

AUTO INSURANCE UPDATE
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I. PRE-TRIAL AND COVERAGE ISSUES

a. Diminished Value

The Supreme Court of Georgia's decision in State Farm Mut. Auto. Ins. Co. v. Mabry, 274 Ga. 498 (2001), to require insurance carriers to reimburse their own policyholders for the diminished value of their vehicles following an accident, was the most significant development in the area of automobile insurance law in the last year. The Court held that under an insurance contract requiring payment for "any loss", the insured was automatically entitled to recover the diminished value of any vehicle not totaled.

State Farm argued that its only contractual obligation was to pay for repairs that return the vehicle to its pre-loss condition. The plaintiffs argued that the policy promised to compensate them for their entire loss, and that when State Farm elects to repair the vehicle, it must compensate them for diminution in value to their vehicle as an element of that loss.

The Court reviewed 75 years of Georgia case law to determine that, in Georgia, the proper measure of property damage is difference in value, not condition, appearance or function, as State Farm urged. "The undertaking of the company to insure the owner

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against ‘actual loss or damage’ must be taken as the primary obligation, under which the measure of the liability would be the difference between the value of the property immediately before the injury and its value immediately afterwards.” See U.S. Fidelity & Guaranty Co. v. Corbett, 35 Ga. App. 606(1) (1926); see also Dependable Ins. Co. v. Gibbs, 218 Ga. 305 (1962) (expressly adopting the reasoning of the Court of Appeals in Corbett); Simmons v. State Farm Mut. Auto. Ins. Co., 111 Ga. App. 738 (1965) (stating that “the market value of the property plus [deductible] after payment must equal the market value before the loss”); State Farm Mut. Auto. Ins. Co. v. Smith, 119 Ga. App. 447 (1969) (reiterating measure of damages set forth in Simmons and further distinguishing between “condition” and “value”). Compare Pritchett v. State Farm Mut. Auto. Ins. Co., 2000850 Ala. Ct. App. __ (Feb. 22, 2002) (relying on customary usage of “repair,” which does not encompass restoration of value).

The Court also rejected State Farm’s claim that it is not required to pay an insured the diminution in value of a vehicle in the absence of a specific claim by the policyholder. The Court held that the contract of insurance does not require the insured to make a separate claim for diminished value.

Ultimately, the Court adopted the following formula for calculating diminished value: 10% of actual cash value (ACV) ´ damage modifier ´ mileage modifier = loss of value (LOV). The actual cash value of the vehicle is based on the current NADA edition at the time of the loss. The damage modifier increases the loss in value commensurate with the degree of damage. The mileage modifier increases the loss in value in inverse proportion to the number of miles. The formula is explained in greater detail at

www.georgia17.com/sample_formula.htm

b. Direct Action Against Insurer

In Dundee Mills, Inc. v. John Deere Ins. Co., 248 Ga. App. 39 (2001), the Court of Appeals addressed the question of whether a shipper can maintain a direct action against an insurer prior to a judgment for theft of cargo in interstate commerce. Dundee Mills sued John Deere, W.A. Harris's insurer, for losses sustained as a result of a W.A. Harris employee's theft of cargo being shipped out of state. John Deere was granted summary judgment by the trial court. Dundee Mills appealed, asserting that it was entitled to sue John Deere directly because it was a third party beneficiary of the insurance contract. Dundee Mills also relied on OCGA § 46-7-12, which authorizes a direct action against the insurer who provides liability coverage to a motor common carrier. The Court of Appeals, relying on Commercial Union Ins. Co. v. Bradley Co., 186 Ga. App. 610 (1988), held that OCGA § 46-7-12 is preempted by the Federal Motor Carrier Act and the Interstate Commerce Clause and does not apply to a cause of action arising out of interstate commerce.

