

EDITOR'S NOTE AND ACKNOWLEDGMENT

Warner S. Fox

The 2001 Georgia Defense Lawyers Association's Annual Journal was published for the first time on GDLA's web site. The 2002 Journal marks the second year for the Journal to be published on the web site. The feedback we have received from the Journal's availability on the web site has been overwhelmingly positive. If anyone has any comments they would like to share about this year's journal, please feel free to email me at wfox@hplegal.com.

This year's Journal is arriving rather late and the editor takes full responsibility for the tardy publication. But, as the saying goes, better late than never.

You will also find attached to the Journal a President's Message from Walter McClelland who was President of the GDLA until this summer when his term ended and he was replaced by Jerry Buchanan. Jerry will get an opportunity to write a President's Message for the 2003 Journal.

The GDLA would like to thank the authors who submitted articles for the 2002 Journal. Obviously, without their time and effort this Journal would not have been possible. The following authors contributed to the Journal this year: Charles R. Beans (Products Liability), Sean M. Dunn and Anne W. Garliss (Automobile Insurance), E. Lee Southwell, III (Workers' Compensation), James E. Looper, Jr. (Medical Malpractice), and Lynn M. Roberson (Premises Liability).

We hope that these articles are conducive to informing you regarding their topic areas and assist you in improving your practice. If you have an opportunity to say thanks to these authors, please do so.

Warner S. Fox, Editor

PRESIDENT'S MESSAGE

Walter B. McClelland
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This year the Annual Meeting of the Georgia Defense Lawyers Association was held in one of our favorite spots, Ponte Vedra, Florida, from July 18th – 21st. We celebrated our 35th Anniversary, and the Saturday night banquet was highlighted by a ten piece band and a tribute to all of our Past Presidents. This past year was an exciting time in the life of our Association, and it has been a privilege to serve as its President.

The GDLA could not be as successful as it is without the hard work and dedication of many of its members, and particularly the members of the Board of Directors. At this year's Annual Meeting, the Board held "open meetings" for those who expressed an interest in serving on the Board. In the event you were not able to attend the Annual Meeting and have interest in serving on the Board of Directors in the future, I would ask that you let Salty Forbes know of that interest.

As is the custom, I want to take this opportunity to highlight the year's activities and to specifically thank certain members for their extraordinary work and dedication to the Association. The Association returns to Ponte Vedra, Florida every third year, and has done so for many years. This is indeed a five star location, and is one of the best venues we attend. This year's Annual Meeting was exceptional, thanks to the efforts of our meeting chairman, Steve Kyle. For those of us who always thought that Steve was very "straight laced", it was a revelation to see him on stage with the band Saturday night. I hope that Johnny Foster got some good pictures of Steve for the newsletter.

Our newly elected President, Jerry Buchanan, put together an excellent program to highlight our Annual Meeting. Dr. Bill McCallister and Michael Boutot, presented the Association with many valuable ideas to make our law practices more efficient and profitable. Of all the speakers that we have ever had, these two were certainly the most energetic, and Jerry is to be commended for an excellent program.

Warner Fox, as Editor of the Law Journal, has put together yet another in a long line of excellent Journals, consisting of scholarly and timely legal articles, with emphasis on issues helpful to the defense practice.

Following last year's Annual Meeting at Destin, the officers held a retreat where we established as one of our primary goals, the solicitation of new members. While my original goal of new members was not met, I am pleased to announce that we did obtain over 50 new members during the last year. I am confident that this number will grow quickly as a result of the solicitation campaign that moved into high gear during the last few months, and under Jerry Buchanan's leadership. I urge each of you to be on the lookout for perspective new members, and to encourage them to join our organization.

As you know, the GDLA has established the Willis J. "Dick" Richardson, Jr. Scholarship Fund at the University of Georgia. This Fund will provide an annual award and scholarship for excellence in Georgia Practice and Procedure to the outstanding student in the Georgia Practice and Procedure course. This is indeed a fitting memorial to our "President in Perpetuity" and good friend, Dick Richardson, who passed away in 1999.

My good friend and Past President, Salty Forbes, continues to serve as unofficial "parliamentarian" at the Board meetings, and makes it a point to attend each and every meeting to make sure that nothing gets passed which is in conflict with the By-Laws. I appreciate Salty keeping me straight during the last year. In addition, Salty continues to serve on the DRI Board of Directors, and has been instrumental in keeping the GDLA apprised of matters of importance to the defense bar on a National level. David Whitworth, another one of our Past Presidents, served as the DRI State Representative, where he acted as the liaison between the DRI and the GDLA.

Jimmy Singer was actively involved this year as Chairman of the Amicus Committee. The Georgia Defense Lawyers Association submitted Amicus Briefs in at least two cases of common interest to the Defense Bar.

Johnny Foster did an excellent job in publishing several informative Newsletters throughout the year. In addition, he took charge of coordinating our sponsorship program and disseminating information to the Association's sponsors, who have grown considerably under his leadership. Our sponsors are an important source of supplemental income to the Association, and they deserve our thanks and patronage.

In November, 2001, the Association sponsored a combination social hour and professionalism seminar, which was organized by Jo Jagor and Karen Raby, with help from George Duncan. This was the first time the Association had held such an event, and it was a smashing success, filling Manuel's Tavern with attendees.

From November 29th to December 1st, 2001, the Association conducted its Annual Trial Academy at Calloway Gardens, under the leadership of Rusty Gunn, and a "cast of thousands." This undoubtedly is one of the highlights of the services that the Association provides, and is an excellent opportunity for firms to send their younger lawyers to an intense training session. The Trial Academy was well attended, and a special thanks to Rusty and the faculty who made the Academy a success.

On February 15, 2002, the mid-year seminar was put on in Atlanta by Staten Bitting and Luanne Clarke. This year's seminar deviated from the usual format, in that it contained a joint session with a breakout session concentrating either on trial tactics or workers' compensation issues. The seminar was very well received, with over 85 attendees, and many thanks to Staten and Luanne for all of the time and effort they put into making this one of the best seminars we have sponsored.

On May 29, 2002, the GDLA sponsored another social get together in Atlanta. This was spearheaded again by Jo Jagor and George Duncan, and concentrated primarily on welcoming new members to our Association, and encouraging perspective members to join our ranks. We hope to expand these gatherings throughout the State.

As you can see, this was a busy and productive year for the Georgia Defense Lawyers Association. I, like all those before me, want to express my special appreciation to our Executive Secretary, Al Shurley, for all that she does for the Association. Al truly works "behind the scenes" and is directly responsible for keeping us moving in the right direction.

In closing, let me say that it has been an honor to be your President this year, and I wish the current officers, Jerry Buchanan, Rick Rominger and Grant Smith, continued success. We elected several new and energetic members to the Board of Directors at the Annual Meeting, and I know that this will be another productive year. I intend to stay active in the affairs of the Association, and look forward to helping the GDLA continue to grow and to enhance and improve the services which it provides to its membership.

Walter B. McClelland
President

OVERVIEW OF RECENT TRENDS IN MEDICAL MALPRACTICE

By: James E. Looper, Jr.*

Attorneys who prosecute or defend medical malpractice, sometimes referred to as med. mal., cases are faced with unique challenges. Med. mal. in Georgia has elements of tort and contract.¹ It has unique pleading requirements that prohibit any dollar amount larger than \$10,000.00 from being mentioned in the complaint and that require an expert's affidavit be attached to the complaint.² Med. mal. has its own statutes of limitation and repose and these periods are not necessarily tolled for disabilities as they are in other *ex delicto* and *ex contractu* actions.³ Med. mal. encompasses cases involving health-care professionals and health-care entities, such as hospitals (for purposes of simplification, this article will refer only to physicians and will make note should there be a distinction for others).

THE BASICS OF MEDICAL MALPRACTICE

In order to bring a cause of action for medical malpractice the plaintiff must prove:

- (1) the duty inherent in the doctor-patient relationship;

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- (2) breach of that duty by failing to exercise the requisite degree of skill and care; and
- (3) that this failure is the proximate cause of the injuries sustained.⁴

Prong one is established by showing that the physician undertook the care and treatment of the patient.⁵ Prongs two and three are established through expert testimony. In order to prove these two prongs, the plaintiff must overcome the presumption in medical malpractice cases that the physician performed his care in an ordinary and skillful manner.⁶ The plaintiff does not satisfy her burden by showing that the testifying physician would have done something differently; rather, the plaintiff must offer expert medical testimony that the defendant doctor “failed to exercise that degree of care and skill which would ordinarily have been employed by the medical profession generally *under the circumstances*.”⁷ In order to show proximate cause, the plaintiff must present expert medical testimony that the alleged deviation from the standard of care probably (more likely than not) caused the injury.⁸ The Court of Appeals has noted that a reasonable degree of medical probability has no greater meaning than preponderance of the evidence as to medical causation and, in fact, has expressly held that charging the jury that the plaintiff must prove the alleged deviation caused the injury within a reasonable degree of medical *certainty* is harmful error.⁹

THE MEDICAL MALPRACTICE STATUTES OF LIMITATION AND REPOSE

One of the most important areas in med. mal. is determining when the statute of limitation expired or will expire. This seems simple on its face; however, it is anything but simple. Georgia requires that “an action for medical malpractice shall be brought

within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred.”¹⁰ This time period is different if dealing with a retained instrument or an injured infant.^{11 12}

Furthermore, the statute of limitation is treated somewhat differently if the alleged deviation resulted in death.¹³ In this situation, the wrongful death action must be brought within two years of the date of death; however, the claims for special damages, pain and suffering, and punitive damages (the estate’s claim) must be brought within two years of the alleged negligent act.¹⁴ It is important to note that the time computation for the estate’s claim will be tolled while awaiting the appointment of the personal representative.¹⁵ This can be especially troubling when dealing with the impending expiration of the time to file the survivor’s wrongful death claim and the interaction with O.C.G.A. § 9-11-9.1 (b).¹⁶

Other than the situations described above, the only time the statute of limitation for med. mal. actions is tolled is when the physician, by fraudulent means, debars and deters a plaintiff from bringing a malpractice claim.¹⁷ This must be actual fraud, that is, more than a mere misdiagnosis.¹⁸

One of the hardest questions to answer is when did the injury manifest itself. Traditionally the date of the alleged negligent act or misdiagnosis is the date of the injury.¹⁹ This is so due to the fact that the plaintiff usually experiences symptoms at this time and it is so regardless of whether the plaintiff knew the cause of the symptoms.²⁰ Recently the Court of Appeals attempted to change this rule by overruling a long line of cases by adopting the “continuous treatment doctrine”.²¹ Under this theory the statute

of limitation would not start to run until the treatment ended regardless of when the negligent act occurred or when symptoms manifested to the plaintiff.²² On certiorari the Supreme Court reversed the Court of Appeals, holding that the “continuous treatment doctrine” was in direct contradiction of O.C.G.A. § 9-3-71 and that the power to change this rule rested with the General Assembly, not the courts.²³

Should the plaintiff believe the statute of limitation tolled for some reason, the case still must be filed within the statute of repose.²⁴ The statute of repose abrogates the cause of action.²⁵ The statute of repose expires five years from the date of the alleged negligent act regardless of when symptoms may have manifested.²⁶ Just as with the statute of limitation, the period of repose is treated differently when dealing with retained foreign bodies and infants.^{27 28}

Unlike the statute of limitation, there is no tolling of the statute of repose; however, a defendant may be equitably estopped from raising the defense of the expiration of the statute of repose if the plaintiff was barred and deterred from filing suit as a result of the fraudulent activity of the physician.²⁹ The *Esener* opinion implicitly overruled prior cases that held the statute of repose would abrogate the claim for medical malpractice when the alleged negligence was discovered prior to the expiration of the statute of repose.³⁰ Recently, the Court of Appeals has clarified the *Esener* opinion and explained that the fraud necessary to equitably estop the defendant from raising the expiration of the period of repose must be intentional fraud.³¹

EXPERT TESTIMONY AND O.C.G.A. § 9-11-9.1

Without expert testimony, there is no medical malpractice case.³² The defendant physician may serve as his own expert; however, it would not be advisable to go to trial without additional expert testimony.³³ In order for the case to begin, the plaintiff must comply with O.C.G.A. § 9-11-9.1 and attach an expert's affidavit to the complaint.³⁴ This affidavit does not have to rise to the level of surviving a motion for summary judgment; rather, it is a pleading requirement.³⁵ That said, the affidavit must be provided by an expert competent to testify and it must provide one negligent act and the factual support for the alleged act of negligence.³⁶ O.C.G.A. § 9-11-9.1 does not require a causation statement nor does it require the medical records relied upon by the expert be attached to the affidavit.³⁷ However, these two criteria must be satisfied in order for the affidavit to be sufficient in response to a motion for summary judgment.³⁸

O.C.G.A. § 9-11-9.1 was meant to reduce frivolous litigation; however, it has created its own subset of litigation. In 1997, the General Assembly amended O.C.G.A. § 9-11-9.1 and the amendments applied only to cases filed after July 1, 1997.³⁹ There were several significant changes to the statute.⁴⁰ One of those changes requires a defendant to raise any deficiencies in the affidavit by way of a motion to dismiss filed contemporaneously with the initial responsive pleading.⁴¹ Prior to the amendments, if the deficiency in the affidavit was not obvious on the face of the affidavit, the defendant was not required to raise this defense with the answer.⁴² Since the amendments took affect, the appellate courts of Georgia have not addressed in a majority opinion how to deal with a deficiency that is not obvious on the face of the affidavit. In a concurring opinion, Judge Eldridge and Presiding Judge McMurray stated that by requiring a

motion to dismiss be filed contemporaneously with the initial responsive pleading the General Assembly intended for defendants to waive any affidavit defense, including those not obvious on the face of the affidavit, if the motion to dismiss was not filed contemporaneously with the initial responsive pleading.⁴³ The opinion of Judge Eldridge and Presiding Judge McMurray seems to comport with the Court of Appeals' recent interpretations of O.C.G.A. § 9-11-9.1 requiring strict adherence to the procedural rules.

If the statute of limitation will expire within ten days of the filing of the complaint, the plaintiff may obtain an additional forty-five days within which to file the affidavits.⁴⁴ The plaintiff is required to allege in her complaint that the statute of limitation will expire within ten days of the filing of the complaint and due to time constraints an affidavit could not be prepared.⁴⁵ The failure to include this language is an amendable defect; however, the Court of Appeals has held that where the complaint does not include this language the plaintiff is not entitled to the additional forty-five days and the complaint will be dismissed.⁴⁶

Strict adherence to the procedural requirements of O.C.G.A. § 9-11-9.1 is also required of defendants. The Court of Appeals recently held that it was improper for the trial court to dismiss a plaintiff's cause of action against a hospital where the hospital had not raised the lack of an affidavit by way of a motion to dismiss filed with its initial responsive pleading.⁴⁷ The Court of Appeals held this despite the fact that the hospital had not answered because of the automatic stay in place as a result of the hospital's voluntary bankruptcy.⁴⁸

While the Court of Appeals has required strict adherence to the requirements of O.C.G.A. § 9-11-9.1 two cases decided on March 6, 2002 create confusion as they have opposite holdings.⁴⁹ Both cases deal with a plaintiff alleging that time constraints prohibited the obtaining of an affidavit before the statute of limitation expired.⁵⁰ In one case, the Court of Appeals held that the plaintiff is not required to prove this assertion and that basically it could not be challenged by a defendant.⁵¹ However, in the other case (which incidentally was a legal malpractice case), the Court of Appeals held that where the plaintiff did not make the allegation in good faith, the defendant may challenge the assertion and have the case dismissed.⁵² The Court held this was basic statutory construction based on the Legislature's use of the word allege and based on the fact that the Legislature did not give an automatic forty-five day extension without making the allegation in the complaint.⁵³ It remains to be seen how the Supreme Court will reconcile this inconsistency.

