Sauter each tried these cases and against some very long odds prevailed. They are quite happy with the results and we at BGS are quite proud of them.

Thomas Malone is a shareholder in BGS' Employment/Commercial Litigation section. He can be reached directly at 763-783-5134 or tmalone@bgs.com.

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BGS Attorney's Win Successful Verdicts in 4 Consecutive Trials

Anoka County Personal Injury Case



John T. Buchman and Adriel B. Villarreal tried a case together to a jury in Anoka County shortly before Christmas 2007. The client was a teenage girl who had been injured in a car crash in Blaine, MN. Her doctor indicated she had suffered injuries to her neck and back that would affect her for the rest of her life.

The Defendant's driver was insured by Progressive. Progressive Insurance has become increasingly inflexible and typically offers settlements much less than those offered by other insurance companies. As a result, this matter went to trial on December 20, 2007.

Buchman and Villarreal successfully argued that the client deserved appropriate compensation for the injuries that would affect the rest of her life. The jury reached a verdict that awarded the client \$61,403.74 after the three day trial. The jury did not believe the testimony of the doctor hired by the defense. In fact, several jurors were offended by the insurance company's doctor's demeanor which likely played a large role in their verdict. Progressive had only offered \$7,500 and refused to negotiate. The trial court will see to it that the funds available to our client are placed in appropriate investments which will likely be used to aid in her college education.

John Buchman is a shareholder in our Personal Injury practice area. Adriel Villarreal is an associate handling Personal Injury and Criminal Defense cases. Having an experienced attorney can make all the difference in cases such as this one in Anoka County. Please call John Buchman at 763-783-5121 or Adriel Villarreal at 763-783-5177 if you have questions regarding a car accident or other personal injury that has changed your life.

Litigation Trial in Beltrami County



Joan Quade, the practice group leader of the Business Litigation department and litigation attorney, recently won a jury trial in Beltrami county, which is in Bemidji, Minnesota. Joan won a jury verdict of \$171,744.83 for her clients. Joan has had cases all over the state and practices in real estate, business, construction and employment

litigation. In order to resolve a case before trial both sides must participate and have an incentive to settle. Joan has had numerous cases in the past year, some worth hundreds of thousands of dollars, and other smaller cases that have settled, as opposed to going to trial. In this case however, the defendants were only offering \$5,000 to settle and believed they had a strong case. It was a case that had to go to trial to obtain a fair result. When those cases present themselves we are happy to seek justice in the courtroom.

In this case, Joan was representing the new owners of a resort, who had purchased the property with a representation from the sellers that the septic system was in working order and in compliance with all laws. Two days after taking control of the resort, it was clear to the new owners that the septic system was leaking and inadequately sized for the resort. It was discovered that the seller had not had a new inspection of the septic system completed at the time of sale. He argued that since he had a compliance inspection done when he had purchased the property two years earlier, a new inspection was not necessary. He argued that the two year old inspection was valid for 3 years, as the inspection form indicated and he refused to make corrections to the failing system. The owners took the position that the law required a new inspection and that it was a false representation to indicate that the system was in working order and compliant with law, when no new inspection had been completed. After 3 days of trial, the jury returned a verdict for Joan's clients on all causes of action—breach of contract, intentional misrepresentation and violation of a Minnesota Statute related to proper disclosure of septic systems. The jury awarded Joan's clients all of the damages they were seeking (\$94,000), plus attorney's fees of \$77,744.83. It was a just and fair result for our clients who can now move on to enjoy their resort.

Joan Quade is the practice group leader for the Employment Law/Commercial Litigation group at BGS. If you have questions regarding a business, construction or commercial litigation issue, please contact Joan directly at 763-783-5138.

Criminal Case Verdict Successful



Jon P. Erickson, the practice group leader of the Consumer Department at BGS, had a jury trial wherein he represented an individual accused of the felony crime of criminal damage to property. The charges in this case stemmed out of an incident where Jon's client was charged with damaging the car of his ex-wife's boyfriend. The defendant had been previously charged with criminal damage to property to a different vehicle owned by the ex-wife's boyfriend,

and had pled guilty to that charge.

This case did not involve many witnesses, and in most respects it was not a complicated case. It did, however, involve a couple of tactical decisions that had to be made by the trial attorney and his client. These tactical decisions revolved around the prior conviction for the same type of incident involving the same people, specifically, how to try to pick members of a jury that would have an open mind to the defendant's claim of innocence regardless of a prior incident.

This was a three day trial, and the jury ultimately came back with a finding of not guilty. In a number of ways this case illustrates how important an experienced trial lawyer can be in the defense of any type of criminal charge. This was not a case where there was a need for any type of investigation or expert witness. It was simply a situation where the defendant and his attorney presented the case and ultimately convinced a jury of twelve that there should not be a finding of guilty.

Jon Erickson is a shareholder at Barna, Guzy & Steffen Ltd. He focuses his practice on Criminal Law and has tried and won numerous criminal cases over his 30 plus years of experience in the field. He can be reached at 763-783-5145.

Isanti County Criminal Case



This January, BGS attorney Doug Sauter represented a 21 year old man who was charged with attempted murder. This was obviously a very serious charge. The charges arose from a shooting incident in rural Isanti County, Minnesota. The client shot another young man in the face at close range. The client then fled the scene, leaving the injured party in a ditch by the side of the road. Incredibly, the injured young man not only survived but suffered no major, permanent injury as the bullet miraculously entered his face under the left eye but was deflected by the bony structure of the face, traveling on the outside of the cranium to exit from the back side of his neck. The State thought that it had an open and shut case and took a hard line seeking the maximum possible penalty.