Further, the Court rejected Dundee Mills' third-party beneficiary claim even though federal law requires motor common carriers to obtain a minimum of \$5,000 in liability insurance. The Court of Appeals also upheld the trial court's finding that OCGA § 46-7-12 was inapplicable, because Dundee Mills failed to prove that the John Deere policy was approved by the Georgia Public Service Commission, a prerequisite to a direct action against the insurer under OCGA § 46-7-12(e).

c. Service Upon a Minor

In Trent v. Franco, 253 Ga. App. 104 (2001), minor defendant Franco was properly served with the plaintiff's original complaint in Gwinnett County, where she and her family resided. Following the expiration of the statute of limitation, the minor defendant, her mother and her stepfather moved to their native Dominican Republic. The plaintiff then dismissed her suit without prejudice. In the renewal action, defendant attempted to dismiss the renewal action as void, because the plaintiff, prior to dismissal, failed to amend the prior action to allege jurisdiction under the Georgia Long Arm Statute.

The Court held that the original suit was not void, because the plaintiff had perfected service on the minor defendant while she still resided in Georgia. Service on the mother is required for purposes of notice but is not an element of service on the minor. The court also held that amendment of the complaint to reflect that the Georgia Long Arm Statute was the basis of jurisdiction over the minor defendant was unnecessary because she had been properly served while in Georgia. Moreover, failure to allege jurisdiction under the Long Arm Statute is an amendable defect.

d. School Buses and Vehicle Use

In State Farm Mut. Auto. Ins. Co. v. Vaughn, 253 Ga. App. 217 (2002), the Court of Appeals further clarified "use" of a vehicle for purposes of uninsured motorist coverage. The litigation arose from injuries suffered by the plaintiffs' child as she crossed the street to board the school bus. The plaintiffs sued for benefits payable under the school board's uninsured motorist policy. State Farm moved for summary judgment on the grounds that the child was not "occupying" the vehicle, which the State Farm policy defined as being "in, on, entering or alighting from" the vehicle, at the time of the accident.

The Court of Appeals extended its liberal definition of the term “use” to include the plaintiffs’ child, who had not boarded the bus, but had crossed the street at the bus driver’s signal for the purpose of boarding the bus. The Court relied on its holding in Georgia Farm & Cas. Ins. Co. v. Greene and the Supreme Court of Georgia’s approval of the Greene holding in Roberts v. Burke County School Dist., 267 Ga. 665 (1997). In Greene, the Court of Appeals ruled that a child who had exited a school bus and was crossing the street to his house was “using” the school bus for the purposes of the insurance policy. In Roberts, the Supreme Court noted that the school bus was, “in essence, ‘standing guard with its lights flashing, its stop signals on and all visual signals functioning’ with the disembarking children under its protection.” The Vaughn court held that use of the school bus involves crossing the road prior to boarding and that the parties to the contract must have contemplated this use.

In DeKalb Co. School Dist. v. Allen, A01A2212 ___ Ga. App. ___ (February 27, 2002), the Court further stretched the meaning of “use” of school buses. The plaintiff brought a wrongful death action against DeKalb County, alleging that its purchase of liability insurance constituted a waiver of sovereign immunity under OCGA § 33-24-51. Because there was no dispute as to the existence of liability insurance, the determinative issue was whether the incident arose from the “use” of the school bus and fell under the terms of the policy.

The plaintiff and her child were seated in her car outside their apartment complex, at the request of the child’s bus driver, waiting for the child’s school bus to arrive. Upon seeing a school bus approach, the plaintiff’s daughter exited the car, on the assumption

that it was her school bus. The plaintiff made a U-turn and was driving back toward the complex when she saw that the bus was not her daughter's bus. In the meantime, the bus had backed into the entrance of the complex while waiting for the plaintiff's child to get back to plaintiff's car. The plaintiff's decedent was crossing the street to return to her mother's car when she was fatally struck by another motorist.

In support of its argument that the accident did not arise out of the use of the bus, DeKalb relied on Brock v. Sumter County School Board, 246 Ga. App. 815 (2000) and Roberts v. Burke County School Dist., 267 Ga. 665 (1997). In Brock, the Court found that the accident did not involve the use of the bus because the child, while waiting for the bus, crossed the street, disobeying the orders of the bus driver and her mother, and was struck and killed. In Roberts, a child was killed when he ran across the road after exiting the bus. The accident took place on the child's half-mile walk home, when the bus had already traveled two miles from the point at which it dropped off the child. In light of these cases, the Allen court expanded "use" to include the instant scenario, where, but for the presence of the school bus, the child would never have left her mother's car.

e. Failure to Accurately Disclose Policy Limits

In Cross v. Tokio Marine & Fire Ins. Co., A01A1864, ___ Ga. App. ___ (February 14, 2002), the Court of Appeals examined a suit for bad faith penalties arising from Tokio's admitted failure to disclose the liability limits of its insured. A jury awarded the plaintiffs \$1,204,000 for damages arising from an automobile accident caused by Tokio's insured. Prior to trial, the plaintiffs demanded information on Tokio's liability limits. Tokio disclosed a \$1,000,000 policy. After trial, Tokio disclosed an additional \$6,000,000 in coverage. The

plaintiffs accepted payment in satisfaction of the judgment but subsequently filed an action for bad faith, fraud, misrepresentation, false swearing and RICO.