In addition to O.C.G.A. § 9-11-9.1, expert testimony is required in med. mal. cases for everything from motions for summary judgment to trial. As stated above, how the expert witness would personally treat the condition is irrelevant; rather, the expert witness must testify to the standard of care and how the defendant physician deviated from the standard of care.⁵⁴ While the Supreme Court and the Court of Appeals upheld this long-standing rule regarding expert testimony, the two courts recently reversed the long-standing rule regarding contradictions in expert testimony.⁵⁵ Prior to these cases, the self-contradictory testimony rule, or *Prophecy* rule, applied to expert witnesses just as it applies to parties.⁵⁶ In fact, the rule was extended regarding experts to not just

self-contradictory statements, but to the addition of an expert by a plaintiff in an attempt to create a question of fact where none existed because of the plaintiff's expert's earlier testimony.⁵⁷ Obviously, since the reversal, contradictions by an expert or between experts go to the weight of the testimony rather than causing the favorable testimony to be disregarded.⁵⁸

DISMISSAL AND RENEWAL

Ordinarily, a plaintiff may make a one-time election to voluntarily dismiss her complaint without prejudice and renew the action within six months even though the statute of limitation has expired.⁵⁹ However, in a med. mal. action, it is not that simple. The statute of limitation, the statute of repose, and the affidavit requirement may adversely affect a plaintiff's right to voluntarily dismiss and renew the action. Renewal after the expiration of the statute of limitation will not be allowed where the plaintiff did not file an expert's affidavit pursuant to O.C.G.A. § 9-11-9.1 with her complaint.⁶⁰ In addition, renewal will not be allowed in a med. mal. case after the expiration of the period of repose.⁶¹

THEORIES OF LIABILITY OTHER THAN THE TRADITIONAL DEVIATION APPROACH

Recently informed consent and negligence *per se* have been making numerous appearances in med. mal. cases. Consent in Georgia is controlled by O.C.G.A. §§ 31-9-6 and 31-9-6.1. O.C.G.A. § 31-9-6 provides for a general consent applicable to all medical procedures and O.C.G.A. § 31-9-6.1 provides for informed consent that is applicable to certain types of surgical procedures. However, in late 2000, the Court of Appeals altered this by holding that informed consent applies to all medical

procedures.⁶² Neither party applied for certiorari, so it is unknown if the Supreme Court will allow this to stand (it seems unlikely in light of the Supreme Court's earlier reversals of the Court of Appeals' attempts to expand informed consent).⁶³ Since rendering the *Ketchup* opinion, the Court of Appeals has either narrowed or ignored the *Ketchup* case.⁶⁴ Attorneys must keep in mind that informed consent does not create another cause of action and that expert testimony plus a 9-11-9.1 affidavit are required in order to sustain a claim for lack of informed consent.⁶⁵

Negligence *per se* cases have also been addressed by the Appellate Courts. The Court of Appeals has held that the violation of certain practice acts is negligence *per se*.⁶⁶ This seems to be more of a risk to non-physician health care professionals than it is to physicians. Not all cases have resulted in the Court of Appeals holding that negligence *per se* exists. Recently the Court of Appeals held that the violation of a hospital policy is not negligence *per se*.⁶⁷

Other causes of action have met with mixed success. In a misdiagnosis case the Court of Appeals has held that failing to inform the patient of the misdiagnosis is a separate cause of action but expressed reservations that the plaintiff would be able to link an injury to this alleged act of negligence.⁶⁸ The Court of Appeals has not been as willing to create new med. mal. causes of action when dealing with product-type issues. In that regard, pharmacists will not be held strictly liable under a product theory because they are sellers, rather than manufacturers.⁶⁹ In addition, a breach of warranty theory against the pharmacist is no different than the standard tort because it also requires expert testimony that the pharmacist deviated from the standard of care.⁷⁰ The Court

has also held that manufacturers are not liable under a theory of failure to warn because the physician who prescribes the device is a “learned intermediary.”⁷¹

VICARIOUS LIABILITY

Typically physicians are not employed at the hospitals where they practice. Traditionally this would mean that the hospital could not be held liable for the actions of the physician.⁷² The Appellate Courts have determined that policy considerations dictate that there be some way to hold hospitals liable for the acts of the physicians, provided that certain requirements are met, and as a result, the doctrine of apparent agency was adopted in Georgia.⁷³ Hospitals can avoid liability for the acts of non-employed physicians by posting signs informing the public of the status of the physician and/or having the patient sign a form disclosing the status of the physicians.⁷⁴ Recently the Court of Appeals refused to hold a group liable for the independent acts of a physician under the theory of a joint venture.⁷⁵

CONCLUSION

As you can see, prosecuting and defending med. mal. cases provides an exciting opportunity to exercise your legal mind. In reading through the court opinions it should be obvious that most counsel, both plaintiff and defense, who practice med. mal. are creative advocates who will challenge your legal skills in a generally professional manner. What is not obvious in reading the opinions, is that there is probably no more emotional legal practice than med. mal. Both sides are heavily invested in their case. The plaintiff has suffered an injury and the defendant's professional reputation has been

impugned. In short, those who have the privilege of handling med. mal. cases are zealous advocates for a very real and concerned client.

ENDNOTES

¹ See, e.g., *St. Joseph's Hosp. v. Mattair*, 239 Ga. 674, 238 S. E. 2d 366 (1977); see also *Robinson v. Williamson*, 245 Ga. App. 17, 19(1), 537 S.E. 2d 159 (2000).

² O.C.G.A. § 9-11-8(a)(2)(B).

³ O.C.G.A. § 9-3-71; 9-3-72; 9-3-73.

⁴ *Bowling v. Foster*, 2002 Ga. App. Lexis 384, *6, 2 Fulton County D.R. 1029 (2002) (*quoting Cannon v. Jeffries*, 250 Ga. App. 371, 372-373(1) (551 S.E. 2d 777) (2001)).

⁵ See, e.g., *Purcell v. Breese*, 250 Ga. App. 472, 475-76, 552 S. E. 2d 865 (2001).

⁶ *Bowling*, 2002 Ga. App. Lexis at *6 (*citing Killingsworth v. Poon*, 167 Ga. App. 653, 654, 307 S.E. 2d 123 (1983)).

⁷ *Bowling*, 2002 Ga. App. Lexis at *6 - 7 (*citing McNabb v. Landis*, 223 Ga. App. 894, 896 (5) 479 S. E. 2d 194 (1996); *Killingsworth v. Poon*, 167 Ga. App. at 655).

⁸ *Thompson v. Zwiren*, 2002 Ga. App. Lexis 315, *5 - 7, (2002) (“in medical malpractice cases, ‘causation issues can be resolved only by expert medical testimony, standing alone; in which case the testimony sufficient to establish a causal connection must at least show there was a reasonable probability that the negligence caused the injury.’ (Citations omitted.) ‘Certainty is not required, but the plaintiff must show *probability* rather than merely a *possibility* that the alleged negligence caused the injury or death.” (Emphasis in original.)) (*quoting Pilzer v. Jones*, 242 Ga. App. 198 201 (1), 529 S. E. 2d 205 (2000); *Abdul-Majeed v. Emory Univ. Hosp.*, 225 Ga. App. 608, 609 484 S. E. 2d 257 (1997), *overruled in part on other grounds*, *Ezor v. Thompson*, 241 Ga. App. 275, 279, 526 S. E. 2d 609 (1999)).

⁹ *Thompson*, 2002 Ga. App. Lexis at *5 – 7 (citations omitted).

¹⁰ O.C.G.A. § 9-3-71(a).

¹¹ O.C.G.A. § 9-3-72 (“the limitations of Code Section 9-3-71 shall not apply where a foreign has been left in a patient’s body, but in such a case an action shall be brought within one year after the negligent or wrongful act or omission act is discovered. For the purposes of this Code section, the term ‘foreign object’ shall not include a chemical compound, fixation device, or prosthetic aid or device”). It is important to note that if the discovery of the foreign object occurs within two years of the date of the alleged negligent act that resulted in the foreign object being retained in the plaintiff’s body, the two year period provided in O.C.G.A. § 9-3-71 will not be shortened. See, e.g., *Spivey v. Whiddon*, 260 Ga. 502, 503, 397 S.E. 2d 117 (1990)).

¹² O.C.G.A. § 9-3-73 (b) (an action for medical malpractice brought on behalf of an infant under the age of five shall be barred two years after the fifth birthday).

¹³ O.C.G.A. § 9-3-71(a); *Legum v. Crouch*, 208 Ga. App. 185, 187-90, 430 S. E. 2d 360 (1993).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Miller v. Kitchens*, 251 Ga. App. 225, 227-29, 553 S. E. 2d 300 (2001) (also explained that the burden of proving the facts necessary to establish tolling is the plaintiff’s).

¹⁸ *Id.* at 227.

¹⁹ *Id.* at 228-29; see also *Oliver v. Sutton*, 246 Ga. App. 436, 437-38, 540 S. E. 2d 645 (2000).

²⁰ *Miller*, 251Ga. App. at 228-29; *Oliver*, 246 Ga. App. at 437-38.

²¹ See generally *Williams v. Young*, 247 Ga. App. 337, 543 S. E. 2d 737 (2000), *rev’d*, *Young v. Williams*, _____ Ga. _____, 560 S. E. 2d 690 (2002).

²² *Williams*, 247 Ga. App. at 340.

²³ *Young*, _____ Ga. at _____ (2002 Ga. Lexis at *8 – 9).

²⁴ *Miller v. Vitner*, 249 Ga. App. 17, 546 S. E. 2d 917 (2000); *Hutcherson v. Obstetrics & Gynecology Assocs. of Columbus, P. C.* 247 Ga. App. 685, 688, 543 S. E. 2d 805 (2000).

²⁵ *Miller*, 249 Ga. App. at 25.

²⁶ *Zechman v. Thigpen*, 210 Ga. App. 726, 730, 437 S. E. 2d 475 (1993).

²⁷ O.C.G.A. § 9-3-73 (e); see, e.g., *Abend v. Klautdt*, 243 Ga. App. 271, 273-74, 531 S. E. 2d 722 (2000) (the statute of repose does not bar a foreign object medical malpractice action timely filed within the one-year period set forth in O.C.G.A. § 9-3-72).

²⁸ O.C.G.A. § 9-3-73 (c) (2) (A) and (B) (the period of repose expires on the tenth birthday if the infant was under five years of age on the date of the alleged negligent act and it expires five years from the date of the alleged negligent act if the infant was over five years of age at the time).

²⁹ See *generally* *Esener v. Kinsey*, 240 Ga. App. 21, 522 S. E. 2d 522 (1999).

³⁰ See, e.g., *Hendrix v. Schrecengost*, 183 Ga. App. 201, 204, 358 S. E. 2d 486 (1987); *Zechman*, 210 Ga. App. at 730.

³¹ *Miller*, 249 Ga. App. at 18.

³² O.C.G.A. § 9-11-9.1; *Bowling*, 2002 Ga. App. Lexis at *6.

³³ See, e.g., *Loving v. Nash*, 182 Ga. App. 253, 255, 355 S. E. 2d 448 (1987).

³⁴ O.C.G.A. § 9-11-9.1; *Frieson v. South Fulton Med. Ctr.*, 2002 Ga. App. Lexis 564, *5 (2002).

³⁵ See, e.g. *Crook v. Frank*, 214 Ga. App. 213, 214, 447 S. E. 2d 60 (1994).

³⁶ O.C.G.A. § 9-11-9.1(a).

³⁷ See, e.g., *Ulbrich v. Batts*, 206 Ga. App. 74, 75, 424 S. E. 2d 288 (1992).

³⁸ O.C.G.A. § 9-11-56(e); see, e.g., *Estate of Patterson v. Fulton-DeKalb Hosp. Auth.*, 233 Ga. App. 706, 707, 505 S. E. 2d 232 (1998).

³⁹ See *generally*, *Mug A Bug Pest Control v. Vester*, 270 Ga. 407, 509 S. E. 2d 925 (1999), *rev'g*, *Vester v. Mug A Bug Pest Control*, 231 Ga. App. 644, 500 S. E. 2d 406 (1988).

⁴⁰ O.C.G.A. § 9-11-9.1. After the amendments, a defendant is required to file an answer even if the affidavit was not filed with the complaint; the defendant must file a motion to dismiss contemporaneously with the initial responsive pleading alleging the failure to file the affidavit or specifically alleging the defects in the affidavit; the plaintiff is provided thirty days to amend the affidavit and correct the alleged defects; and the professionals to which O.C.G.A. § 9-11-9.1 applies are delineated in the Code Section.

⁴¹ O.C.G.A. § 9-11-9.1 (b) and (d); see *generally* *Friesen* (note 34 *supra*).

⁴² *Harris v. Murray*, 233 Ga. App. 661, 663-67, 504 S. E. 2d 736 (1998).

⁴³ *Id.* at 667-68 (“either the motion to dismiss is made contemporaneously with the responsive pleading or no motion to dismiss can be later filed”).

⁴⁴ O.C.G.A. § 9-11-9.1(b). It is possible for the plaintiff to obtain more than the forty-five days by filing a motion and showing good cause for the extension. See, e.g., *Memorial Hosp. of Adel v. Dunn*, 251 Ga. App. 399, 554 S. E. 2d 548 (2001).

⁴⁵ O.C.G.A. § 9-11-9.1(b).

⁴⁶ Cabey v. DeKalb Med. Ctr., 252 Ga. App. 313, 314-15, 555 S. E. 2d 742 (2001) (this is so even if the plaintiff includes the language in a motion seeking additional time); see also Sullivan v. Fredericks, 251 Ga. App. 790, 791, 554 S. E. 2d 809 (2001).

⁴⁷ Frieson, 2002 Ga. App. Lexis at *4 - 5.

⁴⁸ Id.

⁴⁹ Georgia Dermatology Clinic v. Nesmith, 2002 Ga. App. Lexis 285 (2002); Smith v. Morris, Manning & Martin, LLP, 2002 Ga. App. Lexis 282 (2002).

⁵⁰ Id.

⁵¹ Georgia Dermatology, 2002 Ga. App. Lexis at *7-10.

⁵² Smith, 2002 Ga. App. Lexis at *7-9.

⁵³ Id.

⁵⁴ Thompson, 2002 Ga. Lexis at *10.

⁵⁵ Thompson v. Ezor, 272 Ga. 849 (2000), *aff'g*, Ezor v. Thompson 241 Ga. App. 275 (1999).

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ Id.

⁵⁹ O.C.G.A. § 9-2-61.

⁶⁰ Witherspoon v. Aranas, 2002 Ga. App. Lewis 433, * 4-6, 2 Fulton county D. R. 1110 (2002)

⁶¹ See generally, Miller v. Vitner (note 24 *supra*).

⁶² Ketchup v. Howard, 247 Ga. App. 54, 543 S.E. 2d 371 (2000).

⁶³ Albany Urology Clinic v. Cleveland, 272 Ga. 296, 300, 528 S. E. 2d 777 (2000), *rev'g*, Cleveland v. Albany Urology Clinic, 235 Ga. App. 838, 509 S. E. 2d 664 (1998) (holding that informed consent does not require a physician to disclose illegal drug use; informed consent in Georgia is controlled by O.C.G.A. § 31-9-6.1); Cardio TVP Surg. Assocs. v. Gillis, 272 Ga. 404, 406-8, 528 S. E. 2d 785 (2000), *rev'g*, Gillis v. Cardio TVP Surg. Assocs., 239 Ga. App. 350, 520 S. E. 2d 767 (1999) (holding that where patient signs consent form that complies with O.C.G.A. § 31-9-6.1 summary judgment is appropriate for the physician on a claim of battery/lack of informed consent).

⁶⁴ Bowling, 2002 Ga. App. Lexis at * 10-13 (the Court cites to O.C.G.A. § 31-9-6.1 and Albany Urology Clinic v. Cleveland, 272 Ga. 296, 300(2), 528 S. E. 2d 777 (2000) in determining that there is no claim for lack of informed consent or battery when the physician complies with O.C.G.A. § 31-9-6.1 and has a signed consent form); Bethea v. Coralli, 248 Ga. App. 853, 854, 546 S. E. 2d 542 (2001) (appropriate to charge the jury on O.C.G.A. § 31-9-6.1 where there is an informed consent claim); Hubert v. Falconer, 248 Ga. App. 243, 244, 545 S. E. 2d 680 (2001).

⁶⁵ O.C.G.A. § 31-9-6.1(d).

⁶⁶ Rockefeller v. Kaiser Foundation Health Plan Of Ga., 251 Ga. App. 699, 701, 554 S. E. 2d 623 (2001) (violation of the Physician's Assistant Act is negligence *per se*); Brown v. Belinfante, 252 Ga. App. 856, 857, 557 S. E. 2d 399 (2001) (violation of the Dental Practice Act is negligence *per se*).

⁶⁷ Leal v. Hobbs, 245 Ga. App. 443, 445-46, 538 S. E. 2d 89 (2000).

⁶⁸ Oliver, 246 Ga. App. at 438-39.

⁶⁹ Robinson v. Williamson, 245 Ga. App. 17, 19, 537 S. E. 2d 159 (2000).

⁷⁰ *Id.*

⁷¹ *See generally* McCombs v. Synthes, 250 Ga. App. 543, 553 S. E. 2d 17 (2001).

⁷² Williamson v. Coastal Phys. Servs. of the S. E., Inc., 251 Ga. App. 667, 669, 554 S. E. 2d 739 (2001) (where the contract provides that the physicians are independent contractors and there is no evidence that showed the alleged principal controlled the time, manner, method or means by which the physician performed his duties, there is no liability for the alleged principal) *see also* Mantooth v. American Nat. Red Cross, 253 Ga. App. 587 _____ S. E. 2d _____ (2002).

⁷³ *See, e.g.,* Sorrells v. Egleston Children's Hosp., 222 Ga. App. 229, 231, 474 S. E. 2d 60 (1996) (where the hospital posts signs and has the patient sign a consent form that notify the patient of the independent contractor status of the physicians the hospital will not be held liable on a theory of apparent agency); *see also* Mantooth, 253 Ga. App. at 594-95 (patient signed form explicitly explaining the independent contractor status of the physicians).

⁷⁴ *Id.*

⁷⁵ Kelleher v. Pain Care of Ga., Inc., 246 Ga. App. 619, 620-21, 540 S. E. 2d 705 (2000) (holding that in order for a joint venture to arise there must be a right of mutual control and that generally corporate defendants cannot be vicariously liable because they do not control the physician's exercise of his independent medical judgment).

AUTO INSURANCE UPDATE
Sean M. Dunn* and Anne W. Garliss**

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.