Our investigation revealed that our client had absolutely no experience with guns, much less experience with a semi-automatic 9 millimeter pistol. We learned that the injured party was responsible for the theft of our client's most treasured possession, his deceased father's class ring. The young man lost his dad when he was only 11 years old in a tragic accident. His grandmother gave him his dad's class ring when he was 15 years old. He kept the ring locked in a box in his room. This box was stolen

BGS Attorneys Win

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and our client believed that the shooting victim was responsible for the theft and knew where the ring was hidden. Foolishly, our client believed that by threatening the other young man with a gun, the other young man would be frightened enough to give him back the class ring. The client failed to understand that any loaded gun in the hands of an inexperienced person is inherently dangerous because of the possibility of accidental discharge which is exactly what we believed occurred. Our office believed that the client was guilty of an assault (threatening another with a handgun, regardless of whether the gun goes off, is an assault under Minnesota law) but not guilty of attempted murder. Doug mounted an extremely vigorous defense

resulting in the jury returning a verdict of not guilty on the charge of attempted murder. The jury was out only three hours before returning its not-guilty verdict. The young man was convicted of the assault, so he will have a significant consequence for his actions. Mr. Sauter was assisted by Jon Erickson, practice group leader for the Criminal Law section, who conducted a mock cross-examination of the client to prepare him to testify.

Doug Sauter is a shareholder practicing in Criminal and Family Law. Doug has practiced law for more than 30 years and is also a former prosecutor. Doug can be reached at 763-783-5158.

Mediation, Arbitration and Venue Provisions in Contracts

By Darrell A. Jensen



Contracts often have provisions governing the methods by which disputes will be resolved. Mediation or arbitration may be the required procedures rather than court litigation. The contract may also govern the venue or court in which disputes must be resolved. These procedural provisions are often over-looked by the layperson focused on the substantive provisions of the contract. They can, however, ultimately determine whether the contract can be enforced or a claim defended.

The differences between mediation and arbitration are often misunderstood. Mediation is, in its basic form, simply a means by which the parties to a dispute can be brought together on neutral turf by a neutral facilitator (the mediator) to try to resolve their differences by compromise. The mediator does not have the power to order the parties to settle their differences, and if the parties, despite the best efforts of the mediator, do not agree to settle, the dispute will not be resolved. The settlement rate for mediated disputes is good, but the success of mediation will rely on the parties finding that their common interests outweigh any benefit there might be in a continuing disagreement. One of the most compelling of those common interests is usually the desire to avoid costly, prolonged and uncertain litigation.

Arbitration, on the other hand, is much like court litigation in that there is a "trial" (the arbitration hearing) and a "judge" (the arbitrator), but it is typically faster and often less costly. It also provides the parties with a means of selecting an arbitrator who is knowledgeable about the substantive area in which the parties are engaged. Court litigation does

not give the parties control over the selection of the judge, and they sometimes draw a judge who knows little about the subject matter of the case. This can be particularly important when the contract covers areas that are not commonly well understood outside the business or profession of the parties. Arbitrators have many of the same powers as judges, including, obviously, the power to decide the case. Mediators do not have that power. In some respects an arbitrator has more power than a judge. For example, the arbitrator's decision is usually final, with no meaningful right of appeal, whereas a judge's decision is often appealable because of alleged errors in procedure or application of the law. Short of fraud or conflict of interest on the part of an arbitrator, attempts to overturn an arbitrator's award are usually futile.

Contracts may have provisions that require all disputes be submitted to mediation as a prerequisite to going either to arbitration or to litigation. Contracts may be silent on mediation but require that disputes be resolved by arbitration rather than court litigation. Or, they may not require either mediation or arbitration, in which case the parties will not have access to those procedures unless, after the dispute arises, they mutually agree to them. Such agreement is often difficult at that stage.

When arbitration is not required, watch for provisions that require litigation be venued in a particular court. Such provisions require that a lawsuit be brought only in the court located where one of the parties is located. This can create enforcement problems if the suit has to be prosecuted or defended in a distant state, where the out-of-state party's regular legal counsel cannot practice without associating with local counsel and which may be remote from important witnesses. Distant venues require expenditure of substantial time and money just for travel and lodging for

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necessary court and deposition appearances. Such venue restrictions create significant inconveniences and disadvantages for one of the parties, and corresponding advantages to the other, independent of the merits of their respective claims or defenses. Because of the costs associated with litigating in remote venues, a party may not be able to defend against claims brought by the other party or may be left with no meaningful remedy for breaches committed by the other. Unfair pressures to enter into unjust settlements are thus created.

Generally, a mediation requirement in a contract is a reasonable provision that should be encouraged. Whether or not arbitration should be required depends on many factors. Aside from the expectation that arbitration would be less costly than litigation, a party should consider the value of the right to appeal. For small claims, the finality of arbitration may well trump the lack of appeal rights. When the stakes are high, however, a party may not wish to put the decision in the hands of an arbitrator whose award cannot be reviewed on appeal. Some consideration should also be given to the fact that, since arbitration is usually easier and less costly to start than a lawsuit, its availability may make small or frivolous claims more likely than if the claimant had to contend with the rigors of litigation in the courts.

When negotiating a contract, do not ignore the procedural and venue provisions. You may find that even the most meritorious claims or defenses will be lost in the complexity or cost of the conflict resolution options available to you. Have your attorney review the contract before you sign it.

Darrell Jensen is a shareholder and director at BGS and practices in the areas of Commercial Litigation, Municipal Law and ADR. If you have questions regarding this article please contact Darrell directly at 763-783-5136 or djensen@bgs.com