The plaintiffs' false swearing claim was based on Tokio's disclosure of liability limits as required by OCGA § 33-3-28. The Court of Appeals relied on the holding of Generali-U.S. Branch v. Southeastern Sec. Ins. Co., 229 Ga. App. 277 (1997), in denying plaintiffs' right to a private cause of action. The Court held that OCGA § 33-3-28(d), which requires insurers to amend their disclosures of policy limits, does not specifically include a right to sue and that the exclusive remedy is sanctions by the Insurance Commissioner. See Parris v. State Farm Mut. Auto. Ins. Co., 229 Ga. App. 522 (1997).

Further, because the plaintiffs claims were fully evaluated by a jury, the Court of Appeals held that they suffered no harm from the non-disclosure. The plaintiffs could not show that but for Tokio's misrepresentation their recovery might have been greater, and therefore could not establish any damages.

The Cross court distinguished Merritt v. State Farm Mut. Auto. Ins. Co., 247 Ga. App. 442 (2000). In Merritt, the plaintiff settled her claim for the disclosed policy limits of \$250,000. The plaintiff subsequently learned that there was an umbrella policy. The Court allowed the plaintiff to pursue her bad faith claims against State Farm as she had lost the use, for a period of time, of money that she might have been awarded had her claim been fully tried.

f. Two Year Limitations Period on Claims for Spouse's Medical Expenses

In Brent v. Hin, A01A2420, ___ Ga. App. ___ (February 28, 2002), the Court of Appeals overruled Brumit v. Mull, 165 Ga. App. 663 (1983) and Old Dominion Freight Lines

v. Martin, 153 Ga. App. 135 (1980). Relying on Brumit, the plaintiff claimed that the two year statute of limitation for personal injury actions did not apply to his claim for his wife's medical expenses. The plaintiff contended that medical expenses are a property right subject to the four year statute of limitation for property damage claims. The Court of Appeals rejected the plaintiff's argument and held that Brumit and Old Dominion, supra, are premised on former Ga. Code Ann. § 53-510, which required husbands to support and maintain their wives. The Court reiterated the holding in Mitchell v. Hamilton, 228 Ga. App. 850 (1979) that a claim for medical expenses on behalf of another individual is subject to a two year statute of limitation.

g. Recovery of Medical Expenses Discharged in Bankruptcy

In Olariu v. Marrero, 248 Ga. App. 824 (2001), the Court of Appeals held that medical expenses written off by a hospital are subject to the collateral source rule and cannot be used to diminish a plaintiff's recovery. However, the Court held that plaintiff cannot collect damages for medical expenses discharged in bankruptcy as no third party is acting as an additional source of recovery. Debts in bankruptcy become unrecoverable by operation of law under 11 U.S.C. § 524(a)(2), whereas a collateral source is generally a third party, such as an insurer, who has voluntarily provided a benefit through a bargained-for agreement.

Notably, the Court upheld the trial court's exclusion of evidence showing the discharge of medical expenses in bankruptcy. The Court determined that the discharge is irrelevant to a jury's determination of damages and that the information could be prejudicial. Therefore the defendant is entitled to a "credit", outside the presence of the

jury, for medical expenses proven to be discharged in bankruptcy.

h. Failure to give timely notice of loss

In Allstate Ins. Co. v. Walker, A01A1917, ___ Ga. App. ___ (March 19, 2002), the Court held that failure to notify the insurer of a loss for almost one year is not notice “as soon as possible” as a matter of law. The plaintiffs traded in their van to a used car dealer, who agreed to assume payment on their note. The plaintiffs subsequently learned that the dealer had made no payments on the note. They then filed a police report detailing the loss as a theft by the dealer and hired a lawyer. The plaintiffs did not make a claim under their insurance policy until almost twelve months after the theft because they did not know the event was covered by their policy. Allstate denied coverage for the claim and moved for summary judgment.