OVERVIEW OF RECENT TRENDS IN GEORGIA WORKERS COMPENSATION LAW

E. Lee Southwell, III

Since the last publication of this newsletter, there has been a great deal of activity in the Supreme Court and Court of Appeals in the workers' compensation area. Cases have dealt with constitutional issues, subrogation issues, exclusive remedy issues, jurisdictional issues, and other areas.

Code Section 34-9-17(b) provides that if an injured employee is found to have marijuana or a controlled substance in his or her body within eight hours of an accident, there is a rebuttable presumption that the use of the marijuana or controlled substance caused the accident. There is an exception for use of a controlled substance pursuant to a lawful prescription when the substance is taken in accordance with the prescription. In Kendricks v. Hollingsworth Concrete Products, 274 Ga. 210 (2001), the distinction between legal and illegal use of a controlled substance was challenged as a violation of the equal protection clause of the state and federal constitutions. This challenge was rejected. The supreme court stated that the distinction in code section 34-9-17(b) did not involve a suspect classification. For that reason, the issue was whether there was a rational basis for the distinction and whether the classification furthered a legitimate governmental interest. The court pointed out that if a controlled substance is taken pursuant to a lawful prescription, the physician gives advice with respect to taking the prescription and controls the dosage and duration of the use of the substance. Furthermore, there are regulations controlling the activities of the pharmacist dispensing the substance. Therefore, there is a rational basis for the distinction between legal and

illegal use of a controlled substance. Further, there is a legitimate governmental interest in promoting workplace safety and productivity which is advanced by providing adverse consequences for illegal (but not legal) use of controlled substances. Also, because the presumption applicable to illegal drug use is rebuttable, as opposed to conclusive, the distinction between the consequences of legal and illegal drug use does not violate equal protection.

There have been four cases in the subrogation area the first of these is Hammond v. Lee, 244 Ga. App. 865 (2000). In that case, the employee was injured in a compensable automobile accident and filed a third-party action against the driver of the other vehicle. Travelers Insurance Company, the employer's workers' compensation insurer, intervened in the third-party action and filed a subrogation lien. After the jury returned a special verdict setting forth specific amounts of damages for past medical expenses, past lost wages, and pain and suffering, the trial court entered judgement allowing a subrogation lien to be applied to all categories of damages. After the employee filed a motion for a new trial, the trial court removed the subrogation lien from the damages awarded for pain and suffering because the workers' compensation law does not provide any remedy for this category of damages. The lien remained applicable to past medical expenses and past lost wages. The court of appeals affirmed in part and reversed in part. The court of appeals pointed out that the evidence which Travelers presented indicated that Travelers had paid more in medical expenses in the workers' compensation claim than the jury awarded in the third-party action. For that reason, the employee had been fully and completely compensated for this category

of damages, and a subrogation lien was properly applied to this category. The court of appeals also pointed out that the evidence demonstrated as a matter of law that the combination of workers' compensation benefits paid and damages awarded for past lost wages did not equal the actual amount of wage loss. For that reason, the employee had not been fully and completely compensated for this category of damages, and a subrogation lien should not have been applied to this category.

The next subrogation case was Anthem Casualty Insurance Company v. Murray, 246 Ga. App. 778 (2000). In that case, as in Hammond v. Lee, supra, the employee was injured in a compensable automobile accident and filed a third-party action against the driver of the other vehicle. In this case, the jury returned a general verdict in favor of Murray, and did not breakdown the amount of damages awarded for various categories. There was then a second trial on the subrogation lien at which the issue was whether the employee had been fully and completely compensated for all economic and non-economic losses. The employee demonstrated that it is sometimes dangerous to be accessibly agreeable by stipulating that he had been fully and completely compensated for all damages. Despite the stipulation, the trial court entered a summary judgement dismissing the subrogation lien. The court of appeals reversed. The court of appeals pointed out that it is exceedingly difficult, if not impossible, to determine whether a plaintiff has been fully and completely compensated for any category of damages if a jury returns a general verdict. In this case, however, the employee's stipulation that he had been fully and completely compensated created a genuine issue of material fact. That stipulation constituted some evidence which would authorize although it did not

demand, the findings that the employee had been fully and completely compensated so that a subrogation lien could be applied to his recovery of damages in his third-party action.

The third subrogation case involved apportionment of attorney's fees. The case of Simpson v. Southwire Company, 249 Ga. App. 406 (2001), involves yet another compensable motor vehicle accident. The employee collected workers' compensation benefits from Southwire, his employer, and filed a third-party action. Southwire intervened to prosecute a subrogation lien. Southwire hired independent counsel to pursue the subrogation lien. The third-party action was settled immediately prior to trial, and Southwire was unsuccessful in proving that the combination of settlement proceeds and workers' compensation benefits paid fully and completely compensated the employee for all economic and non-economic losses. For that reason, Southwire's subrogation lien failed. Southwire nevertheless attempted to have the attorney's fees generated by the settlement apportioned. The trial court did allow an apportionment, but the court of appeals did not. The court of appeals held that Southwire was not entitled to apportionment of the attorney's fees based on negotiation of the settlement of the third-party action. The only apportionment to which Southwire would have been entitled would have been for fees based on successful prosecution of a subrogation lien.

In Johnson v. Comcar Industries, 252 Ga. App. 625 (2001), the injured employee was involved in an automobile collision in Georgia. The employee collected workers' compensation benefits under the laws of the State of Virginia. The employee did not

collect any benefits under the laws of the State of Georgia. The employee then filed a personal injury action in Georgia against Johnson, the driver of the other vehicle. The workers' compensation insurer sought to impose a subrogation lien on the recovery in the personal injury action. The trial court refused to dismiss the subrogation lien, but the court of appeals reversed. The court of appeals noted that code section 34-9-11.1 provided that a subrogation lien applied to workers' compensation benefits paid pursuant to Georgia law. Because no benefits were paid pursuant to Georgia law in this case, there could be no subrogation lien.

There were two exclusive-remedy cases decided in the period covered by this article. The first of these was Kaplan v. Pulte Homes, 245 Ga. App. 286 (2000). In that case, Kaplan worked as a cabinet installer in a subdivision under construction. He was a sole proprietor and an independent contractor who was not an employee of anyone. Kaplan purchased workers' compensation insurance to cover himself while he was working on projects such as the one where he was injured. He suffered a slip and fall injury when he fell on ice which was allegedly created by the negligence of another subcontractor working in the subdivision. He collected workers' compensation benefits pursuant to his personal insurance policy, and filed a third-party action against the allegedly negligent subcontractor and Pulte, the general contractor. The third-party defendants moved for summary judgement based on their allegations that Kaplan's exclusive remedy was the workers' compensation law. The trial court agreed, but the court of appeals did not. The court of appeals pointed out that Kaplan was an independent contractor and was not an employee of anyone. For that reason, no one

(subcontractor or general contractor) had any potential liability to Kaplan to pay workers' compensation benefits. If no potential defendant had any liability for workers' compensation benefits, there was no reason to allow any potential defendant to have immunity from tort liability. The fact that Kaplan had purchased his own workers' compensation insurance policy made no difference in the outcome of this case because that policy was a separate agreement between Kaplan and his insurer. Kaplan himself (and none of the potential defendants) had paid the premiums.

The other exclusive-remedy case is Betts v. Medcross Imaging Center, 246 Ga. App. 873 (2000). Although the plaintiffs based their claim on alleged intentional infliction of emotional distress, and this category of claims is normally not subject to an exclusive-remedy defense, the exclusive-remedy defense was successful in this case. The defense is usually not successful because the workers' compensation law does not provide any coverage for psychological injuries which result from purely psychological causes. The defense succeeded in Betts because the cause of the psychological distress was not purely psychological. Plaintiffs argued that their emotional distress resulted from the employer's intentional refusal to provide proper shielding, thus exposing the employee to excessive dosages of radiation. The emotional stress resulted from fear of the consequences of exposure. The trial court and the court of appeals held that the exposure to radiation was a physical event and the fear experienced by the employee was an emotional consequence of this physical event. This combination of circumstances is covered under the workers' compensation law, and is therefore subject to an exclusive-remedy defense.

There were several cases, which answered questions, which needed to be answered. In Hitchcock v. Jack Wiggins, Inc. d/b/a Wiggins Paint and Body Shop, 249 Ga. App. 845 (2001), the question was whether a corporation which would have had enough employees to be subject to the workers' compensation law except for the fact that all the employees had exempted themselves from coverage as permitted by code section 34-9-2.1 immediately became subject to the law when it hired one non-exempt employee. Jack Wiggins, Inc. would have been subject to the law except for the fact that all of the corporation's employees chose to exempt themselves from coverage under the workers' compensation law. The Corporation later hired Mr. Hitchcock, who did not and could not legally exempt himself. After Mr. Hitchcock suffered what appeared to be a compensable injury, his employer defended on the basis that it was not subject to the law. The employer argued that it did not become subject to the law until it hired at least three non-exempt employees. The Trial and Appellate Divisions rejected this argument, but the superior court accepted it. The court of appeals agreed with the Trial and Appellate Divisions. The court of appeals held that the plain meaning of code section 34-9-2 was that a corporation or limited liability company which was not subject to the law because all of its employees had exempted themselves from coverage became subject to the law as soon as one non-exempt employee was hired.

The case of McCarty v. Delta Pride, 247 Ga. App. 734 (2001), involves an occupational disease claim. In that case, McCarty was hired in Georgia to work on a project installing an irrigation system at a fruit plantation in the Central American Nation of Belize. As a necessary incident of this work, the employee and his coworkers had to

make certain preparations while they were in Georgia. These preparations included acquiring the necessary equipment to complete the project and loading it into vans for the journey to Belize. After completing these preparations, the employee and his coworkers drove to Belize (which is possible if one can find and use the Pan American Highway). The employee spent approximately six weeks in Belize. He spent this time on employer's plantation. During this six-week period, the employee contracted malaria. Malaria is virtually never contracted in the United States, but is a common occurrence in Belize. Upon his return to Georgia, the employee filed a workers' compensation claim based on an occupational disease. The employer defended on the basis that the employee's malaria was not an occupational disease covered under the worker's compensation law. The evidence in the claim indicated a causal connection between the employee's working conditions in Belize and his malaria. The evidence also indicated that malaria was not a disease to which the employee would have had a substantial risk of exposure outside of his employment in Belize. The issue in the claim was whether malaria is an ordinary disease of life to which the general public is exposed. It is an ordinary disease of life in Belize to which the general public of that nation is exposed, but it is not an ordinary disease of life in Georgia to which the general public of this state is exposed. The administrative law judge denied the employee's claim because malaria is an ordinary disease of life in Belize. The Appellate Division reversed, holding that the ordinary diseases of life referred to in the Georgia Workers' Compensation Law are ordinary diseases of life in Georgia. The superior court agreed with the administrative law judge, but the court of appeals agreed with the Appellate

Division. The court of appeals agreed with the Appellate Division's holding that the legislature did not intend to make the scope of ordinary diseases of life so broad as to include ordinary diseases of life anywhere on the planet to which the general public of the world is exposed. Ordinary diseases of life are ordinary diseases of life in Georgia to which the general public of Georgia is exposed. Malaria is not such a disease and is covered under the workers' compensation law. The employer also defended this claim on the grounds that McCarty was hired to perform services exclusively outside Georgia. The Appellate Division rejected this contention because the employee was required to make certain necessary preparations prior to leaving Georgia as a necessary incident of the work done in Belize. For this reason, the work was not exclusively performed outside Georgia. After spending most of its time dealing with the issue regarding ordinary diseases of life, the court of appeals summarily agreed with the Appellate Division on this issue.

Code section 34-9-264 governs claims for benefits based on hearing loss due to exposure to harmful noise. One of the provisions of this code section is the requirement that a claim not be filed until at least six months have elapsed since the employee was last exposed to harmful noise. The issue involved in Woodgrain Millwork/Windsor Wood Windows v. Millender, 250 Ga. App. 204 (2001), was the effect of a filing which was made less than six months after the employee ceased to be exposed to harmful noise and discovery continued and the hearing was held far more than six months after the employee ceased to be exposed to harmful noise.

In that case, the employee was a forklift driver who worked in an extremely noisy environment. The employer provided protective devices which would remove employees from exposure to harmful noise. The employee did not wear protection on one ear so that he might hear and understand instructions relayed to him through a radio on his forklift. The employer condoned, if it did not instigate, this practice. The employee ceased to work for the employer, and filed a claim for workers' compensation benefits based on noise-induced hearing loss less than six months later. Discovery continued after the claim was filed, and the hearing was not held until more than one year after the employee ceased to work for the employer. At the hearing, the employer contended that the employee's claim was barred by the statute of limitation found in code section 34-9-82. The employer contended that the original filing was premature and therefore not valid. Inasmuch as no other claim was filed, the employer contended that the claim was time-barred. The administrative law judge, the Appellate Division, and the superior court did not agree. They all held that the premature filing became valid when discovery continued and the hearing was held more than six months after the employee ceased to be exposed to harmful noise. The court of appeals pointed out that the purpose of requiring the filing of a claim for benefits based on noise-induced hearing loss to be delayed for at least six months after the employee ceased to be exposed to harmful noise was to allow the employee's condition to stabilize. The court held that this purpose was served even if the original claim was filed less than six months after the employee ceased to be exposed to harmful noise if discovery continued and the hearing was held more than six months after the employee ceased to

be exposed to harmful noise. By the time discovery was completed and a hearing was held, the employee's condition would have stabilized. Therefore, the filing which was originally premature ripened into a valid filing as soon as six months elapsed after the employee ceased to be exposed to harmful noise. The court of appeals also held that the employer was not entitled to contend that the claim was barred by the employee's failure to use protective devices when the employer condoned, if it did not instigate, this practice. Finally, based on the "any evidence" rule, the court of appeals held that there was sufficient evidence in the record to establish that the noise level to which the employee was exposed was harmful. For all these reasons, the employee had a valid claim for workers' compensation benefits based on noise-induced hearing loss.

The question involved in Shepherd Center v. Williams, 251 Ga. App. 560 (2001), was what the employer needs to prove in order to establish that it relied on false representations in an employment application. In that case, the employee had suffered a number of back injuries before he applied for employment with the Shepherd Center. After he received a conditional offer of employment, he was asked to fill out a medical history form. This form contained questions with respect to prior back injuries. The employee denied that he had any such injuries. He was hired and was assigned fairly heavy work duties. He suffered two accidents which aggravated his previous back condition. When he filed workers' compensation claims based on these accidents, the employer began investigating and discovered the existence of his previous back injuries. At the hearing, the employer contended that the employee's claim was barred pursuant to Georgia Electric Company v. Rycroft, 259 Ga. 155 (1989). That case held

that a claim was barred if the employer could prove three things: (1) a willful and knowing misrepresentation of a physical condition on an employment application; (2) the employer relied on the misrepresentation in making the hiring decision; and (3) there was a causal connection between the misrepresentation and the employee's injury. In this case, there was little, if any, doubt that the employer established the existence of the first and third elements. The question was whether the employer had demonstrated that it substantially relied on the employee's misrepresentation in making its hiring decision. The employer's evidence did not demonstrate that it would not have hired the employee had he made a truthful disclosure of his previous injuries. The employer demonstrated that it would have made a further investigation of his medical condition if it had received truthful information and would have based the hiring decision on the results of that further investigation. The administrative law judge and the Appellate Division held that the employer had established a sufficient reliance on the employee's misrepresentation. The superior court disagreed, but the court of appeals reversed. The court of appeals held that an employer did not have to prove that it would not have hired the employee if there had been a truthful revelation of the employee's physical condition. It was sufficient to show that, had there been a truthful statement, the employer would have made a further investigation of the employee's physical condition, and would have based the hiring decision on the results of that investigation.

The law has continued to evolve in the area of application of child support liens to workers' compensation benefits. The latest evolution is Cromer v. Denmark, 273 Ga. 290 (2001). In that case, the employee settled his workers' compensation claim with a

liability stipulation. In a separate proceeding to determine his liability for child support, the issue was whether the proceeds of the settlement should be included in calculating his gross income. The Trial Court held and the supreme court agreed that the portion of settlement proceeds attributable to income benefits was to be included in gross income for the purpose of calculating the employee's liability for child support. The supreme court stated that the portion of the settlement attributable to attorney's fees was not to be included. The supreme court did not state, but logic would appear to dictate, that the portion of settlement proceeds attributable to the employee's medical expenses should not be included in gross income. It remains to be seen whether the same rules apply to the proceeds paid pursuant to a no-liability settlement.

In 1996, the General Assembly amended code section 34-9-1(4) to require that the evidence which proves that a heart attack or stroke is attributable to the performance of the ordinary duties of employment must include medical evidence. There have now been two cases dealing with the sufficiency of the medical evidence. In Phillips Correctional Institute v. Yarbrough, 248 Ga. App. 693 (2001), the employee worked as a correctional officer. He began manifesting the symptoms of a heart problem shortly after reporting to work and after having walked up and down a number of flights of stairs to deliver meals to inmates. He was taken to a hospital and died the same day. The cause of death was a heart attack. There was conflicting medical evidence in the record. One doctor stated that there was absolutely no connection between the duties the employee performed and his heart attack. Another doctor stated that the performance of the employee's work duties was a contributing precipitating

factor in his heart attack. The administrative law judge and the Appellate Division found the doctor who stated that the performance of the duties of employment was a contributing precipitating factor to be more persuasive. The superior court affirmed. The court of appeals reviewed the record and applied the 1996 amendment to code section 34-9-1(4) and the "any evidence" rule to determine that the administrative law judge and the Appellate Division were authorized to give more weight to one piece of conflicting medical evidence than to another. Because there was some medical evidence to support the findings of the Trial and Appellate Divisions, the decision was upheld.

