2016 GDLA

Georgia Defense Lawyers Association

Advancing the Civil Defense Bar©

Law Journal

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PRESIDENT'S MESSAGE

Matthew G. Moffett is a partner with Gray, Rust, St. Amand, Moffett & Brieske, with over 25 years of litigation experience. He has been listed among the top 100 lawyers in *Atlanta Magazine* and selected among the Legal Elite in *Georgia Trend Magazine*. He has worked tirelessly to advance the Georgia Defense Lawyers Association during his term as President.

As anyone who has served on a law school editorial board can attest, a publication like the Georgia Defense Lawyers Association's *Law Journal* is not an effortless undertaking. Rather, it takes considerable time and energy on the part of many.

At the head of that extraordinary group effort is the Editor-in-Chief, who must identify the timeliest topics that will have the broadest appeal to our readership – GDLA members and judges at all levels of the bench. The Editor-in-Chief must recruit authors, ensure articles are submitted by the deadlines, review and edit, and otherwise ensure the entire publication is worthy of the name it bears. And, all the while, continuing to practice law.

This year, GDLA Vice President Dave Nelson of Chambless, Higdon, Richardson, Katz & Griggs in Macon, has done a terrific job as Editor-in-Chief, and I know you join me in thanking him for his considerable efforts.

Without the authors, though, there would be nothing for Dave to edit. This year, 12 talented attorneys have taken time away from their busy practices to prepare 8 insightful and practical articles to benefit us all. We all owe them a debt of gratitude for their hard work in making the *Law Journal* a great reflection of the civil defense bar in Georgia.

And perhaps most importantly, our organization has one great executive director who pulls it all together and makes it all happen. Every day of every year, for every president and every board, Jennifer Davis shows us why she is simply the best at what she does – period! We are so incredibly fortunate to have her as a member of the team.

As my tenure draws to a close, I want to thank you for the privilege of serving as your President. With the support of the Board, and so many of you, it has truly been an honor.

I hope you enjoy this year's *Law Journal*.

For the defense,

Matthew G. Moffett
GDLA President
Gray, Rust, St. Amand, Moffett & Brieske
Atlanta

EDITOR'S ACKNOWLEDGEMENT

David N. Nelson is a partner at Chambless, Higdon, Richardson, Katz & Griggs LLP. He has over 20 years experience in civil trial practice focused the defense of general civil claims and professional negligence claims throughout the state of Georgia.

The origin of the 2016 edition of the GDLA *Law Journal* began when I accepted the role as editor of this year's *Law Journal*. The contributors to the *Law Journal* have delivered a mix of articles addressing both cutting-edge issues, such as the interplay between medical funding companies and the collateral source rule, and recent developments in well settled law. The *Law Journal* represents the culmination of the hard work of the 13 contributing authors. Therefore, I am proud to present the 2016 edition of the GDLA *Law Journal*.

I want to offer my heartfelt thanks for the countless hours and dedication the contributors spent crafting their submissions. The authors for this publication are Clay Knowles, Rachel Reed, David Glustrom, Sandra Vinueza Foster, Drew C. Timmons, Wayne S. Melnick, Parker M. Green, Matthew S. Grattan, Matthew T. Jones, Erin A. Easley, Phillip W. Savrin, and Joseph D. Stephens. Their articles are timely, interesting, and offer great insight.

I also want to thank the Editorial Board members, Bridgette Eckerson of Mozley Finlayson & Loggins in Atlanta; Tracie Macke of Brennan Wasden & Painter in Savannah; Jim Painter of Brennan Wasden & Painter in Augusta; Bradley Wilkes of King & Spalding in Atlanta; Richard Tisinger, Jr. of Tisinger Vance in Carrollton; and Jamie Weston of Trotter Jones in Augusta for agreeing to assist with this project.

My thanks and gratitude are extended to the fine lawyers who volunteered their time to contribute to this publication. I also want to thank both Matthew Moffett and Jennifer Davis for the guidance they offered during the process. Finally, Jennifer was of immeasurable assistance and support from the time we first met to start working on this year's *Law Journal*.

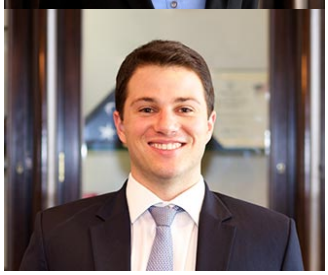
I trust that you will find the articles in the 2016 *Law Journal* informative. Please take the time to thank the many authors for their contributions to this year's *Law Journal* if you have the opportunity.

For the defense,

David N. Nelson
GDLA Vice-President
Chambless, Higdon, Richardson, Katz & Griggs, LLP

MEDICAL FUNDING COMPANIES: A NEW PROBLEM FOR AN OLD RULE

By Clay Knowles, Rachel Reed and David Glustrom



Clay Knowles, Rachel Reed and David Glustrom are associates with Waldon, Adelman, Castilla, Hiestand & Prout. Their focus is on the defense of matters involving insurance coverage, automobile liability claims, and other civil matters.