The Court held that, although timeliness of notice is usually a jury question, see State Farm Mut. Auto. Ins. Co. v. Sloan, 150 Ga. App. 464 (1979), an unexcused significant delay may be unreasonable as a matter of law. See Plantation Pipeline Co. v. Royal Indemnity Co., 245 Ga. App. 23 (2000). Relying on Snow v. Atlanta Int’l. Ins. Co., the Court determined that the insureds delay in notifying Allstate for almost one year was unreasonable as a matter of law. See Snow v. Atlanta Int’l. Ins. Co. 182 Ga. App. 1 (1987) (holding that ten month delay in notification unreasonable as matter of law where insured claimed he did not know which company carried insurance on tractor trailer).

II. TRIAL ISSUES

a. Rehabilitation of Biased Jurors

When a juror expresses an opinion during voir dire as to which party should prevail

in a given lawsuit, the trial court must consider the evidence with regard to that juror's potential bias and exercise its discretion "to retain or dismiss a juror." Cohen v. Baxter, 267 Ga. 422, 423 (1997). It is the burden of the party who moves to dismiss a juror for cause to rebut the presumption of the juror's impartiality. 267 Ga. at 424. The authority of the trial court to evaluate juror bias by its own questioning had previously gone unchallenged.

In Walls v. Kim, 250 Ga. App. 259 (2001), *cert. granted* (January 10, 2002), the Georgia Court of Appeals noted that trial courts faced with jurors who were "clearly biased" would frequently use their broad discretion to "rehabilitate" such biased jurors. 250 Ga. App. at 259. A common technique which the trial courts utilized was to ask a leading question such as, "After you hear the evidence and my charge on the law, and considering the oath you take as jurors, can you set aside your preconceptions and decide this case solely on the evidence and the law?" 250 Ga. App. at 259. The Court of Appeals indicated, however, that a trial judge should be cautious in this area and dismiss a juror who is potentially biased instead of trying to rehabilitate such a juror. 250 Ga. App. at 260.

The Court of Appeals held that "[a] juror is objectionable when it is shown that her finding in the case may be affected by personal interest in the result; and the probability as to whether that interest will produce bias is determined by ordinary and general human experience." 250 Ga. App. at 261. This holding should make it more difficult for a trial judge to fail to dismiss a clearly biased juror based upon a mere statement by that juror that he can decide a particular case on the law and the facts of that case.

b. Admissibility of Police Diagrams

Police reports are admissible as a business records, but not the opinions in those

reports. Rickett v. State, 123 Ga. App. 1 (1970). Consequently, the narrative portions of police reports are generally inadmissible when they include hearsay statements, opinion evidence, and conclusions of the investigating officer. Brown v. State, 274 Ga. 31 (2001).

The Georgia Court of Appeals has recently held that a diagram contained in a police report may be admissible into evidence, even without the investigating officer's testimony. Beckett v. Monroe, 249 Ga. App. 615 (2001). In the past, diagrams based upon the officer's own testimony had been admitted. Drummond v. Gladson, 219 Ga. App. 521 (1995). Beckett expanded the law, however, to eliminate the requirement that the preparing officer identify the diagram. 249 Ga. App. 615-16.

The Court held that diagrams in general are admissible into evidence "simply on the basis of testimony that they are substantially accurate representations of what the witness is endeavoring to describe." 249 Ga. App. at 615-616 (*citing* J.B. Hunt Transp. v. Brown, 236 Ga. App. 634, 636 (1999)). "Thus, a sketch or a diagram of an auto accident is admissible through a witness who testifies the drawing is substantially accurate, even though the drawing was not prepared by the witness and the author is unknown." 249 Ga. App. at 616. The Court of Appeals further held that the trial court did not err in admitting the diagram despite the fact the officer's name, badge number, and position was evident on the diagram. 249 Ga. App. at 616.