The evidence was different in Aflac, Inc. v. Hardy, 250 Ga. App. 570 (2001). In that case, the employee had what was admitted to be an extremely stressful job. The employee requested a transfer to a less stressful position, but this request was denied. The employee remained under pressure to quickly produce an increasing amount of work while at the same time maintaining accuracy. The employee eventually suffered a heart attack. One piece of medical evidence in the record stated unequivocally that there was no connection between employee's job stress and her heart attack. The only medical evidence in the record which could be interpreted as favorable to the employee stated that job stress could aggravate symptoms of underlying disease. The medical evidence did not state that job stress did aggravate the underlying heart disease, nor did it state that job stress played a precipitating role in bringing about the heart attack. Based on consideration of all the facts and circumstances in this case, the administrative law judge and the Appellate Division found employee's heart attack

compensable. The superior court affirmed, but the court of appeals reversed. The court of appeals pointed out that it is extremely difficult to distinguish between stress which causes the symptoms of underlying disease to manifest themselves and stress which causes a heart attack to occur. The court of appeals stated that, at best, the employee's medical evidence might have established that stress caused symptoms to manifest themselves. This evidence was not sufficient to establish that stress precipitated this particular heart attack. Therefore, pursuant to the 1996 amendment to code section 34-9-1(4), the evidence was not sufficient to support a finding that the performance of the ordinary duties of employment precipitated employee's heart attack.

Another case involving the sufficiency of evidence is Mix v. Allied Ready Mix, 248 Ga. App. 261 (2001). In that case, the employee suffered a compensable injury and received total disability benefits for a period of time. He then returned to work. The issue in the case was the extent, if any, of his permanent partial disability. The evidence in the record contained two permanent partial disability ratings. One doctor gave the employee a 5% permanent partial disability rating based on his reading of his findings and the American Medical Association Guides to the Evaluation of Permanent Impairment, Fourth Edition. Another doctor, also based on his findings and his interpretation of the American Medical Association Guides, gave the employee a 15% permanent partial disability rating. The administrative law judge awarded the employee permanent partial disability benefits based on a 10% rating. The Appellate Division adopted, but the superior court, reversed. The superior court found that there was no evidence in the record to support a 10% rating. The court of appeals reversed. The

court of appeals held that the finding made by the administrative law judge and the Appellate Division fell within the range of the evidence. Even though there was not a medical report in the record which stated that the employee had a 10% permanent partial disability rating, the court of appeals held that the evidence in the record would have supported a rating of not less than 5% nor more than 15%. A 10% rating falls within this range, and was supported by the evidence.

The case of Stevedoring Services of America v. Collins, 247 Ga. App. 149 (2000), contained interesting facts and rulings of law. That case involved a dispute as to the identity of a deceased employee's dependents. The contenders were the deceased employee's mother and his alleged illegitimate daughter. The child's mother had been separated from her ex-husband but was not officially divorced from him when she began living with the deceased employee. The child was born more than nine months after her mother began living with the deceased employee but prior to the time the divorce from her mother's ex-husband became final. The deceased employee supported the child and acknowledged to at least one lifelong friend that the child was his. The child's mother always contended that the deceased employee was the father. Despite these facts, the deceased employee's mother relied on the strong presumption that a child born during wedlock was the child of the husband. If the deceased employee was the father, the child was a total dependent and his mother, a partial dependent at best, was entitled to no benefits. In addition to the testimony of witnesses the record in this claim contains a report of a paternity test which purported to establish that the deceased employee was indeed the father. The administrative law judge and

the Appellate Division found that the deceased employee was the father. The superior court reversed, holding that neither the administrative law judge nor the Appellate Division had properly stated the evidentiary standard by which they made their determination. The court of appeals reversed. The court of appeals did state that there was a strong presumption that a child born during wedlock was the child of the husband. This presumption can only be overcome by clear and convincing evidence, which must include evidence of lack of access. The court of appeals held that the testimony in this case was clear and convincing, that the evidence did demonstrate lack of access, and, that the testimony was sufficient to establish that the child was the daughter of the deceased employee.

Under these circumstances, there was no need to articulate the evidentiary standard which was applied because the record conclusively demonstrated that clear and convincing evidence did exist. The court of appeals reached this conclusion without the benefit of the paternity test evidence. The court of appeals ruled that this report was inadmissible. The court of appeals noted that the identity of the person signing the report of the results of the paternity test could not be determined. The written signature was not legible, and the printed names on the report listed a physician, a biologist who held a Ph.D. degree and two others. The report would have been admissible if the physician had signed it, but not otherwise. The court of appeals held that a report signed by a biologist, even one who holds a Ph.D. degree, is not a medical report contemplated under code section 34-9-102(e)(2) because biologists do not practice medicine. This holding may well be the most important ruling in this case, but it

does appear to be limited to the particular facts of this case. Most psychologists whose reports are tendered in evidence before the Board hold Ph.D. degrees. Until it is ruled otherwise, it would appear that these reports continue to be admissible because psychologists do practice a form of medicine. It would appear that reports from physical therapists would also be admissible because they render medical services.

It is now well settled in the workers' compensation law that injuries which occur while an employee is on a scheduled lunch or rest break during which the employee is free from any control by the employer are not compensable. It has also become well settled that the employee is allowed a reasonable time for ingress and egress around a scheduled break during which the employee remains under the coverage of the workers' compensation law. For many years, the cases which applied the ingress and egress rule to the scheduled break rule involved cases in which the injury occurred while the employee was returning from a scheduled break. Although it appeared that logic would dictate that the rule would be the same if the injury occurred while the employee was leaving to begin a scheduled break during a reasonable time for egress, there was no case to that effect. Such a case now exists, but it is not the result of a workers' compensation claim. In Rockwell v. Lockheed Martin Corporation d/b/a Lockheed Aeronautical Systems, 248 Ga. App. 73 (2001), the employee suffered a slip and fall injury as she was leaving employer's premises to begin a scheduled break. Based on her contention that her slip and fall was caused by employer's negligent maintenance of its premises the employee filed a personal injury action. The employer defended on the grounds that the employee's exclusive remedy was a workers' compensation claim.

The court of appeals agreed. In the process of doing so, the court of appeals specifically stated that an employee was allowed a reasonable time for ingress and egress surrounding a scheduled break during which any injury which occurred would be compensable. The court specifically ruled that the employee's exclusive remedy was a workers' compensation claim when her injury occurred at the beginning of her scheduled break during a reasonable time for egress from the premises.

As a general rule, injuries which occur while the employee is going to or coming from work are not compensable. There are certain exceptions to this rule, i.e., the employer furnishes transportation to and from work as an incident of employment, the employer requires or allows the doing of special tasks beneficial to the employer during the journey, or the injury occurs between the employer's premises and a parking lot owned, maintained or furnished by the employer for use by employees. The case of Harrison v. Winn Dixie Stores, Inc., 247 Ga. App. 6 (2000), represents an application of the general "going to and coming from" rule to a unique set of circumstances. The employee usually worked at a Winn Dixie Store at one location. After he completed working his scheduled shift at that location, his manager asked him to work an extra shift at another location. The employee clocked out at the first location, and would have clocked in and received a new employee number and identification badge upon arrival at the other location. Unfortunately, he did not arrive at the second location because he was involved in a serious automobile accident while traveling between the two locations. The administrative law judge found that the "going to and coming from" rule controlled the outcome of this case. The administrative law judge found that the employer did not

furnish the employee transportation from one location to the other and did not reimburse the employee for his transportation expenses during the journey. The administrative law judge also found that the special task exception did not apply because the employee did not have any special task to perform during the journey but only at the end of the journey. For all of these reasons, the administrative law judge denied the claim. The Appellate Division, the superior court, and the court of appeals affirmed. It would appear that the fact that employee had clocked out before he left his original employment location and would have received a new employee number and identification badge when he clocked in at the second location makes this case unique. It would appear that this case is distinguishable from other cases in which employees travel from one employer work site to another during their work day without clocking out or completing a work shift at one location and beginning a new and different shift at another location.

The issue involved in the case of City of Atlanta v. Arnold, 246 Ga. App. 762 (2000), was the effect of voluntary retirement in a case in which the employee had the burden of proving a change in condition for the worse. The employee in that case was a City of Atlanta police officer who suffered a compensable injury. After a period of total disability, he was released to return to light duty work and actually did return to a light duty job. He performed this work for a period of time, and then voluntarily retired. The employee did not contend that he retired because he was unable to perform his work duties because of his compensable injury. There was no medical evidence to this effect. Nevertheless, the administrative law judge and the Appellate Division found that

he underwent a change in condition for the worse at the time he retired. The superior court affirmed, but the court of appeals reversed. The court of appeals pointed out that the employee retired at a time when he was actually working. Therefore, the employee had the burden of proving a change in condition for the worse. The court of appeals stated that voluntary retirement, without more, does not automatically establish a change in condition for the worse. There must also be some indication that the retirement occurred because of the employee's inability to perform the work due to the compensable injury. He did not present any medical evidence to this effect. He did not present any evidence of a diligent but unsuccessful job search following his retirement from the police department. Under these circumstances, it could not be said that he had demonstrated a change in condition for the worse. It should be noted that cases in which there is evidence of disability, an unsuccessful job search, or both will be distinguishable from this decision. In fact, the Appellate Division has distinguished it twice. In one case, there was medical evidence to indicate that the employee was no longer capable of doing any work at the time the employee retired. In the other case, there was credible lay testimony to this effect.

The cases of Georgia-Pacific Corporation v. Ivey, 250 Ga. App. 181 (2001), and Thurmond v. Ivey, 250 Ga. App. 181 (2001), deal with the question of whether an employer which has a policy against illegal drug use but has not been certified as a drug-free workplace is entitled to use violation of the anti-drug policy as a defense to an unemployment claim. The court of appeals held that the employer was entitled to use violation of its policy against illegal drug use as a defense to a claim for unemployment

benefits even though the employer had not been certified as a drug-free workplace. The court of appeals pointed out that the reward for being certified, as a drug-free workplace is a reduced premium for workers' compensation insurance. The consequence of a failure to be certified is disqualification for a reduced workers' compensation insurance premium. Failure to be certified as a drug-free workplace does not deprive an employer of the right to use violation of a company policy against illegal drug use as a defense to a claim for unemployment. It would appear that the same reasoning would apply to allow an employer to defend a workers' compensation claim based on the rebuttable presumption found in code section 34-9-17 (b)(2) regardless of whether the employer has been certified as a drug-free workplace.

Employers and insurers frequently utilize the services of private investigators in workers' compensation claims. The cases of Association Services, Inc. v. Smith, 249 Ga. App. 629 (2001), and Association Services, Inc. v. Pierce, 249 Ga. app. 629 (2001), demonstrate that investigators and those who hire them can subject themselves to tort actions if the investigators are excessively aggressive in performing their work. In those cases, a servicing agent hired an investigator to perform surveillance on a person who was receiving workers' compensation benefits. In performing the surveillance, the investigator obtained a video tape of a woman watering plants and performing other gardening activities which would have been inconsistent with the alleged restrictions of the workers' compensation claimant. The claimant contended that the woman on the tape was her sister, and it subsequently was determined that the two sisters looked sufficiently alike that it was possible that the woman on the tape was not the claimant.

The two sisters also contended that the investigator could not have obtained the surveillance tape without trespassing on the claimant's property. For this reason, the two sisters filed separate tort actions. Each plaintiff sought damages for intrusion upon seclusion, conspiracy to intrude on seclusion, false light invasion of privacy, defamation, conspiracy to commit criminal conduct, and RICO violations. The defendants (the investigator and the servicing agent) filed motions for summary judgement. Both plaintiffs dismissed their RICO actions before the Trial Court ruled on the summary judgement motion. Smith also dismissed her defamation claim. The Trial Court granted summary judgement to defendants on the false light invasion of privacy and conspiracy to commit criminal conduct claims and as to Pierce's defamation claim. The Trial Court denied summary judgement with respect to the claims of intrusion upon seclusion and conspiracy to intrude upon seclusion. All parties appealed. The court of appeals affirmed. The court of appeals ruled that the documentation before the Trial Court established the existence of genuine issues of material fact with respect to whether there had been an intrusion upon seclusion and in a conspiracy to intrude upon seclusion. The same documentation demonstrated as a matter of law that there was no genuine issue of material fact as to whether there had been a false light invasion of privacy in this case, a conspiracy to commit criminal conduct in this case, or defamation with respect to Pierce. Therefore, the Trial Court correctly granted partial summary judgement and allowed the trial to go forward on the intrusion upon seclusion and conspiracy to intrude upon seclusion claims.

Code Section 34-9-104(a)(1) defines a change in condition as a change in the earning capacity, physical condition, or status of an employee or other beneficiary which occurs at some time after the earning capacity, physical condition, or status was last established by award or otherwise. Code Section 34-9-104(d)(1) provides that a subsequent award may determine that a change in condition has occurred as of the date the event occurs despite the retroactive effect of such a determination. The case of Aldrich v. City of Lumber City, 273 Ga. 461 (2001), deals with an apparent conflict between the two statutes. In that case, the employee sustained his original injury while he was employed as a police officer with the city of Lumber City in 1989. The city disputed this claim, and, after a hearing, the administrative law judge found that the claim was not compensable. The Appellate Division reversed this determination in an award which was issued in May of 1991. Following the issuance of the Appellate Division's award, the City of Lumber City began paying benefits to the employee. Unbeknownst to anyone, the employee began working for the City of Alamo as a police officer in February of 1991. The City of Lumber City and the City of Alamo were both self-insurers for workers' compensation purposes, and both used the same servicing agent. At some point after May of 1991, the employee sustained a second compensable injury while working for the City of Alamo. The adjuster handling the second claim recognized the employee's name, and made an investigation. That investigation revealed that the employee was receiving workers' compensation benefits for total disability from the City of Lumber City while he was working for the City of Alamo. The City of Lumber City immediately suspended payment of income benefits

and requested a hearing to obtain an order directing the employee to reimburse income benefits to which he was not entitled. The administrative law judge and the Appellate Division used the provisions of code section 34-9-104(d)(1) to determine that employee under went a change in condition for the better in February 1991 when he began working for the City of Alamo. For this reason, the administrative law judge and the Appellate Division ordered the employee to reimburse the City of Lumber City for all income benefits which he had received since February 1991. The administrative law judge and the Appellate Division rejected the employee's contention that he could not be ordered to reimburse any income benefits received prior to May of 1991 when the original award which found his first claim to be compensable was issued. The superior court affirmed. The court of appeals also ultimately affirmed. The court of appeals held that the employee's return to work with the City of Alamo occurred after the record closed following the original hearing. It was therefore a subsequent event which could form the basis of a change in condition regardless of the retroactive effect of such a determination. This holding was based on application of the provisions of code section 34-9-104(d)(1). The supreme court disagreed. The supreme court held that the retroactive effect of code section 34-9-104(d)(1) was not unlimited. The supreme court held that code section 34-9-104(a)(1) provided that a change in condition could only occur after a condition had been established by award or otherwise. If a condition is established by award, it cannot be established any earlier than the date of the first award which determines that the condition exists. Code section 34-9-104(d)(1) then allows a change in condition to be found as of the date it occurs, regardless of the

retroactive effect of such a determination, as long as the change in condition is found to have occurred after the date of the first award which originally established the condition which is later found to have changed.

While the case of Aldrich v. City of Lumber City, supra, dealt with when a claim is established as compensable by award, the case of Smith v. Mr. Sweeper Stores, 247 Ga. App. 726 (2001), deals with when and how a claim is established as compensable otherwise. In that case, the employee sustained a compensable injury in 1990. She never missed any time from work, but did receive medical treatment over the years. The employer/insurer paid for the medical treatment for many years, but eventually became convinced that the injury-resultant condition had resolved itself so that the medical treatment was no longer related to the injury. The employer/insurer controverted liability for further medical treatment for this reason. The employee requested a hearing. A major issue at the hearing was placement of the burden of proof. The administrative law judge treated the case as an all-issues case in which the employee had the burden of proof. The administrative law judge then found that the employee had failed to carry the burden of proving that her current medical treatment was related to the original injury. The Appellate Division, the superior court, and the court of appeals agreed with the administrative law judge. The court of appeals held that a claim is established as compensable by a means other than an award only when income benefits are paid. Payment of medical expenses alone, regardless of the duration of the payment, does not establish a claim as compensable. If no income

benefits have been paid at the time of the first hearing in a claim, the claim is an all-issues claim in which the employee has the burden of proving entitlement to benefits.

