



Chris Wilkerson, left, and Robert S. Carlson of Caldwell, Carlson, Elliott & DeLoach. Courtesy photos

NEWS

Business Tort Verdict: Fulton County Jury Awards \$7 Million in Damages

"The misconduct here was egregious and I think that became apparent through the presentation of our case," said plaintiff attorney Rob Carlson of Caldwell, Carlson, Elliott & DeLoach in Atlanta.

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Business Torts

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- Weeklong business tort trial ends with \$7 million jury verdict.
- Fulton County Superior Court jury awards plaintiff \$5 million in punitive damages and nearly \$2 million in compensatory damages..
- Pair of Atlanta litigators awarded more than \$638,000 in attorney fees.

After a weeklong trial in Fulton County Superior Court, two Atlanta litigators have achieved a \$7 million jury verdict for a former waste-management minority shareholder involved in a breach-of-fiduciary-duty dispute.

The litigators credit their in-person cross-examination of the defendant, and their firm's specialized experience for helping secure their client's \$5 million punitive and \$1.9 million compensatory damage awards.

The verdict might put an end to a legal drama plaintiff counsel said has been years in the making.

But if defense counsel has its way, the litigation will continue.

Explaining to the Jury

Before Fulton County Superior Court Chief Judge Chris S. Brasher and initially masked jurors seated in the jury box, Caldwell, Carlson, Elliott & DeLoach partners Rob Carlson and Chris Wilkerson suited up to argue on behalf of plaintiff Edward J. Foye and Southern Waste & Recycling Inc.

The lawyer-duo represented plaintiffs pursuing damages against defendant Phillip E. Kitchens after the majority shareholder allegedly diverted company assets to other companies he owned and controlled.

Atlanta attorney Mark Ford of Ford Legal represented Kitchens at trial.

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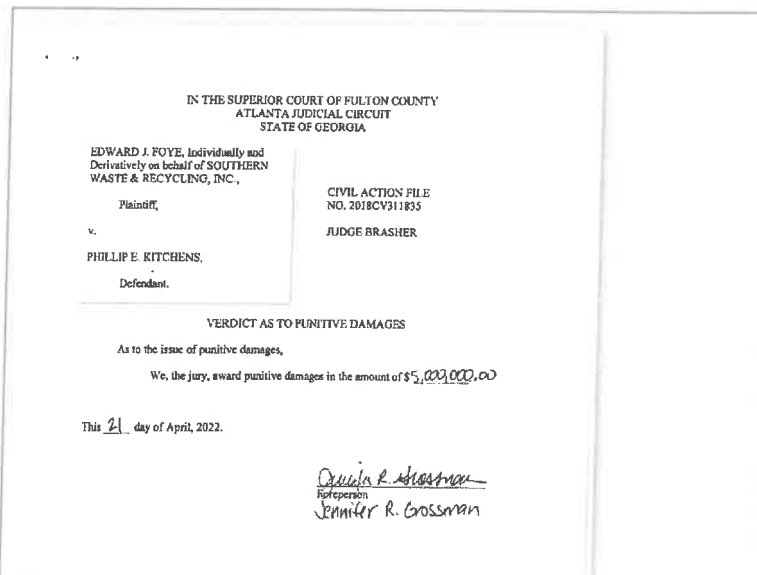
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"There were multiple interrelated entities that he had created that had different ownership and control," Carlson said. "All of that was really just a sham that he had put together, but the jury needed to understand how it was a sham, and why the ultimate purpose of his having done that was to try to shield himself from liability, for in essence, just stealing the corporate assets for himself."

To do that, Carlson said he and Wilkerson had to first simplify an otherwise complicated breach of fiduciary duty case in a way that the jurors could understand. From using visual aids, including graphics summarizing the chronology of events and organizational structures of the defendant's companies to homing in on the cross-examination of the defendant and the lawyer Kitchens employed to orchestrate various transactions, Carlson said plaintiff counsel succeeded at their goal.

"Most jurors are not immersed in these type of business transactions," Carlson said. "So a lot of your job is to educate them, introduce them to terminology they're not familiar with, explain to them how things ought to be dealt with in the management of a business and then show how the defendant didn't handle things properly."

The jury, who Carlson said had been selected using virtual voir dire, returned a verdict awarding the plaintiff \$5 million in punitive damages and another \$1.9 million in compensatory damages. The jury also awarded more than \$638,000 in attorney fees.



Read the Verdict

Plaintiff counsel credited the notable verdict in part to Caldwell Carlson's specialized experience handling breach-of-fiduciary-duty claims.

Carlson applauded the verdict, but said in this case, it didn't surprise him.

"The misconduct here was egregious, and I think that became apparent through the presentation of our case," Carlson said. "I could tell by looking at the jurors. We had a jury that was particularly attentive and very patient in allowing me to lay things out."

Next Steps

"The jury's verdict in this case was a long time coming. The case started out for us over five years ago with a shareholder inspection demand proceeding that we brought in Gwinnett County," Carlson said. "That resulted in multiple orders compelling the production of the corporate records that ultimately led to our filing the breach-of-fiduciary-duty claims in Fulton Superior Court."

But when reached for comment Tuesday, defense counsel Ford replied, "Mr. Kitchens plans to file an appeal."

With the case marking Carlson and Wilkerson's first in-person trial since the pandemic began, the plaintiff attorneys had mixed feelings about virtual voir dire.

Carlson said having remote juror candidates appear on screen alongside biographical information had been helpful, but that having to conduct voir dire three times for several 12-candidate panels had been time-consuming.

"We spent an entire day doing it," Carlson said.

Meanwhile, Carlson said adjusting to safety protocols meant he had to remain masked while delivering his opening statements and initial cross-examinations. But later in the trial, Brasher offered the jury the opportunity to unanimously decide whether to unmask, according to Carlson.

"That's a real challenge because your voice gets muffled and, of course, when you're talking, you're recirculating a lot of carbon dioxide," Carlson said. "It didn't take them long to come out of the jury room and say, 'We're ditching the masks,'" Carlson said.

Carlson said he remained unmasked throughout the remainder of the trial, which he noted had several litigation takeaways.

Judge Christopher Brasher, Chief Judge, Fulton County Superior Court.

"One of the things that was very obvious to us is that the legal doctrine that's involved in these cases is very, very complicated and requires some pretty serious study," Carlson said. "For example, we had both direct and derivative claims. ... The case law can get kind of muddled on who's entitled to a recovery: the plaintiff individually or the corporation."

Plaintiff counsel also pointed out the importance of researching the tolling of limitation periods in a fiduciary context and the weight carefully crafted charges in the verdict form can have on the ultimate outcome of a jury trial.

"You learn when the jury comes back that they get totally confused by the verdict forms," Carlson said. "So having one that effectuates the verdict that they really want to render that's presented to them in a way that they can express that, requires some effort."

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