In Scott v. LaRosa and LaRosa Inc., 253 Ga. App. 489 (2002), the Court of Appeals reconfirmed that the narrative in a police report is mere hearsay with no probative value. 253 Ga. App. at 490. The Court held that it was improper for a trial court ruling on a motion for summary judgment to rely on the narrative contained in a police report. 253 Ga.

App. at 490.

c. Jury Charges on Federal Regulations as Negligence Per Se

Parker v R&L Carriers, Inc., 253 Ga. App. 628 (2002) dealt with an auto accident between a pick-up truck and a tractor-trailer. There was evidence that the driver of the tractor-trailer violated several Federal Motor Carrier Safety Regulations. 253 Ga. App. at 628. However, the trial court refused to charge the jury on the federal regulation dealing with driver fatigue. 253 Ga. App. at 628.

The Court of Appeals held that the trial court did not err in denying the plaintiff's request to charge on the federal regulation. 253 Ga. App. at 628. In so holding, the Court stated that the proximate cause of the accident was the failure to yield the right of way on the part of the tractor-trailer and not driver fatigue. 253 Ga. App. at 628. Fatigue on the part of the tractor-trailer driver explained the failure to yield the right of way but was not in and of itself the proximate cause of the accident. 253 Ga. App. at 628.

d. Jury Charges on Skidding

In Armandroff v. Cushing, 250 Ga. App. 105 (2001), the Court of Appeals held that the following was a legal jury charge:

It is common knowledge that a skidding automobile is very difficult to accurately control. And mere skidding of a vehicle does not, in and of itself, necessarily constitute negligence. Furthermore, it is common knowledge that an automobile may skid on a slippery highway without negligence on the part of the operator. It is incumbent on the Plaintiff to show by a preponderance of the evidence that skidding was a result of the negligent operations of the automobile by the Defendant.

250 Ga. App. at 105-106. The evidence at trial showed that it was raining at the time of the accident. 250 Ga. App. at 106. Further, there was also evidence that the defendant had "skidded into" the back of the vehicle in front of her. 250 Ga. App. at 106. The Court of

Appeals held that “if there is even slight evidence on a specific issue, it is not error for the court to charge the jury on the law related to that issue.” 250 Ga. App. at 106.

e. Assumption of Risk

Atlanta Affordable Housing Fund, LP v. Brown. 253 Ga. App. 286 (2002) dealt with the application of the assumption of the risk defense in a motor vehicle accident involving a nine year old pedestrian. The case involved a girl who was enrolled in an after-school academic enrichment program. 253 Ga. App. at 286. The child, after taking out the trash for the program, ran out into the path of a truck from behind an illegally parked van. 253 Ga. App. at 286.

The Court of Appeals ruled that the trial court did not err in failing to charge the jury on the doctrine of assumption of the risk, as there was no evidence that the nine year old was aware of the approaching truck. 253 Ga. App. at 287-88. The pedestrian must possess a “particularized and subjective awareness” of the risks and dangers posed by an approaching vehicle before the assumption of the risk defense will apply. 253 Ga. App. at 287. This risk must also be voluntarily “assumed” such as “racing against” the approaching vehicle. 253 Ga. App. at 287. Generally, a defendant who asserts the assumption of the risk defense must establish that “the plaintiff (1) had actual knowledge of the danger; (2) understood and appreciated the risks associated with such danger; and (3) voluntarily exposed [herself] to those risks.” 253 Ga. App. at 286. The knowledge of the danger must be both actual and subjective. 253 Ga. App. at 286-287. A plaintiff’s knowledge of “general, non-specific risks” will not satisfy the assumption of the risk defense. 253 Ga. App. at 286.

In Shaw v. Brannon, 253 Ga. App.673 (2002), a Mayfield truck swerved into the plaintiff's lane and caused a collision. The Court of Appeals held that, in order for the plaintiff to assume the risk of being struck by a vehicle entering his lane, there must be evidence that, after the vehicle swerved into the plaintiff's lane of travel, the plaintiff "made a conscious and voluntary decision" to continue a course of conduct and risk a collision. Id.