The case of Holliday v. Jacky Jones Lincoln Mercury, 251 Ga. App. 493 (2001), deals with hearing procedures. In that case, the original hearing request listed temporary total disability and temporary partial disability income benefits among the items which the employee was seeking. It did not list permanent partial disability income benefits. At the beginning of the hearing, the administrative law judge framed the issue to be tried by stating that the purpose of the hearing was to determine whether the employee was entitled to temporary total disability benefits, temporary partial disability benefits, or any benefits at all. During the hearing, evidence was admitted which indicated that a permanent partial disability existed. The administrative law judge found that the employee was not entitled to temporary total disability or temporary partial disability income benefits, but did find that he was entitled to income benefits for permanent partial disability. The Appellate Division affirmed. The superior court accepted the employer's contention that it did not have proper notice that entitlement to permanent partial disability benefits would be an issue at the hearing and was deprived of due process when the administrative law judge decided that issue. The superior court therefore reversed the decision of the Appellate Division. The court of appeals agreed with the superior court. The court of appeals noted that the employee had the first opportunity to notify the employer that permanent partial disability benefits would be an issue at the hearing so that the employer could prepare to defend this issue when the hearing was originally requested. The employee did not indicate on his hearing

request that he was seeking permanent partial disability benefits. The court of appeals held that the administrative law judge's statement at the beginning of the hearing that the issues involved were whether the employee was entitled to temporary total disability benefits, temporary partial disability benefits, or any benefits at all was not sufficient to give the employer notice that employee's entitlement to permanent partial disability income benefits would be an issue at the hearing. The court of appeals did rule that the violation of due process in this hearing did not forever foreclose the issue of employee's entitlement to permanent partial disability benefits. The court of appeals ordered the case to be remanded so that a hearing could be held on the issue of employee's entitlement to permanent partial disability benefits after employer was given proper notice that this issue would be the subject of the hearing and an opportunity to defend this portion of the claim.

It has always been the holding of the Board that a contingent that a claim is barred by the running of a statute of limitation is an affirmative defense. Board Rule 82 provides that such a defense is waived if it is not asserted at or before the first hearing in a claim. Board Rule 82 is coordinated with code section 34-9-82, which contains the statute of limitation for all-issues claims. In Baugh-Carroll v. Hospital Authority of Randolph County, 248 Ga. App. 591 (2001), the Court of Appeals upheld this principle and even expanded it. In that case, the employee suffered an original compensable injury and received income benefits for a period of time. She then returned to work, and later alleged a change in condition for the worse. She did not file her request for additional income benefits until more than two years had elapsed since the last payment

of benefits for temporary total disability or temporary partial disability had actually been made. Employer attempted to contend that the claim was barred by the provisions of the statute of limitation but based this contention on the provisions of code section 34-9-82. Code section 34-9-82 has no application to a change in condition claim. The statute of limitation for a change in condition claim is found in code section 34-9-104(b). The administrative law judge ruled that no contention that the claim was barred pursuant to the statute of limitation in code section 34-9-104(b) had been made, and that that defense was waived. The administrative law judge then found in favor of employee on the merits of the claim. The Appellate Division adopted the award of the administrative law judge. The superior court reversed, holding that the claim was time-barred as a matter of law. The court of appeals reversed the judgement of the superior court. The court of appeals held that any defense based on the running of the statute of limitation is an affirmative defense. The court further stated that this holding applied to code section 34-9-82 and code section 34-9-104 with equal force. The court further stated that the provisions of Board Rule 82, which merely restated the general civil law, applied with equal force to statute of limitation defenses based on code section 34-9-104. In this particular case, the employer based its contention that the employee's claim was time-barred on the wrong statute of limitation. Because there was no contention that the claim was time-barred pursuant to the proper code section, the court of appeals agreed with the administrative law judge and the Appellate Division that the affirmative defense was waived.

Prior to 1990, code section 34-9-104 had provided that a claim for additional income benefits based on a change in condition had to be filed within two years after the last payment of income benefits due pursuant to code chapter 34-9 was made. This provision led to the development of a body of case law which held that the time for filing a claim for additional income benefits did not begin to run as long as any income benefits remained potentially due. The case of City of Pulan v. Hodge, 251 Ga. App. 500 (2001), is the most recent addition to this body of case law. It also is another indication of why the legislature amended code section 34-9-104 in 1990. In the Hodge case, the employee suffered his original injury in 1989. He last received income benefits not later than 1992. The medical evidence at that time indicated that he had not reached maximum medical improvement. He filed his first claim for permanent partial disability benefits in 1999. The employer contended that the claim for permanent partial disability benefits was time-barred. The administrative law judge and the Appellate Division agreed. The superior court and the court of appeals did not agree. The court of appeals pointed out that income benefits for permanent partial disability are not payable until the employee's condition has reached maximum medical improvement. Because the medical evidence at the time income benefits were last paid indicated that the employee's condition had not reached maximum medical improvement, income benefits for permanent partial disability remained potentially due at that time. Therefore, the statute of limitations for filing a claim for additional income benefits had not begun to run. The only holding of the Hodge case which has application to current law is its reaffirmation of the requirement that a condition must have reached maximum medical

improvement before income benefits for permanent partial disability can be awarded. The 1990 amendment to code section 34-9-104 provides that a claim for additional income benefits for temporary total or temporary partial disability must be filed within two years of the date the last payment of income benefits for temporary total or temporary partial disability was actually made. A claim for additional benefits for permanent partial disability must be filed within four years of the date the last payment of income benefits for temporary total or temporary partial disability was actually made. Although the court of appeals in the Hodge opinion may not appear to recognize this amendment as being as substantial as it is, it should be clear that the 1990 amendment eliminated the "potentially due" concept from the workers' compensation law. Because the original injury in the Hodge case occurred in 1989, any holdings in that case have no effect on the post-1990 law. It should further be noted that Judge Andrews concurred in the judgement only. Therefore, according to the rules of the court of appeals, this case is not binding precedent. It has only the persuasive effect which future courts see fit to give it.

Until the case of Murph v. Maynard Fixture Craft, Inc., 252 Ga. App. 483 (2001), reached the court of appeals, it appeared that the employee had a claim for which no one was responsible. Murph worked for a sole proprietor refrigeration sub-contractor doing installation of refrigeration equipment at a construction site. This immediate employer did not have three employees regularly in service. The refrigeration installation work was being done pursuant to a contract with Maynard. Maynard had a contract with the owner of the premises to install refrigeration equipment. Maynard was

a Tennessee corporation which had no employees regularly in service in Georgia, and hired a sub-contractor to do the actual work. This sub-contractor was Murph's immediate employer. As a part of the agreement with the owner of the premises, Maynard promised to obtain insurance coverage for itself and all the sub-contractors working on the property. Workers' compensation insurance was specifically mentioned as one class of coverage which Maynard agreed to provide. Maynard purchased a workers' compensation insurance policy in order to carry out its obligation under its agreement with the owner of the premises. Maynard also agreed to require all sub-contractors to furnish proof of insurance coverage, including workers' compensation insurance coverage, but did not fulfill this agreement with respect to Murph's immediate employer. (One reason for this failure could be the fact that the immediate employer was not subject to the worker's compensation law.) At the time of Murph's injury, the owner of the premises had no contract with anyone else to perform work on the premises. A franchise agreement to place and ice cream store on the premises later came into existence. Of course, the installation of refrigeration equipment was essential to performing the franchise agreement. Murph suffered a serious injury while performing work for his immediate employer and filed a claim against Maynard and the owner of the premises as statutory employers. The administrative law judge dismissed both alleged statutory employers from the claim. The administrative law judge held that the owner of the premises was not its own general contractor because it did not owe any other entity a contractual duty to perform any work on the premises at the time of Murph's injury. The administrative law judge also dismissed Maynard because Maynard

did not have any employees in Georgia and was therefore not subject to the Georgia workers' compensation law. The Appellate Division and the superior court affirmed. The court of appeals affirmed in part and reversed in part. The court of appeals agreed that the owner of the premises was not a statutory employer at the time of Murph's injury. The owner did not become its own general contractor and a potential statutory employer until it assumed a contractual duty to another entity. This event did not occur until after Murph's injury. Therefore, the owner of the premises was not Murph's statutory employer at the time of his injury, although it could have been his statutory employer had the injury occurred later. The court of appeals reversed the dismissal of Maynard from the claim. The court of appeals pointed out that if an employer which is not subject to the workers' compensation law nevertheless obtains insurance coverage pursuant to the workers' compensation law, the employer is estopped to contend that it is not subject to the law. The court of appeals pointed out that Maynard had agreed with the owner of the premises to obtain workers' compensation insurance coverage to cover all sub-contractors and their employees working on the construction project. The court of appeals held that this agreement was intended to benefit Murph and all others similarly situated. The court further held that Murph was a third-party beneficiary of the workers' compensation insurance policy which Maynard obtained. Maynard was therefore required to provide workers' compensation coverage to Murph whether it was subject to the Georgia workers' compensation law or not. The court of appeals ordered the case to be remanded for a decision on the merits of Murph's claim against Maynard and its insurer as a statutory employer.

If legal gymnastics were an Olympic sport, the case of Marine Port Terminals, Inc. v. Dixon, 252 Ga. App. 340 (2001), would win a gold medal. In that case, the employee suffered what would appear to be a compensable injury. While he was receiving medical treatment for that injury, the employer requested that he submit to a drug test. The employer contended that employee refused to submit to the drug test. Employee contended that he was unable (not unwilling) to submit to the drug test because a panic attack rendered him unable to urinate. At the hearing, the employer/insurer did not present any evidence that the drug test was or would have been performed in compliance with the procedures set forth in code section 34-9-415. The administrative law judge made no finding as to whether there had been a refusal to submit to the drug test or as to whether the refusal, if any, was justified. Instead, the administrative law judge ruled that because there was no evidence that the drug test would have complied with the requirements of code section 34-9-415, there was no rebuttable presumption that the employee's injury was caused by alcohol or marijuana intoxication or improper use of a controlled substance as set forth in code section 34-9-17 (b)(3). The Appellate Division and the superior court affirmed. The court of appeals reversed. The court of appeals quoted directly from the Supreme Court's decision in Georgia Self-Insurers Guaranty Trust Fund v. Thomas, 269 Ga. 560 (1998), that a drug test had to be performed in compliance with the procedures set forth in code section 34-9-415 before refusal to submit to that drug test would create a rebuttable presumption that alcohol, marijuana, or illegal drug use caused an injury. The court of appeals then proceeded to hold that the supreme court did not really mean what it said or say what it

really meant in Thomas, supra. The court of appeals held that strict compliance with the procedural requirements of code section 34-9-415 was required only if a drug test was actually performed. There was no requirement that there be an indication that these requirements would have been complied with if a test is not performed. This holding overlooks the fact that code section 34-9-17(b)(2) deals with a situation in which a drug test is performed and code section 34-9-17(b)(3) deals with a situation in which a drug test is not performed due to the employee's allegedly unjustified refusal to submit to the test. This holding also overlooks the fact that code section 34-9-17(b)(2) does not refer to or incorporate the requirements of code section 34-9-415 while code section 34-9-17(b)(3) does refer to and incorporate these requirements. The court of appeals held that the procedural requirements of code section 34-9-415 are relevant to code section 34-9-17(b)(3) only to the extent that it is alleged that failure to comply with these procedures justified a refusal to submit to a drug test. Examples cited by the court of appeals are in excessive invasion of the employee's privacy or an improper demand that the employee pay for the drug test. This holding gives an exceedingly narrow application to code section 34-9-415 even though it appears that the supreme court intended to give that same code section a broad application. Based on its holdings, the court of appeals remanded the case to the Board for further findings of fact and conclusions of law as to whether there was an unjustified refusal to submit to a drug test, whether a rebuttable presumption was created, and whether that presumption was rebutted. Although the court of appeals did not so state, a necessary prerequisite to these findings will be a determination of whether there was a refusal (unwillingness as

opposed to inability) to submit to a drug test. Although it is impossible to predict whether the supreme court will grant certiorari if requested to do so, it is your author's opinion that a further review of this decision is more likely than not if a request is made. It now appears that certiorari was not requested in this case.

In Russell Morgan Landscape Management, Inc. v. Velez-Ochoa, 252 Ga. App. 549 (2001), the employee sustained a compensable injury in 1995 and was paid benefits until 1997. The employer suspended payment of income benefits in August of 1997 based on an alleged failure to comply with medical treatment. An evidentiary hearing was held in January of 1999. The evidence presented at that hearing disclosed that employee had been able to return to work without restrictions since August of 1997. The evidence at the hearing disclosed that there had not been a failure to comply with medical treatment. The WC-2 Form which gave employee notice of suspension of benefits in 1997 did not contain the information which normally appeared on the back of such a form regarding the procedure to challenge a suspension of benefits, was not accompanied by a medical report from the authorized treating physician showing that the employee was released to return to work without restrictions, and did not provide for the payment of a 10-day notice prior to suspension of benefits. The administrative law judge found that, based on the evidence presented at the hearing, the employer had established that the employee underwent a change in condition for the better in August of 1997 and found that the employer committed technical violations of Board Rules in its method of giving notice of suspension of benefits. The administrative law judge imposed civil penalties and a small amount of assessed attorney's fees for these

violations and also ordered payment of an additional ten days of benefits. The Appellate Division found that employer's violations of Board Rules amounted to a legally improper suspension of benefits and ordered benefits to be paid until the date of the hearing before the administrative law judge. The superior court allowed the Appellate Division's decision to become affirmed by operation of law. The court of appeals also affirmed the Appellate Division's decision. The court of appeals pointed out that the provisions of Board Rules 221(i)(1) and 221(i)(4) which employer violated were designed to assure procedural due process to an employee whose benefits were unilaterally suspended. The court of appeals stated that the Appellate Division made an even-handed application of the law in finding that the original reason for suspension did not exist and, because of employer's violation of rules designed to assure procedural due process, in allowing benefits to be suspended at the time of the hearing before the administrative law judge. This time was chosen because it was the first time the employee could fairly be said to have notice of the actual reason for suspension of his benefits and an opportunity to present his side of the case.

The Supreme Court of Georgia has now spoken on the issue of whether code sections 34-9-221(d) and 34-9-221(h) are separate and distinct. They are. Both sections deal with the times within which an employer/insurer may controvert liability for a claim without penalty. Failure to comply with each subsection has different consequences, however. Code section 34-9-221(d) applies when an employer/insurer choose to controvert liability in a claim in which no income benefits have been paid. Under these circumstances, the employer/insurer must give notice that the claim is

controverted within 21 days after receiving knowledge of the alleged injury. Failure to file a notice to controvert within the time provided by this code section does not deprive the employer/insurer of the right to present whatever defenses it may have to the claim. The employer/insurer are subject to the imposition of penalties and assessed attorney's fees if their defenses are not successful. The court of appeals had so held in Raines & Milam v. Milam, 161 Ga. App. 860 (1982). The supreme court has also now so held in Meredith v. Atlanta Intermodal Rail Services, S.Ct. No. SO2A0167, decided February 5, 2002. The supreme court further held that the employer/insurer does not have to pay all income benefits which accrue from the time of the alleged injury until the filing of the late notice to controvert in order to be allowed to present defenses to the claim. In so holding, the supreme court also distinguished the provisions of code section 34-9-221(h) and the case of Cartersville Ready-Mix v. Hamby, 224 Ga. App. 116 (1996). Code section 34-9-221(h) deals with the times within which claims can be controverted after payment of income benefits has begun. Once payment of income benefits has begun, the Hamby decision, supra, requires that all income benefits which have accrued prior to the time the claim is controverted, including penalties if applicable, must be paid. Failure to pay all accrued income benefits under these circumstances deprives the employer/insurer of the right to controvert the claim. The supreme court noted that its interpretation of these separate and distinct code sections as having separate and distinct consequences for failure to comply might present an unfair result, but the court was unwilling to interpret distinct code sections as having similar consequences.

The case of ABB Management Services, Inc./Georgia Kaolin v. Lord, Ct. App. No. A01A2083, decided March 1, 2002, deals with the ways in which a change in condition for the better can be demonstrated. In that case, the employee sustained a compensable injury in 1984 and began receiving income benefits at that time. In 1999, his employer sought to suspend payment of his income benefits based on a change in condition for the better. The employer presented evidence which showed that the employee had entered into a partnership with his daughter to own and operate two convenient stores. The employee's name appeared on applications for business licenses and bank loans. There was also videotape surveillance evidence showing the employee taking out trash, stocking shelves with merchandise, waiting on customers, and helping customers carry the purchases to their vehicles. The employee attempted to counter this evidence with the contention he was merely an investor in the business and received no pay for any work he may have done in the business. After a hearing, the administrative law judge found that the evidence which employer presented was sufficient to demonstrate a change in condition for the better. The Appellate Division affirmed, but the superior court reversed. The court of appeals granted discretionary appeal and reversed the judgement of the superior court. The court of appeals pointed out that a change in condition for the better could be demonstrated by a showing of an actual return to work, by evidence of a medical release to return to work without restrictions, or by other evidence of an ability to work. The administrative law judge and the Appellate Division had held that the evidence in this case fell into the third category. Under the "any evidence" rule, the superior court was required to accept the findings

that employee was more than a passive investor in the business and that the activity he performed demonstrated an ability to work. Therefore, the superior court was required to hold that the employer had demonstrated a change in condition for the better. In many similar cases, the employee would have been entitled to payment of income benefits for temporary partial disability after it was demonstrated that he was no longer totally disabled, but in this case the change in condition occurred so long after the original injury that the time period during which benefits for temporary partial disability could be paid had long ago expired.

