

## How Hanson Bridgett Took A \$156M Case Over The Finish Line

By **Emma Cueto**

*Law360 (June 22, 2021, 2:38 PM EDT)* -- Attorneys from Hanson Bridgett LLP navigated a skeptical judge, a tangled litigation history and the challenge of COVID-19 safety measures to bring a 10-year case over the finish line with a \$156 million jury verdict.

A team of Hanson Bridgett attorneys, led by partners Andrew Giacomini and Brian Schnarr joined the lawsuit — which involved a Colorado shopping development deal gone wrong — eight years after the case originated but worked to make the case their own.

The effort paid off in May, when a jury ruled in their client's favor on almost all counts, including claims for fraudulent concealment and civil conspiracy, and calculated the damages to be \$156 million.

"Our client got their day in court ... and the jury determined that they had been wronged," Schnarr said. "That was important."

The long-running dispute dated to a 2004 agreement between Hanson Bridgett's clients, Chad and Troy McWhinney, and developers Dan Poag and Terry McEwen, according to court documents. The plan, which involved several corporate entities, was for Poag and McEwen to build and operate an upscale shopping center on land owned by the McWhinneys in Loveland, Colorado.

Things initially seemed to go well, with the shopping center, dubbed the Promenade Shops at Centerra, opening in 2005, according to court documents. But after a Poag and McEwen corporate entity failed to secure a key loan, the property was eventually foreclosed on by lenders and sold, court documents said.

The McWhinneys sued in Colorado state court in 2011. They eventually won a bench trial in 2017 in which Judge Thomas French, now retired, ruled that the corporate entity had violated its contractual duties and owed the McWhinneys \$42 million, plus interest.

The judgment, however, was not the end of the story. According to Schnarr and Giacomini, the corporate entity involved had no assets, making it impossible to collect on the judgment unless the McWhinneys could hold other parties accountable for the wrongdoing.

After unsuccessful attempts to first prove that the corporate entity in question was an alter ego for another company controlled by Poag and McEwen and then to add the two men to the suit as individuals, the McWhinneys eventually filed a second, separate lawsuit, which was removed to federal

court in November 2017.

By the time Hanson Bridgett joined the case in early 2019, Schnarr and Giacomini said, U.S. District Judge R. Brooke Jackson "did not like the case at all."

"He didn't like that it had been around a long time; he didn't like either of the parties because of the way it had been litigated," Giacomini said. "He wasn't happy with anybody."

It's an impression that comes across in court documents, as well. In a December order, Judge Jackson wrote while recounting the litigation history that he "ultimately (and regretfully) denied" a motion to send the suit back to state court in 2018.

In multiple orders, the judge also noted how long the case had been ongoing. In a February ruling, Judge Jackson denied a request from the McWhinneys to wait until the state appellate court ruled on their motion to reconsider a recent appellate ruling by saying, "I take their point, but I am not persuaded that this is a sufficient reason to delay this old case even longer."

Later in the same ruling, he said, "that is as far as I am willing to go at this time with respect to [the partial motion for summary judgment]. It is the parties' job to make what they will of it."

Given the situation, Schnarr and Giacomini set to work trying to reshape the case into something more streamlined — and something Judge Jackson would look upon more favorably.

"What we had to do was get ahold of it and streamline it and find the claims that actually had value," Schnarr said. "Once we started chipping away at it and reshaping the case from the one we inherited, we had to find a theme that was really simple and something the judge would understand — and see as something that could be done in a short amount of time. Because shortly after we got involved, COVID hit, and we were now faced with ... significant backlogs."

Even with these efforts, it took time to soften the judge toward the litigation.

"I would say it took two years before Judge Jackson thought that either Brian or I had any legitimacy as lawyers at all," Giacomini said.

Part of the effort to reframe the case was trying to portray it as simpler than it appeared. After all, the state court had already weighed and ruled on many of the issues, they said. If the federal court adopted those findings, then the case could simply pick up where the state court left off.

The attorneys' work paid off when Judge Jackson agreed to allow the findings from Judge French's 79-page state court decision in favor of the McWhinneys to apply in the federal case.

"[That] motion was the most important motion in the case," Giacomini said.

The attorneys felt confident heading into the trial, which began May 3. And then on the eve of trial, two of the defendants — Dan Poag and Josh Poag, who was sued as a co-trustee of several relevant trusts — decided to settle for a confidential amount.

While it was good news for the client, Schnarr and Giacomini worried about the impact it might have on the trial. There was more direct evidence against the Poags, they said, than there was against McEwen.

Trying to go after him alone might be a tougher sell to a jury, and it meant there was no chance of the defendants breaking ranks and pointing fingers at each other, which Schnarr and Giacomini had thought was a possibility.

With just hours before opening arguments, the team shifted gears and redoubled their focus on the argument that it just wasn't plausible for McEwen, as the president of the company doing business with the McWhinneys, not to know what was going on.

The trial itself also presented a challenge in light of the ongoing pandemic safety measures. It's harder to establish credibility to a jury, the attorneys said, while wearing a mask. They also were hampered by the rule that attorneys would need to stay at the plaintiff's table, instead of being able to move around, as is typical.

"Sitting down isn't ideal at all for a person doing trial work," Schnarr said. "You talk to trial lawyers, and they typically want to be on their feet, move from place to place, keep people's attention."

They adapted by including multiple demonstratives in the form of large corkboards with information and timelines that would be placed on easels in different locations in the courtroom, allowing attorneys to move around a bit more and giving the jurors something to look at when they went back to the jury room.

Attorneys initially also thought that the jury would be seated in two places to allow for social distancing, with half the jurors in the jury box and half in the gallery behind the attorneys. Fortunately, they said, all the selected jurors had been vaccinated, allowing them to sit in the box together.

"It sounds small, but [it was] very significant," Schnarr said.

Ultimately, the jury sided with the McWhinneys, deciding that they had been damaged to the tune of \$156 million, 15% of which they ruled was McEwen's fault.

McEwen has appealed but has not yet filed a brief indicating the grounds for it. Attorneys for McEwen did not respond to a request for comment.

Overall, Giacomini and Schnarr said, they were extremely pleased with the outcome.

"It was exciting," Schnarr said. "It's exciting to go into a jury trial of this magnitude during a pandemic. It's not something I ever would have thought would happen."

Giacomini added that despite some of the judge's early displeasure with the litigation, he also appreciated the way Judge Jackson handled the case and especially the trial.

"Judge Jackson ... he's a trial judge," he said. "He kept us in line, but he lets you try your case. And he protected the jury, made us go as fast as we could. It was, overall ... a great experience."

--Editing by Orlando Lorenzo.