f. Vehicles Parked on the Side of the Roadway

In Phillips v. South West Mechanical Contractors, Inc., A01A1935, ___ Ga. App. ___ (March 7, 2002), the Court of Appeals held that a company was not negligent for leaving a disabled truck partially in the emergency lane of Georgia 400 for 36 hours. There, a dump truck ran into mechanical difficulty on Georgia 400 and had to pull off to the side of the road. The driver parked the dump truck halfway in the emergency lane and halfway on the grass. After the driver had tried unsuccessfully to repair the dump truck, the owner of the truck directed the driver to leave the vehicle behind. The owner told the driver that he would come out to where the vehicle was parked the next day and replace the truck's fuel pump. About 36 hours after the truck originally broke down, two teenagers joyriding on a stolen ATV entered the emergency lane and struck the rear of the dump truck. The plaintiffs alleged that the owner of the truck was negligent per se in that the driver violated O.C.G.A. §§ 40-6-200(d) and O.C.G.A. 40-6-203 (a)(1)(I) which relate to parking vehicles. Id. The Court found that merely leaving a truck parked on the side of Georgia 400 did not constitute negligence. Id.

g. The Good Samaritan Rule

Herrin Bus. Products, Inc. v. Ergle, A01A1908, ___ Ga. App. ____ (March 6, 2002) was a wrongful death case arising from a motor vehicle accident. The decedent was struck and killed by a pick-up truck driven by defendant Brian Edwards, who displayed symptoms of low blood-sugar levels on several occasions while working for Herrin. On several previous occasions when Mr. Edwards was lethargic due to his low blood sugar, fellow employees at Herrin would provide Mr. Edwards with food and beverages to increase his blood sugar.

On the night of the collision, Mr. Edwards was detained at work by his supervisor, who believed that Mr. Edwards was having one of his diabetic episodes. The supervisor provided Mr. Edwards with some food and a soft drink in an attempt to raise his blood sugar. The accident occurred about ten to twenty minutes later. Tests showed that Edwards' blood sugar was very low.

Herrin, relying on the Good Samaritan Rule, appealed the denial of summary judgement by the trial court. The Good Samaritan Rule, which was codified by O.C.G.A. § 51-1-29, provides:

Any person . . . who in good faith renders emergency care at the scene of an accident or emergency . . . without making any charge therefore shall not be liable for civil damages as a result of any act or omission by such person in rendering emergency care or as a result of any act or any failure to act to provide or arrange for further medical treatment or care for the injured person.

The Court of Appeals held that due to the repetitive nature of Mr. Edwards' diabetic

episodes, it did not fit within “any reasonable definition of emergency.” Id. Thus, O.C.G.A. § 51-1-29 was not applicable.

h. Statements in Medical Records as Prior Inconsistent Statements

In Waldrup v. Baker, 180 Ga. App. 121, 122 (1986), the Georgia Court of Appeals held that patient medical history forms or admission forms which were completed by a witness were admissible to impeach that witness insofar as they contained prior inconsistent statements. In Barone v. Law, 242 Ga. App. 102 (2000), the Georgia Court of Appeals went one step further by holding that the medical history contained within medical records, whether or not such records were completed by the plaintiff, are not inadmissible hearsay. 242 Ga. App. at 104. The Court of Appeals cited O.C.G.A. § 24-3-4 which states that “statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admissible in evidence.” 242 Ga. App. at 104.

The Court of Appeals did place some conditions on when statements and medical records could be used to impeach a witness. “[I]n order for statements in medical records to be utilized as a prior inconsistent statements against a witness . . . , the trial court must be able to reasonably infer from the face of the records that the witness was the actual source of the statements at issue” 242 Ga. App. at 105. Such a reasonable inference might “be made when the witness’ medical records (a) are written in the ‘first person,’ as in a patient’s medical history; (b) specifically quote the witness as having made the statement; or (c) clearly indicate on the face of the records that the only source of the

medical history was the witness, as when the information reveals something only the witness would know and which could not come from a third party.” 242 Ga. App. at 105.

i. Full Compensation Reimbursement Rule’s Application to a UM Carrier’s Right to A Med-Pay Write-Off

Yates v. Dean, 244 Ga. App. 333 (2000), involved the construction of O.C.G.A. § 33-24-56.1(c), which deals with the rights of insurers to seek reimbursement for medical payments upon the settlement of a personal injury case, to an uninsured motorist claim. In Yates, the plaintiffs brought an action to recover uninsured motorist benefits. 244 Ga. App. at 334. At trial, the jury returned a verdict in the amount of \$5,360.90 in favor of the plaintiffs. The trial court reduced the jury’s award by \$5,138.65, as defense counsel had presented evidence that the plaintiff’s uninsured motorist insurance carrier had previously paid med-pay benefits equal to this amount. 244 Ga. App. at 333.