The case of Connell v. Head, 253 Ga. App. 443 (2002) deals with an exclusive remedy defense in a tort action. The validity of the defense depends on whether the accident in question arose out of and in the course of the injured employee's employment. Head, a cafeteria worker, and Connell, a school bus driver, were both employed by the Cartersville City Schools. Head had signed out at the end of her work shift and proceeded to her car in the parking lot. As she was exiting the employer's parking lot, she collided with a school bus driven by Connell. Head contended that the collision was caused by Connell's negligence. The collision occurred on a street which was owned and controlled by the employer, even though the public was allowed to use the street even during school hours. Connell moved for summary judgment, contending that Head's exclusive remedy was the workers' compensation law. The trial court denied Connell's motion, but the court of appeals reversed. The court of appeals held that Head's accident and injuries did indeed arise out of and in the course of her employment. The court of appeals pointed out that this accident occurred on school

property while Head was within a reasonable time for egress from her work location. The court of appeals stated that the employer's premises included any property owned, controlled or maintained by the employer. This property could include a street, even if the public is allowed to use the street. Therefore, Head's accident fell within an exception to the general rule that accidents which occur while an employee is traveling to and from work are not compensable. Because an exception applied, Head's accident was compensable, and her exclusive remedy against her employer and Connell, an employee of the same employer, was the workers' compensation law.

The case of Conex Freight Systems v. Georgia Insurance Insolvency Pool, Ct. App. No. AO1A2429, decided March 1, 2002, deals with how an insured qualifies for coverage with the Pool. Conex, a California Corporation and resident of that state, leased property in Georgia. That property consisted of land and buildings. The buildings included office space and warehouse space. Conex carried various categories of insurance on the land and buildings, their contents and the people who worked in the buildings. Those categories of insurance included liability and workers' compensation. The insurer which provided coverage to Conex became insolvent. Conex filed a declaratory judgment action, seeking a determination that it qualified for coverage with the Pool. The trial court found that Conex did not qualify for coverage because it was not a resident of Georgia. The court of appeals agreed with this holding, but ruled that it was not totally dispositive of the case. For purposes of coverage with the Pool, an insured can be a resident of only one state. Because Conex was clearly a resident of California, it could not also be a resident of Georgia. Nevertheless, there are

other ways to qualify for coverage with the Pool. One of these ways is to have an insurable interest in property permanently located in Georgia. The property which Conex leased was clearly permanently located in Georgia. The lease which Conex held on that property gave it an insurable interest in the property. Therefore, Conex did qualify for coverage with the Pool despite the fact that it was not a resident of Georgia.

In 1979, the court of appeals adopted the positional risk doctrine for the purpose of determining whether an accident and injury arose out of an employee's employment for workers' compensation purposes. That doctrine provides that an accident arises out of the employment if the employment requires the employee to be in the place where the danger occurs and brings the employee within the range of the danger. National Fire Insurance Company v. Edwards, 152 Ga. App. 566 (1979). That doctrine has now been reaffirmed and given a broad application in an exclusive-remedy case. In DeKalb Collision Center, Inc. v. Foster, Ct. App. No. AO1A1955, decided March 11, 2002, the employer hired a contractor to erect a brick facade and plant shrubs on the employer's premises. A dispute arose as to the price the employer should pay for the work the contractor did. When the employer refused to pay the price the contractor demanded, the contractor and his employees came to the employer's premises and began to attempt to demolish the brick facade. When the owner and some supervisory personnel attempted to stop the destruction, they were attacked. Foster and other employees of DeKalb Collision Center attempted to intervene in order to protect the physical integrity of the premises and the lives of their co-workers. Foster was injured in the fight, and died as a result of those injuries. His survivors filed a wrongful death action against the

contractor and his employees as well as against DeKalb Collision Center and its employees. The case against the contractor and his employees was settled before trial. The trial jury returned a verdict against DeKalb Collision Center and its employees. The trial court denied DeKalb Collision Center's motions for directed verdict and judgement notwithstanding the verdict based on a contention that tort claims were barred by the exclusive-remedy provisions of the workers' compensation law. The court of appeals agreed with DeKalb Collision Center. The court of appeals stated that Foster's injury and death arose out of and in the course of his employment. In the process of reaching that conclusion, the court of appeals clearly stated that the question of whether the injury and death arose out of employment was to be resolved by application of the positional risk doctrine. That doctrine provides that an injury arises out of employment if the employee's employment requires the employee to be in the place where the danger occurs and brings the employee within the range of the danger. The court of appeals pointed out that this doctrine had been the law since 1979, if not before. The court also pointed out that any case, even one decided after 1979, which appears not to recognize this doctrine is not accurate and should not be followed. The court pointed out that Foster's employment required him to be at the place where the danger of being injured in the fight involved in this case occurred and brought him within the range of that danger. Foster's injury and death also arose in the course of his employment because he was in a place where he might reasonably be expected to be in the course of his employment and was doing something incident to that employment at the time he was injured. The court of appeals held that attempting to protect the premises from physical

destruction and attempting to protect co-workers from injury are acts which are incident to employment. Because Foster's injury and death arose out of and in the course of his employment, his survivors' exclusive remedy against DeKalb Collision Center and its employees was the benefits provided by the workers' compensation law.

The case of Satilla Regional Medical Center v. Corbett, Ct. App. No. AO1A2224, decided March 12, 2002, is of procedural interest. In that case, the administrative law judge and the Appellate Division found that the employee had not proved entitlement to benefits. This decision was based, at least in part, on consideration of various medical reports. Neither the administrative law judge nor the Appellate Division specifically mentioned every medical report in their decisions. The superior court reversed the decision of the Appellate Division. The superior court ruled that all the medical evidence had not been considered and remanded the case directly to the administrative law judge for reconsideration in light of all medical evidence. The court of appeals granted discretionary appeal. The court of appeals ruled that the decision of the superior court was procedurally defective for several reasons. First, the superior court had no authority to remand a case directly to an administrative law judge. If the case is to be remanded to an administrative law judge, the Appellate Division is the entity which should remand the case to the administrative law judge. Second, it was not necessary to specifically mention every piece of evidence in order to be deemed to have considered all the evidence. The record in this case contained no evidence that all the medical evidence had not been considered. Third, the findings of the administrative law

judge and the Appellate Division were supported by evidence in the record and should have been affirmed pursuant to the "any evidence" rule.

Although the court of appeals acknowledged the existence and applicability of the "any evidence" rule, the result was different in Rheem Manufacturing Company v. Jackson, Ct. App. No. AO2A0073, decided March 26, 2002. In that case, the main bone of contention was the amount of the employee's average weekly wage. At the hearing before the administrative law judge, it was clear from the evidence presented that the employee had not worked in the type of employment in which she was injured for the same or another employer for substantially the whole of 13 weeks immediately preceding her injury. There was no testimony, documentation, or stipulation that there was not a similar employee of the same employer who had worked in that type of employment during substantially the whole of 13 weeks immediately preceding employee's injury. There was evidence of employee's hourly rate of pay. After the close of the evidence, the administrative law judge requested that the parties supply information which would enable him to calculate the employee's average weekly wage. The employee submitted a post-hearing brief which contained the statement that there was no similar employee whose earnings could be used to calculate the employee's average weekly wage. The employer did not dispute this statement, but also did not agree with it. The administrative law judge found that the first and second methods of calculating an average weekly wage found in code section 34-9-260 could not be applied and based his finding as to the employee's average weekly wage on her hourly rate of pay times 40 hours. The Appellate Division adopted the award of the

administrative law judge, and the superior court affirmed. The court of appeals granted discretionary appeal and reversed. The court of appeals ruled that there was no evidence that there was not a similarly-situated employee whose earnings could be used to calculate employee's average weekly wage. There was no testimony, documentation, or stipulation with respect to this issue in the record of evidence presented at the hearing before the administrative law judge. The statement in employee's post-hearing brief was not sufficient to constitute "any evidence" for this proposition. Therefore, the case had to be remanded to the Appellate Division so that it could be remanded to the administrative law judge to hold an evidentiary hearing on the issue of whether there was a similarly-situated employee so that a proper calculation of employee's average weekly wage could be made.

The case of Jones County Board of Education v. Patterson, Ct. App. No. A02A0674, decided April 25, 2002, arises in the context of the any evidence rule. In that case, Patterson worked full-time as a vice principal at a school in Jones County. He also performed maintenance on a part-time basis in the Jones County school system. He injured himself while performing maintenance work. His maintenance work and his work as a vice principal were treated as concurrent dissimilar employment. He received benefits based strictly on his earnings from his maintenance job. These benefits continued to be paid for a number of years. Patterson eventually found a job as a principal at an elementary school in another county. He worked more hours and earned more money in that job than he had in his two previous concurrent dissimilar jobs combined. The Jones County Board of Education requested a hearing to

determine that Patterson had undergone a change in condition for the better. The evidence presented at that hearing showed that Patterson was not taking any pain medication to treat the symptoms of his injury, that he was not seeking medical treatment for that injury except at the direction of the employer, and that he had been released to return to medium-duty maintenance work. A vocational expert also testified that there were 21 part-time maintenance jobs available in the geographic area which were within Patterson's medical restrictions and abilities. Patterson testified that some of these jobs looked interesting to him, but that he did not have the time or energy to pursue them because of the demands placed on him by his full-time employment. Based on this evidence, the administrative law judge and the Appellate Division found that Patterson had undergone a change in condition for the better. The superior court reversed for reasons which the court of appeals did not enumerate. The court of appeals reversed the judgement of the superior court. The court of appeals strongly stated that the evidence in this record clearly supported the findings made by the administrative law judge and the Appellate Division. The court of appeals further stated that the superior court should have affirmed the Appellate Division's decision based on the any evidence rule. It should be noted that the evidence in this case limited itself to Patterson's part-time employment, and made only tangential reference to his full-time concurrent dissimilar employment. It should also be noted that, because this is an any evidence case, it is highly likely that any holdings in this case will be limited to the particular unique facts of this case.

The case of WAGA-TV, Inc. v. Yang, Ct. App. No. A02A0434, decided May 31, 2002, also deals with the issue of change in condition. In that case, Yang was employed by WAGA as a camera operator. He was injured while filming a high school football game in 1986. He returned to work with WAGA on a limited basis and received temporary partial disability benefits. In 1991, his position was eliminated and he was laid off along with a number of other people. At that time, the employer increased his benefits to total disability benefits. After being laid off, Yang began performing work for his own video production company. He performed a great deal of work for the corporation, and traveled extensively on behalf of the corporation. He was the sole owner of the corporation, and his wife, the bookkeeper, was the only other employee of the corporation. Although the corporation had large gross revenues, Yang contended that it made no profit, and even contended that he had to make loans out of his personal assets to the corporation in order for the corporation to remain in business. In 1998, the employer requested a hearing in order to demonstrate a change in condition for the better and to obtain authorization to suspend payment of total disability benefits. Based on the evidence of the extent of Yang's activities, the revenues created by the corporation, and the lack of corporate profits, the administrative law judge found that Yang had undergone a change in condition from total disability to temporary partial disability. Based on the fact that Yang was making loans out of his personal assets to keep the corporation in business, the administrative law judge, in the exercise of his discretion, did not order Yang to reimburse the employer for the difference between the total disability benefits he had received and the temporary partial disability benefits to

which he was actually entitled. The administrative law judge did allow the difference between total and temporary partial disability benefits to act as a credit against any future liability for disability benefits. The Appellate Division affirmed, but the superior court reversed. The superior court cited Smith v. Lockheed-Georgia Company, 185 Ga. App. 869 (1988) for the proposition that total disability benefits remained payable in spite of Yang's ability to work because of the lack of profit from his business. Smith, supra, does not stand for this proposition. That case held that a change in condition had been demonstrated when the employee started a business following his injury. The extent of the economic disability was measured by the net income not the gross receipts, of the business. The superior court thus misapplied Smith. The court of appeals reversed the judgement of the superior court. The court of appeals ruled that the 1978 amendment to what is now code section 34-9-104 changed the definition of a change in condition. Prior to that time, at least since 1968, a change in condition had been defined as solely and economic change based on an employee's ability to work or continue to work for the same or another employer or inability to work or continue to work for the same or another employer. In 1978, the concept of wage-earning capacity was added to the definition. The court of appeals stated that there is a distinction between the ability to work and the ability to earn. It was clear that Yang had the ability to work. The issue in this case was whether he had the ability to earn. Based on the evidence presented, the court of appeals ruled that the administrative law judge and the Appellate Division properly ruled that Yang had an ability to earn but did not have an ability to make a profit. Therefore, the administrative law judge and the Appellate

Division correctly ruled that Yang underwent a change in condition from total disability to temporary partial disability. In reaching this conclusion, the court of appeals held that Smith v. Lockheed-Georgia Company, supra, did not apply to this case. The only obvious distinction between the two cases is that the business in Yang was incorporated, while the business in Smith was not. Both cases involved injuries which occurred after the 1978 change in the definition of a change in condition. The issue in both was how to determine the extent of temporary partial disability. Both cases based this determination on net income, not gross receipts.

In Ridley v. Monroe, Ct. App. No. A02A0243, decided July 2, 2002, the court of appeals issued a landmark decision in the exclusive-remedy area. In that case, plaintiff was a passenger in a car driven by a co-worker (the defendant). They were involved in a collision and plaintiff was injured. Although they were on a scheduled lunch break at the time, plaintiff originally contended that she was performing a work-related errand at the time and that the collision was therefore compensable. The employer originally controverted the claim, but eventually the claim was settled with a no-liability stipulation. The Board award approving the no-liability stipulation recited that the parties had agreed that this claim was not covered by workers' compensation law and denied the claim. Money did change hands, however. The payment was made pursuant to a separate document, a covenant not to appeal the award denying the claim. Plaintiff then filed this tort action against defendant. Defendant moved for summary judgment based on the exclusive-remedy provision of the workers' compensation law. The trial court granted summary judgment. On appeal, the majority of the court of appeals

affirmed. The majority held that even though the workers' compensation claim was settled on a no-liability basis, payment was nevertheless made and that payment was plaintiff's exclusive remedy. The majority ruled that payments made pursuant to any kind of workers' compensation settlement, liability or no-liability, were payments made pursuant to the workers' compensation law and were therefore subject to the exclusive-remedy provisions of that law. The majority pointed out that the amendment to code section 34-9-15 effective July 1, 2000 authorized the Board to approve no-liability settlements. The majority further noted that when the legislature enacted this amendment, it made no provision exempting payments made pursuant to a no-liability settlement from the exclusive-remedy provisions of the workers' compensation law. The majority stated that if such an exemption were to be made, the legislature would have to make it. Two judges dissented. They pointed out that the 2000 amendment merely codified procedure which had been in place for many years. They further pointed out that an award approving a no-liability settlement recites that the claim is denied. The dissenters stated that such an award is a ruling that the claim is not covered under the workers' compensation law. Claims not covered under the workers' compensation law are not subject to the exclusive-remedy provision of that law. Therefore, the dissenters would have ruled that a claim which is settled on a no-liability basis is not subject to the exclusive-remedy provision of the workers' compensation law. Although it is impossible to predict how the supreme court would rule on a request for certiorari, it would appear to be highly likely that such a request will be made in this case.

The case of Johnson v. Publix Super Markets, Ct. App. No. A02A0428, decided July 16, 2002, is a major landmark decision with regard to whether an injury arises out of employment. In that case, employee worked as a cashier. Shortly before closing time, she received permission from her supervisor to retrieve personal items from the rear of the store. She locked her register but did not close it out so that she could serve customers if the need arose. As she was returning from the rear of the store, she was hurrying to reach her register and was checking to see that the aisle was clear of obstructions (as she had been trained to do by employer) when she slipped, fell, and broke her leg. Although the floor was of terrazzo construction, all the testimony in the record indicated that the floor at the location where employee fell was not wet, slick, or rough. The evidence also did not indicate that there was any object on the over which employee might have tripped. Employee filed a workers' compensation claim which employer/insurer controverted. The only issue in the claim was whether employee's accident and injury arose out of (it was stipulated that they arose in the course of) her employment. The administrative law judge found that employee's accident and injury arose out of her employment. This finding was based at least in part on a finding that terrazzo floors are slick. The Appellate Division affirmed, but the superior court reversed. The superior court ruled that there was no evidence in the record to support the findings of the administrative law judge. especially the finding that terrazzo floors are slick. The court of appeals granted discretionary appeal and reversed by a 9-3 vote. A six-judge majority wrote an opinion which expanded the positional risk doctrine. The majority began by pointing out that it is possible to take judicial notice of facts which are

undisputed and of common knowledge. They also stated that the determination that terrazzo floors are slick is not such an undisputed fact which is of common knowledge and could not be judicially noticed. Although this holding would appear to support the judgement of the superior court, the majority went on to state that it was not relevant whether the floor where employee fell was slick or not. The majority stated that employer/insurer appeared to be treating this claim as an idiopathic (cause unknown) fall. Employer/insurer cited cases which held that idiopathic falls did not arise out of an employee's employment and were not compensable. Cases specifically mentioned were Borden Foods, Inc. v. Dorsey, 112 Ga. App. 838 (1965) and Prudential Bache v. Moore, 219 Ga. App. 847 (1995). The majority stated that Borden Foods, Inc. v. Dorsey, supra, was based in large part on a holding that in order to arise out of employment, an accident and injury had to result from a risk peculiar to the employment. A risk peculiar to the employment was required in order to find that there was a causal connection between the working conditions and the accident and injury so that the accident and injury could be said to arise out of employment. This peculiar-risk doctrine was specifically rejected by a unanimous court of appeals in National Fire Insurance Company v. Edwards, 152 Ga. App. 566 (1979). That case dealt with an injury resulting from the collapse of a wall of a building caused by a tornado. In that case, the court of appeals adopted as the law of Georgia the positional risk doctrine. Under that doctrine, an accident and injury arose out of employment if the employee's employment required the employee to be in the place where the danger manifested itself at the time the danger manifested itself and brought the employee within range of

the danger. The Edwards specifically overruled two prior peculiar-risk decisions, and stated that any other case which was inconsistent with the positional risk doctrine was also overruled. There may have been a question as to whether the Edwards case was to be applied narrowly or broadly, but that question was resolved in DeKalb Collision Center v. Foster, 254 Ga. App. 477 (2002). The majority held that Foster called for a broad application of the positional risk doctrine. Under this broad application, the employee's employment in Johnson required her to be in the place where the danger of a slip and fall manifested itself at the time the danger manifested itself and brought her within range of that danger. Therefore, her accident and injury arose out of her employment even though any member of the general public similarly situated would have been exposed to the same danger. The majority specifically overruled Prudential Bache v. Moore, supra, because it relied on Borden Foods, Inc. v. Dorsey, supra, a peculiar-risk case, and was therefore itself a peculiar-risk case. The majority also pointed out that Borden Foods, Inc. v. Dorsey, supra, had been overruled by National Fire Insurance Company v. Edwards, supra, even though it was not specifically mentioned in the Edwards case. The majority also interpreted United States Casualty Company v. Richardson, 75 Ga. App. 496 (1947), which might appear to be an idiopathic-fall case, as a positional risk case. It thus appears that so-called idiopathic falls are now compensable under the positional risk doctrine. Three judges concurred in the judgement only. Three other judges dissented. The dissenters stated that even under the positional risk doctrine, there had to be some causal connection between an employee's working conditions and the employee's accident and injury in this case, in

which the floor on which the employee slipped and fell was not wet, slick, or rough and there was no object over which the employee tripped, there was no such causal connection demonstrated by the record in this case. The dissenters stated that there was certainly no evidence in the record to support a finding that terrazzo floors are in and of themselves slick. This fact was certainly not so undisputed and of such common knowledge that it could be judicially noticed. The dissenters considered the finding that terrazzo floors are slick to be essential to the administrative law judge's determination that employee's accident and injury arose out of her employment. The dissenters therefore believed that the superior court correctly ruled that there was no evidence in the record to support the decision of the administrative law judge and the Appellate Division and correctly reversed that decision. Once again, although the outcome of an application for certiorari is impossible to predict, it would appear highly likely that such an application will be filed in this case.

OVERVIEW OF RECENT TRENDS IN GEORGIA PREMISES LIABILITY LAW

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In premises liability cases arising out of violent crimes and claims of negligence in providing security, the issue of prior substantially similar incidents is almost always present.

The question is frequently, “What prior substantially similar incidents are admissible in evidence?” The corresponding question is, “How does one prove the occurrence of prior substantially similar incidents?” This paper will address these issues from the defense perspective.

1. What prior substantially similar incidents are admissible?

The appellate courts of Georgia have been all over the board in the past few years and have essentially provided confusing or no guidance for practitioners and trial judges in determining what is admissible evidence in ruling on a Motion for Summary Judgment and what is admissible evidence at trial. Many trial court judges seem to have thrown up their hands in frustration and abdicated their responsibility to sift through the proffered evidence

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and make a reasoned determination of what evidence is properly admissible under the particular circumstances of the case before them.

A. What is “substantially similar”?

The Plaintiff has the burden of proving that the Defendants were placed on notice of the danger by a prior substantially similar incident. Donaldson v. Olympic Health Spa, Inc., 175 Ga. App. 258, 259 (1985). For crimes to be "substantially similar", Georgia law requires that the circumstances surrounding the prior incident be sufficiently similar "to attract the owner's attention to the alleged dangerous condition which resulted in the litigated instance." Wade v. Findlay Management, Inc., 253 Ga. App. 688, 689 (2002); Grandma's Biscuits, Inc. v. Baisden, 192 Ga. App. 816, 817 (1989). "The prior incident need not be the same crime, and the means of inflicting injury need not be identical [to be deemed substantially similar.]" Wade v. Findlay Management, Inc., 253 Ga. App. at 690. Arguably, under Georgia case law, for the crimes to be substantially similar, they must (1) occur at comparable locations, (2) occur under similar physical circumstances and conditions, (3) be of a similar type and (4) not be too remote in time. Burnette v. Stagner Hotel Courts, Inc., 821 F. Supp. 678, 683 (N.D. Ga. 1993); Sturbridge Partners, Ltd. v. Walker, 267 Ga. 785, 786, 482 S.E.2d 339 (1997); Washington Road Properties, Inc. v. Stark, 178 Ga. App. 180, 342 S.E.2d 327 (1986), cert. denied.

For example, notice of prior robberies which occurred at a motel front desk three and five years earlier did not establish a duty on the part of the defendants to protect against personal attacks which occurred outside the Plaintiff's room. See Washington Road Properties, Inc. v. Starks, 178 Ga. App. 180 (1986), cert. denied. Instances

occurring in the parking lot have been held not to be similar to those occurring at other locations on the premises. McCoy v. Gay, 165 Ga. App. 590 (1983). A shooting in the same parking lot, in which a subsequent shooting occurs, has been held not to be similar when there was no showing that the lot was similarly lighted or patrolled at the time of the second crime. Id. at 593. An incident not involving a shooting has been held not to be similar to one that involved a shooting. Grandma's Biscuits, 192 Ga. App. at 817. An incident involving theft from a vehicle in a parking lot was held not to be similar to an assault/rape in the same parking lot. See Tolbert v. Captain Joe's Seafood, 170 Ga. App. 26 (1984). In Nalle v. Quality Inn, 183 Ga. App. 119, 358 S.E.2d 281 (1987), where the plaintiff was attacked and robbed as he was standing near the swimming pool on the premises of the defendant's motel drinking a cup of coffee, the court held there were no prior substantially similar incidents although there were 25 prior offenses relied upon by the plaintiff to establish the defendant's knowledge of the danger in question. Only two had involved "personal confrontation," and both of those had occurred at the front office. These cases show that the necessary elements to prove a crime to be substantially similar to a prior crime require the subsequent crime to be substantially similar in location, circumstance, condition and substance to the prior crime. See also Woods v. Kim, 207 Ga. App. 910 (1993).

Geographically, plaintiffs frequently rely on prior crimes of violence on neighboring or surrounding properties. Arguably any crimes which did not occur on the Defendant's property are inadmissible to show notice to the Defendant of a risk of crime to its own invitees. See Sun Trust Banks, Inc. v. Killebrew, 266 Ga. 109, 109 (1995). In addition, it is

hard to explain how a crime on a neighboring property puts the defendant on notice of some dangerous condition on its own property.

On the other hand, the more recent decisions from the Georgia appellate courts seem to ignore the above precedent authority without overruling it. In Woodall v. Rivermont Apartments Ltd. Partnership, 239 Ga. App. 36 (1999), the Court of Appeals reversed the trial court's ruling on Defendant's motion in limine in a case in which a tenant was violently assaulted near the apartment complex mail boxes. The motion in limine dealt with "evidence of twenty separate property crimes that had occurred at the apartment complex in the previous year, including eight burglaries of apartment units, nine instances where cars in the parking lot were either broken into or stolen, and three instances where mailboxes at the apartment complex were broken into.

"In addition to these property crimes, there were two other incidents involving encounters by a resident or security guard with suspicious individuals. In granting defendants' motion in limine to exclude evidence of these incidents, the trial court examined each incident separately and concluded that each individual incident was not sufficiently similar to the attack on Woodall to render it admissible. The trial court also excluded certain internal reports of defendants referencing these property crimes. **The court did not consider whether the volume of crime, alone or combined with other factors, affected the question of admissibility**, but simply considered each prior incident separately. However, the court stated in its order that it had 'misgivings that the jury will not have a fair and accurate picture of the condition of the Rivermont [Apartments] at the time of trial.' The court denied defendants' request to exclude evidence relating to violent

crimes occurring in the vicinity of the apartment complex.” Woodall v. Rivermont Apartments Ltd. Partnership, 239 Ga. App. 36, 520 S.E.2d 741, 742-743 (1999)(emphasis added).

The Woodall decision went on to explain:

Thus, although Sturbridge rejected the proposition that the occurrence of property crimes may never render the occurrence of violent crimes foreseeable, the Court in Doe appears to have restricted the applicability of Sturbridge. Doe appears to establish the following principles: (1) a crime against property will make an act of violent crime foreseeable if the "very nature" of the property crime "suggest[s] that personal injury may occur"; and (2) if an individual who encounters someone committing such a property crime has "opportunities for escaping" the encounter, then the occurrence of the property crime, in and of itself, may not render it foreseeable that a violent crime will occur.

In this case, it does not appear that any of the property crimes, standing alone, would raise an issue of foreseeability under the standards set forth in Sturbridge and Doe. The trial court clearly believed that these cases required it to analyze each prior crime independently to determine its similarity to the attack at issue in this case, without reference to other crimes at the complex or other evidence placing the crimes in context.

The court went on to note:

Given the fact that the area adjacent to the Rivermont complex was known as a high-violent crime area, and that defendants were concerned about security issues relating to the increase in crime, we believe that evidence of an increase in property crimes at the complex is relevant to whether defendants should have foreseen a risk of personal injury to their tenants from an attack such as the one on Woodall. In analyzing each prior property crime individually, without reference to any context, the trial court applied an overly rigid interpretation of the Supreme Court's decisions in

Sturbridge and Doe. As discussed above, Georgia law "favors the admission of any relevant evidence, no matter how slight its probative value; evidence of doubtful relevance or competency should be admitted and its weight left to the jury." Johnson, supra. Because we cannot say that such evidence was inadmissible for any purpose, the trial court erred in granting defendants' motion to exclude evidence of the various property crimes and of defendants' knowledge of those crimes."

Woodall v. Rivermont Apartments Ltd. Partnership, 239 Ga.App. 36, 520 S.E.2d 741, 745 (1999). Thus, the determination of what prior crime evidence is admissible seems to be getting more difficult to decipher and seems to depend in large measure to which panel of the Court of Appeals the case is assigned and not on legal precedent.

Only prior crimes which occurred on the subject premises should be relevant and admissible because these cases are **premises** liability cases and because the Defendant has no responsibility for the **surrounding** properties. Plaintiffs always try to circumvent this argument by relying on the decision in Matt v. Days Inns of America, Inc., 212 Ga.App. 792, 795 (1994), to support their claim that evidence of crime **in the area** of the subject property is admissible to establish foreseeability. In the Matt case the Court of Appeals stated, "In this appeal, however, the record of criminal activity in the parking lots of nearby hotels, including serious crimes against persons, when coupled with the record of criminal activity in [Days Inns'] own parking lot (a crime about once every two weeks) was sufficient to create a genuine issue of material fact on whether Days Inns was put on notice that criminal conduct against its guests was foreseeable". The court never said that evidence of

crime in the area of the subject property but off the property is admissible at trial and the Supreme Court, which affirmed the decision, explicitly did **NOT** adopt that standard. See Days Inns of America, Inc. v. Matt, 265 Ga. 235, 236, 454 S.E.2d 507, 508 (1995), in which the Supreme Court stated, "proof of the prior robbery committed by force [which occurred on Days Inns' property] creates a triable issue as to whether Days Inns had a duty to exercise ordinary care to guard its patrons against the risks posed by similar criminal activity.") Thus, **there is as of yet no appellate decision in Georgia holding that crime unknown to the defendant which occurs on other properties is relevant to a determination of foreseeability or that such evidence of crime on other properties is admissible at trial.** However, the Woodall decision discussed above clearly took the position that some surrounding crime was admissible, without really citing legal authority for that position.

The rule appears to be that if a landowner knows of a prior burglary (even if the perpetrator entered an apartment during the day when no one was at home solely to steal property, for example), it is arguably foreseeable to the landlord the same or another perpetrator could break into an apartment and commit a violent assault or battery (during the night when the perpetrator could reasonably expect the resident to be home in bed). In that example, the "nature" of burglary requires a breaking and entering, and it becomes foreseeable to the owner that a perpetrator could break in again and commit a personal attack. See Sturbridge Partners, Ltd. v. Walker, 267 Ga. 785, 482 S.E.2d 339 (1997). Arguably, under the Sturbridge circumstances, the prior burglaries should have at least put the landlord on notice that the apartments were not secure when locked. However, the

Supreme Court has held car thefts in the parking lot are not substantially similar in nature or extent to a personal attack in the parking lot. See Doe v. Prudential-Bache, 268 Ga. 604, 492 S.E.2d 865 (1997). Therefore, under the same analysis, a car theft or thefts in the parking lot of a commercial property are not substantially similar to a personal attack in the parking lot or outside a guest's room. The Supreme Court in Doe distinguished the knowledge of burglaries in Sturbridge from the thefts from autos at issue in Doe by emphasizing the likelihood of an isolated encounter with little chance of escape in an apartment burglary versus opportunities for escape in a parking lot. See Doe, 268 Ga. at 606.

The final provision, that the prior crime not be too remote in time from the subject crime, requires that the prior incident must have occurred in the "recent past." Donaldson, 175 Ga. App. at 261. The Georgia Court of Appeals has held as a matter of law that crimes occurring two years before the crime in question are "too remote in time to cast on defendant the reasonable apprehension of criminal acts on a guest." Nalle v. Quality Inn, Inc., 183 Ga. App. 119 (1987); see also Burnette, 821 F. Supp. at 678. Yet many trial courts put no time limits on how far back plaintiffs may go to show evidence or prior crimes.

B. Only evidence of crimes known to the Defendant should be admissible.

If Plaintiff cannot prove that **the Defendant** was aware of the prior crime, that crime is arguably insufficient to demonstrate foreseeability of the Plaintiff's crime by the defendant. See Sun Trust Banks Inc. v. Killebrew, 266 Ga. 109 (1995). "[I]t is the law in Georgia that a property owner is under no obligation to investigate police files to determine whether criminal activities have occurred on his property. Sun Trust Banks v. Killebrew,

266 Ga. 109, 464 S.E.2d 207 (1995). . .” Habersham Venture, Ltd. v. Breedlove, 244 Ga.App. 407, 410, 535 S.E.2d 788, 791 (2000)(also citing to Johnson v. Atlanta Housing Auth., 243 Ga.App. 157, 159, 532 S.E.2d 701, 704 (2000)). Since this is the law of Georgia, I submit no so-called “expert” should be permitted to testify that, in his or her opinion, the standard of care requires such an investigation of police files to determine whether criminal activities have occurred on this property. Yet some trial courts continue to ignore binding appellate precedent and admit such evidence.

2. How does one put in evidence of prior substantially similar incidents?

Although many plaintiff’s attorneys have done so in the past, the Georgia Supreme Court has recently made it crystal clear that the trial court may not admit into evidence police incident reports based solely upon their authentication as business records. Brown v. State, 274 Ga. 31, 33-34, 549 S.E.2d 107, 109-110 (2001). In Brown, the Supreme Court held that the narrative portions of police reports are not admissible under the business records hearsay exception. The Supreme Court also made it clear that its ruling applied to civil premises security cases when it specifically overruled Shoney's Inc. v. Hudson, 218 Ga. App. 171, 460 S.E.2d 809 (1995), to the extent it may have held that a police report narrative was admissible as a business record. Id. at 34. See also Scott v. LaRosa and LaRosa Inc., 253 Ga. App. 489, 559 S.E.2d 525 (2002), in which the Court of Appeals reversed the grant of summary judgment to the defendant in a wrongful death case on the ground that “the narrative portion of a police report [which] showed that two employees of LaRosa and LaRosa were not acting within the scope of their employment when the decedent in this case was killed in a collision involving a car loaned out by one of

the employees' . . . was not admissible as a business record under the recent decision of Brown v. State, 274 Ga. 31 (549 SE2d 107) (2001).” The LaRosa case makes it clear that the Brown decision is applicable to civil cases.

Thus, how does a plaintiff present admissible evidence of prior substantially similar incidents? I submit that the plaintiff must have admissible evidence that the crime occurred and of the circumstances surrounding the crime which arguably support a finding that the crime was substantially similar to the one at issue or should have called the owner's attention to the alleged dangerous condition. In order to do that without the use of inadmissible hearsay, the plaintiff must either have an eyewitness to the crime testify to the crime or have a record of that crime which was prepared by the defendant, which could arguably be presented as an admission, an exception to the hearsay rule. In addition, where the defendant's own records can be used to present evidence of prior substantially similar incidents, the plaintiff also gets the benefit of simultaneously proving notice to the defendant of the incident because it was obviously reported to the defendant if the defendant made a record of it. Thus, under this scenario, the conscientious defendant is arguably prejudiced by its efforts to keep advised about what is occurring on the property and keeping records of such information whereas the defendant who keeps no records and keeps its head buried in the sand won't have any damning records to give to the plaintiff to assist the plaintiff in proving the prior substantially similar incidents. Nevertheless, I believe property owners are still better off keeping abreast of what is happening on their property and keeping records of such activity as ignorance is rarely bliss in the legal arena.