The Court of Appeals determined that the write-off was proper and affirmed the trial court’s judgment. 244 Ga. App. at 333. Counsel had argued that O.C.G.A. § 33-24-56.1 prohibited the uninsured motorist carrier from seeking reimbursement for medical payments where the plaintiffs had not been fully compensated. 244 Ga. App. at 334. The Court of Appeals held that a write-off for medical payments in no way involved “reimbursement.” 244 Ga. App. at 334. The uninsured motorist carrier was merely seeking to set-off a jury award by the amount it had already paid out in medical expenses. 244 Ga. App. at 334. The Court of Appeals stated that “disallowing the set-off would result in a double recovery” for the plaintiffs. 244 Ga. App. at 334.

j. Qualification of Expert Witnesses with Respect to Opinions Regarding Proximate Cause

Cromer v. Mulkey Enters. Inc., A01A2305, ___ Ga. App. ____ (March 21, 2002)

involved an appeal by a plaintiff who asserted that the trial court erred in limiting the testimony of her expert witness. The plaintiff had been involved in other automobile accidents along with a lifting accident. The plaintiff identified an expert with a background in physics and biomechanics. The trial court ruled that it would allow the expert to testify as to the movement of the plaintiff's body inside the cabin of her vehicle, but the court would not allow the expert witness to give an opinion that the accident in question caused the plaintiff's injuries. Id.

The Court of Appeals held that in order for an expert to testify as to which accident among several accidents caused a particular injury, it must be shown that the underlying technique used by the expert has "reached a scientific stage of verifiable certainty," and it must be shown that the expert has "expertise in that science." Id. "With respect to [each] particular scientific procedure or technique, the trial court makes a determination whether the procedure or technique in question has reached a scientific stage of verifiable certainty, based upon evidence, expert testimony, treatises, or the rational of cases in other jurisdictions." Cromer, A01A2305 (3/21/02) (*citing* Jordan v. Georgia Power Co., 219 Ga. App. 690, 693 (1995)). The Court held it was not error to exclude the testimony of the plaintiff's expert as to the causation of her injuries. Id. The evidence in the record did not support a finding that the field of biomechanics "includes a technique of determining if specific injuries resulted from specific accidents, let alone that that technique has reached a stage of verifiable certainty." Id.

k. Impeachment with Documents not listed in the Pre-Trial Order

The unpublished case of Ballard v. Meyers, A01A1249 (July 17, 2001), *cert. granted* (January 10, 2002) dealt with the question of whether it is proper for a court to allow impeachment of a witness with documents which were not listed in the pre-trial order. At trial, counsel for the defendant attempted to impeach the plaintiff with a certified copy of a verified complaint which the plaintiff had filed after a previous accident. On cross-examination, defense counsel asked the plaintiff to admit that he had claimed over \$122,000 in special damages after the prior auto accident. The plaintiff answered that “he did not know” how much he claimed in the prior accident.

Defense counsel then showed the plaintiff a copy of the complaint, and the plaintiff continued to deny remembering what he claimed in damages for the previous accident. Defense counsel then tendered the certified copy of the complaint into evidence for the purpose of impeachment. Plaintiff’s counsel objected to the documents admission into evidence, and the trial court sustained the objection partly on the basis that the document was not included in the pre-trial order. Ballard, A01A1249 at 2-3.

The Court of Appeals, relying on Allstate v. Reynolds, 138 Ga. App. 582, 587 (1976), held that the trial court had discretion to deny the introduction of documents into evidence which were not listed in the pre-trial order, “especially when the party seeking to introduce the evidence had anticipated needing it at trial and did not move to amend the pre-trial order.” Ballard, A01A1249 at 3-4. The Court of Appeals also quoted Mullinax v. Shaw, 143 Ga. App. 657, 661 (1977) in support of the proposition that “[i]n the absence of a viable claim of surprise or unfairness, a trial court’s refusal to amend a pre-trial order is

not an abuse of discretion.” Ballard, A01A1249 at 4.