RECENT UPDATE IN GEORGIA PRODUCTS LIABILITY LAW

Charles R. Beans^{*}

I. DUTY TO WARN

A. Foreseeability and The Duty to Warn

Recently, both the federal and state courts in Georgia have been faced with the issue of foreseeability of harm in products liability actions. In Smith v. Ontario Sewing Machine Co., Ltd., 249 Ga. App. 364, 548 S.E.2d 89 (2001), the court elaborated upon a manufacturer's post-sale duty to warn. In that case, plaintiff-appellant, a worker in a sewing machine plant, sued the defendant-appellee manufacturer for injuries sustained on the job. Defendant had sent post-sale notices to plaintiff's employer warning the employer to stop using the machines, but did not specify the particular defects. Plaintiff never learned of these notices. More importantly, employees of the manufacturer, Ontario Sewing Machine Co., had visited the particular plant site and saw workers using the defective machines, but never attempted to speak to the workers. Moreover, the employees of the defendant never attached signs to the machines, mailed or distributed warnings or attempted any other methods to warn of the dangers.

The Georgia Court of Appeals emphasized that there is a post-sale duty to warn, even for successors of manufacturers, relying on the Restatement (Third) of Torts. In

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this case, the manufacturer of the defective mechanism owed such a duty to warn. More importantly, the Court held that Ontario had a duty to recall the defective product, stating as follows:

When the manufacturer subsequently learns that its products have been sold with dangerous defects, it is under a duty to recall the product from the market and to remedy the defect or replace the product in some cases in the exercise of ordinary care beyond the duty to give a post-sale warning.

249 Ga. App. at 368. Furthermore, in finding that defendant's actions with regard to the recall were completely inadequate, the Court noted as follows:

A post-sale warning must be adequate and specific to satisfy the manufacturer-seller's duty to the ultimate user to protect from harm; a vague or generalized warning that fails to warn of the specific defect, the danger from the defect, and remediation is not an adequate warning (emphasis added).

Id. at 369. Because Ontario "sought refuge" behind their vague attempt at a recall notice, the court held that it, as a manufacturer, could not shift the burden to recall and warn to the employer.

Of import with regard to the Smith case are two things. Although the court did not specifically base its ruling on the doctrine of foreseeability, it is clear that in imposing such a high burden on the manufacturer, foreseeability was a factor. More importantly, however, the Supreme Court of Georgia recently granted certiorari to reconsider whether the Court of Appeals erroneously expanded the law regarding the scope of duties of manufacturers and sellers with respect to product defects. Oral argument is presently set for May of 2002.

In DeLoach v. Rovema Corp., 241 Ga. App. 802, 527 S.E.2d 882 (2000), plaintiff-appellant was injured while performing maintenance on a tea bagging machine at work. The issue presented to the Court of Appeals was whether the seller had a duty to warn of dangers that became known after the sale to plaintiff's employer. In affirming summary judgment for the defendant, the Court held there was no duty to warn. The duty of the seller to warn was "only of dangers actually or constructively known at the time of sale." 241 Ga. App. at 804. Thus, depending on the outcome of the Smith case, the duty to warn is clearly broader for manufacturers than it is for sellers.

The issue of foreseeability in regard to the duty to warn recently arose in Williams v. Web Packaging Corp., 2002 U.S. Dist. Lexis 4103 (M.D. Ga. March 2002). In that case, the Middle District of Georgia was faced with issues of foreseeability regarding product alteration. Williams was a products liability case tried to a jury who returned a verdict for the defendant. Plaintiff-appellant filed a Motion For New Trial alleging that the Court committed numerous errors, including failure to instruct the jury properly with respect to the issue of alteration as to the design defect claim. Plaintiff sought a charge to the effect that defendant had offered evidence that the subject palletizer machine which injured plaintiff was altered from its original condition after it was sold by defendant. Defendant contended that the alterations constituted intervening acts absolving it from liability. Plaintiff wanted the judge to charge the jury that such an intervening act would absolve the defendant only if alteration "was not foreseeable by the defendant. . ." Id. at 2. Instead, the Court instructed the jury as follows:

The plaintiff cannot recover if his injuries are not traceable to the original design of the defendant. And an injury is not traceable to the original

design of the defendant if the machine was materially altered and if the alteration was sufficient of itself to cause injury.

Id. at 3. Plaintiff contended that instruction was erroneous because it omitted the concept of foreseeability.

The Court agreed with plaintiff “because Georgia law recognizes that the concept of foreseeability is relevant to a design defect claim,” Id. at 5, citing numerous important decisions in this respect, to wit, Chrysler Corp. v. Batten, 264 Ga. 723, 450 S.E.2d 208 (1994); Ford Motor Co. v. Stubblefield, 171 Ga. App. 331, 319 S.E.2d 470 (1984); and Banks v. ICI Americas, Inc., 264 Ga. 732, 450 S.E.2d 671 (1994). The Court further reiterated, however, relying upon Talley v. City Tank Corp., 158 Ga. App. 130, 279 S.E.2d 264 (1981), that a manufacturer has the right in strict liability cases to be “adjudged on the basis of the design of its own marketed product and not that of someone else.” Id. at 7. Recognizing the conflict between the law in Georgia, the Court held that in the instant case, the Court’s instruction on the issue of alteration did not misstate the law. Rather, the Court’s instruction was incomplete because it did not instruct the jury with regard to foreseeability of the alteration made. Id. As such, “the Court should have instructed the jury that defendant could be liable if the alteration was foreseeable, but that defendant could not be liable if the alteration was substantial (and therefore unforeseeable as a matter of law).” Id. at 9. Unfortunately, since a general verdict form was used, the Middle District found there was no way of knowing the basis of the jury’s verdict. Not knowing the jury’s rationale, the Court found that plaintiff was entitled to a new trial. In dicta, the Middle District also noted that uncertainties in the law would make the case an ideal candidate for certification to the Georgia Supreme

Court, but federal district courts cannot certify questions of the Georgia Supreme Court, and therefore, a new trial must stand.

B. Learned Intermediary Doctrine

The learned intermediary doctrine, sometimes referred to as the “sophisticated user” doctrine, generally holds that where a product is sold to a particular group or profession, there is no duty to warn of risks generally known to that group or profession. See, e.g., Exxon Corp. v. Jones, 209 Ga. App. 373, 433 S.E.2d 350 (1993). Based upon issues of foreseeability, the rationale behind this doctrine is that a duty to warn depends not just upon foreseeability of the use of the product in question, but also the user’s knowledge. Wilson Foods Corp. v. Turner, 218 Ga. App. 74, 460 S.E.2d 532 (1995).

This concept was recently addressed in the medical arena in Toole v. Baxter Healthcare Corp., 235 F.3d 1307 (11th Cir. 2000). In that case, plaintiff-appellant Toole, a breast implant recipient, sued the successor corporation of the manufacturer of the implants. She was awarded a great amount in damages, and the trial court granted the defendant-appellee’s JNOV on punitives and reduced the general damage award to \$1 million. In specifically addressing the duty to warn, the Eleventh Circuit stated that “it is limited to an obligation to advise the prescribing physicians of any potential dangers that may result from the use of its product.” Id. at 1313. Thus, any duty to warn with regard to the breast implants themselves did not extend all the way to the ultimate user, in that case, the patient. In sum, based on this doctrine, combined with the concept of foreseeability, the physician has the sole responsibility to advise his patient of any potential dangers associated with a product. See also, McCombs v. Synthes, 250 Ga. App. 543, 553 S.E.2d 17 (2001).

II. EXPERT WITNESSES AND THE DAUBERT STANDARD

In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L.Ed.2d 469, 113 S.Ct. 2786 (1993), the United States Supreme Court rejected the traditional notions governing the admissibility of expert opinions. Based on Federal Rule of Evidence 702, an expert can testify if three requirements are met. First, the individual must be competent and qualified on the very issues before the court. Secondly, the expert's methodology must be sufficiently reliable. Finally, the expert, through scientific, technical, or specialized expertise, must provide testimony that assists the trier of fact to understand the evidence before it. In determining whether these three requirements are met, the trial judge, in federal actions, becomes the "gatekeeper," determining whether the expert evidence lives up to the reliability and relevance standards.

The Toole case, *supra*, also addressed the defendant's allegation that expert testimony was improperly admitted on behalf of the plaintiff with regard to causation. Reiterating the standard set forth in Daubert, the Eleventh Circuit dismissed defendant's arguments, recognizing that the trial court has extremely broad discretion in its gatekeeper function. In the more recent case of Siharath v. Sandoz Pharmaceuticals Corp., 131 F. Supp.2d 1347 (N.D. Ga. 2001), the Northern District of Georgia was called upon to address the concept of "junk science." In those combined cases brought by two plaintiffs who suffered strokes after taking a drug manufactured by the defendant, the District Court accepted the defendant's argument regarding excluding plaintiffs' expert witness on causation. The District Court found that the lack of scientific methodology, including the non-existence of any epidemiological studies, precluded the

admission of such testimony. The Court did not question the expert's competency, but found that the second prong required under Daubert was lacking. Specifically, the rate of error of the studies was unknown, and there was very limited peer review. In so holding, the Court stated that "in an attempt to prohibit the presentation of 'junk science' to the trier of fact, perhaps Daubert has raised the bar of admissibility of expert testimony too high. It is not, however, for this Court to seek the middle ground." Id. at 1373.

Obviously, while the trial judge does have broad discretion in determining whether to allow expert testimony, that discretion is not without limits. The three requirements of Daubert must be met. Finally, these requirements, of course, only apply in federal courts since they are based on the Federal Rules of Evidence.

III. THE STATUTE OF REPOSE

O.C.G.A. § 51-1-11(b)(2) provides as follows:

No action shall be commenced pursuant to this subsection with respect to an injury after 10 years from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury.

Thus, in strict liability actions, plaintiff cannot maintain a strict liability claim for any reason as a matter of law if the product sued upon was manufactured more than 10 years from the date of the first sale for use or consumption.

Subsection (c) of that statute, which has been the basis of many suits in the past, contains two exceptions in causes of action based on negligence. The first is the exclusion in subparagraph (c) which states that with regard to negligence claims, "nothing contained in this subsection shall relieve a manufacturer from the duty to warn

of a danger arising from the use of a product once that danger becomes known to the manufacturer.” The second exception is for claims arising out of defendant’s conduct which constitutes “a willful, reckless, or wanton disregard for life or property.”

In Dorsey Trailers, Inc. v. Knight, 2001 Ga. App. Lexis 123 (Feb. 2001), the Georgia Court of Appeals expanded upon the application of the 10-year statute of repose with regard to when time actually begins to run. That case involved the malfunction of an aerial lift commonly referred to as a “cherry picker” manufactured by defendant Dorsey. Plaintiffs contended that the trial court improperly determined the date upon which the statute of repose began to run, thereby eliminating all of their claims for failure to warn. Applying Georgia law, the Court affirmed the trial court’s finding that the clock began to tick from the date that the first purchaser, and not one of the defendants, acquired the lift. In other words, § 51-1-11(b)(2) does not provide that the period of repose commences on the date of the “first sale” of a product by its manufacturer, but that it commences on the date of the first sale for use or consumption. Thus, in effect, Dorsey expanded the window of responsibility for defendants.

In Vickery v. Waste Management of Georgia, Inc., 249 Ga. App. 659, 549 S.E.2d 482 (2001), the court reiterated that in a failure to warn product liability action, to escape the 10-year time bar, there must be evidence of willfulness. In that case, the failure to install backup warning signals in a truck did not constitute such a wanton disregard for life to trigger the exception of the 10-year statute of repose. Affirming that “willful

conduct is based on an actual intent to cause harm or injury,” there simply was no evidence of that. 249 Ga. App. at 660.

IV. DEFENSES IN PRODUCT LIABILITY ACTIONS

In Dean v. Toyota Ind. Equip. Manfrg., Inc., 246 Ga. App. 255, 540 S.E.2d 233 (2000), one of the issues before the court was the doctrine of assumption of the risk. In that case, Toyota was granted summary judgment in plaintiff’s suit alleging strict liability for failure to install a back-up alarm on its forklift. Toyota argued that plaintiff knew the forklift had no backup alarms, knew they were dangerous, and had been warned of that fact. On the other hand, plaintiff contended he did not know the forklift was near him at the time or even operating in the general area. In agreeing with plaintiff, the court found that whether a party assumes the risk of injury is a jury question that should not be decided by summary judgment “unless the defense is conclusively established by plain, palpable, and undisputed evidence.” 246 Ga. App. at 258. As a matter of law, it could not be stated that plaintiff voluntarily exposed himself to a known risk and deliberately chose a perilous course of conduct. Therefore, it was a jury question.

In addressing the applicability of defenses in strict liability actions, the courts must utilize the “risk-utility analysis” enunciated in the Banks decision, supra. Prior to that case, if a danger was known, open, and obvious to the plaintiff, then a design defect action could not be brought. Since Banks, an open and obvious defense may still apply, but it becomes one of the many factors to be injected into the analysis. For example, in Cornish v. Byrd Welding Service, Inc., 252 Ga. App. 793, 557 S.E.2d 432 (2001), plaintiff-appellant-employee sued the defendant-appellee-manufacturer when he

slipped and fell on metal stairs manufactured and installed at his place of employment. Cornish alleged that the stairs were defectively designed and manufactured. The case went to trial, and the jury returned a verdict for the defendant. On appeal, plaintiff alleged that the trial court's charge that it could consider the open and obvious danger of the product as an additional factor pertinent to its risk-utility analysis was erroneous, and that it improperly shifted the burden of proof to plaintiff.

The Court of Appeals affirmed the defense verdict, finding as follows:

Cornish correctly points out that the pattern risk-utility jury charge does not explicitly set out the open and obvious nature of the danger of a product as a risk-utility factor. [cit. Omitted] However, it does not follow that a charge explicitly doing so impermissibly shifts the burden of proof to the plaintiff as Cornish urges it does. An instruction authorizing a jury to consider open and obvious danger in a product as one among many risk-utility factors in a design defect case, as here, is not the functional equivalent of an instruction as to the open and obvious danger rule, a rule no longer proper in design defect cases "whether brought in strict liability or in negligence." [cits. Omitted]

252 Ga. App. at 794. In other words, while assumption of the risk remains a valid defense in product liability actions, the "open and obvious" defense becomes a risk-utility factor and not a complete bar to recovery. This is an important distinction, especially in cases addressing allegations of failure to warn, inasmuch as there is no duty on a manufacturer to warn of a product danger that is obviously and generally known. Moore v. ECI Management, 246 Ga. App. 601, 542 S.E.2d 115 (2000). However, as noted in that case, an open and obvious defense in a design defect case is more difficult to argue.

V. MISCELLANEOUS

A. Evidentiary Issues

In Cooper Tire & Rubber Co. v. Crosby, 273 Ga. 454, 543 S.E.2d 21 (2001), plaintiff-appellee sued defendant-appellant tire manufacturer after she and her daughter were injured and her husband was killed. She claimed that the blowout leading to the accident was caused by a defective tire. The trial court excluded plaintiff's "adjustment data," which was statistical evidence of consumer claims of defective tires that defendant had previously honored. After a defense verdict, the Court of Appeals reversed, ruling that the exclusion of that evidence was error. The Georgia Supreme Court granted Defendant's Petition For Certiorari and reversed the Court of Appeals, holding that the trial court correctly ruled such data inadmissible. "Without an independent showing of a substantial similarity between the purported tire defect that caused the injuries in this case and the basis for the consumer claims that were honored by the manufacturer", the evidence was not allowed. 273 Ga. at 454. In so finding, the Georgia Supreme Court stated as follows:

In products liability cases, the "rule of substantial similarity" prohibits the admission into evidence of other transactions, occurrences, or claims unless the proponent first shows that there is a "substantial similarity" between the other transactions, occurrences, or claims and the claim at issue in the litigation. The showing of substantial similarities must include a showing of similarity as to causation. Before admitting proffered evidence of other transactions in products liability cases, the trial court must satisfy itself that the rule of substantial similarity has been met.

Id. at 455. Thus, Crosby's attempt to introduce nine years worth of adjustment data concerning all tires manufactured by Cooper lacked evidence that they were the same

make and model as the tire at issue. Moreover, plaintiff failed to show that the tires in those studies suffered from the same defect as alleged in her suit.

B. What Constitutes “Product Use”

In Jones v. Nordictrack, Inc., 268 F.3d 1292 (11th Cir. 2001), the Eleventh Circuit certified the following question to the Georgia Supreme Court: “Must a product be in use at the time of injury for a defendant to be held liable for defective design under theories of strict liability, negligence, or failure to warn?” 268 F.3d at 1292. In responding, the Georgia Supreme Court found that the focus is not on use of the product, but rather the balance of risks inherent in a product design against its utility. Thus, the Supreme Court made clear “that product ‘use’ is not a necessary predicate to liability in design defect cases. . .” Id. In so holding, the Court further explained that the appropriate analysis to be utilized is in accordance with Banks. Accordingly, when the district judge focused on whether the plaintiff was using the product, he failed to properly apply the risk utility analysis, and as such, the grant of summary judgment in favor of Nordictrack was reversed and remanded.