I. INTRODUCTION

Viewing claims or lawsuits as economic assets to be developed and profited from, funding companies have changed the landscape upon which we litigate. Funding companies do this by financing medical studies or procedures that may be medically unnecessary and are often unduly expensive. Often times, the relationship between funding companies and the spike in a claim's healthcare costs may not be presented to the juries by virtue of the collateral source rule. This leaves a quandary insofar as the collateral source rule allows funding companies to occupy and pervert the principles underlying the collateral source rule.

II. THE COLLATERAL SOURCE RULE IN GEORGIA

The Georgia collateral source rule bars defendants from presenting evidence that a plaintiff received recovery for a tortious injury and also prohibits defendants from reducing potential liability by that recovery amount.[1]

In 1885, the Georgia Supreme Court first introduced and conceptualized this rule in *Western and Atlantic Railroad v. Meigs*.[2] In *Meigs* a passenger train struck and killed a man. Justice Samuel Lumpkin feared that if the Court reduced the widow's damages by the amount of the life insurance policy and the jury awarded less than the policy limits, then the defendant might seek to collect from the widow the excess above the amount of the judgment. The theory would be that the husband's death bestowed a "positive pecuniary benefit."[3]

Over time, the basis for the rule has encompassed three fundamental rationales. First, no portion of an injured party's benefits should be credited to the tortfeasor's liability because the tortfeasor would then receive a

windfall.[4] Second, the plaintiff should retain any recovery above the amount of a judgment or settlement. [5] Third, the rule should serve the punitive function of creating a disincentive for potential tortfeasors to cause harm.[6]

III. APPLICATION OF THE COLLATERAL SOURCE RULE

The collateral source rule applies to various types of plaintiff recoveries. Payments made by contractually bound insurance companies are the most common example of such payments.[7] Payments made by operation of law such as those by government entities like Medicare, Medicaid, the Veteran's Administration, unemployment and disability benefits are also included.[8] Lastly, evidence of gratuitous payments such as free or reduced rate medical care; continued salary or wage payments; [9] and payments made by beneficent employers or helpful relatives are also inadmissible.[10]

The collateral source rule does not apply to prior payments by the defendant, the defendant's insurer, or a joint tortfeasor. This limitation prevents defendants from paying an amount greater than their full share of the claim's value. [11] Evidence of such payments is admissible to offset the defendant's damages.[12]

Evidence of plaintiff's debts that have been discharged through bankruptcy is also admissible to mitigate defendant's damages. [13] The dual rationale is that there is no third party acting as an additional source of recovery to the plaintiff in bankruptcy. [14] Prohibiting defendants from offering evidence that a plaintiff has discharged their debts in bankruptcy may incentivize plaintiffs to file for bankruptcy.[15]

Also, parties can contract around the collateral source rule. In *Doyle v. Liberty Mut. Ins. Co.*, the Georgia Court of Appeals held that a defendant may offer evidence of a payment by a collateral source if the plaintiff has agreed, pursuant to an unambiguous contractual provision, that the defendant may use evidence of third party payments. [16] Interestingly, the court noted that this was only to be allowed if such application is not against public policy.[17]

Lastly, in contrast to tort actions, the collateral source rule does not apply to contract disputes. [18] This is illustrative of both the difference between damages in tort and contract cases and the role of the collateral source rule. Collateral source evidence can be admitted in contract disputes if it is relevant to demonstrate the extent of the plaintiff's actual loss caused by the breach. [19] The reason being; "the collateral

source rule is punitive; contractual damages are compensatory. The collateral source rule, if applied to an action based on the breach of contract, would violate the contractual damage rule that no one shall profit more from the breach of an obligation than from its full performance."[20]

IV. AUTHORIZED USE OF COLLATERAL SOURCE EVIDENCE

Defendants may utilize collateral source evidence in specific instances other than for the purpose of mitigating their liability. Defendants may present collateral source evidence for impeachment purposes if the testimony is related to a material issue. [21] For example, a defendant may impeach a plaintiff with evidence of health insurance coverage if the plaintiff testifies that they delayed or declined treatment because they could not afford it. [22] Such testimony goes to the issue of the extent of plaintiff's damages and whether defendant's negligence proximately caused the injuries and, therefore, is admissible for the limited purpose of impeachment.[23] However, the court has made it clear that collateral source evidence cannot then be used to mitigate the defendant's damages.[24]

Georgia courts have set a high bar in regards to what may amount to a material issue and has opted for other remedies before allowing collateral source evidence to be admitted. The Supreme Court of Georgia held that a defendant could not impeach the plaintiff with evidence of plaintiff's health insurance when the plaintiff testified about their anxiety related to their inability to pay medical bills. [25] The Court reasoned that because recovery was not permitted for this anxiety, the testimony was not related to a material issue. This ruling overrode the trial court's discretion to balance the probative value of collateral source evidence against its prejudicial impact.[26]

The Supreme Court concluded that the testimony was objectionable and that the trial court was obliged to exclude the testimony upon such objection and, if requested, give curative instructions to the jury. Furthermore, upon such objections, sanctions or a mistrial might be appropriate. [27] Interestingly, Justice Sears, concurring specially in part and dissenting in part, made the point that, if the plaintiff had been seeking damages for this anxiety, or had their financial hardship been the immediate consequence of plaintiff's injury, collateral source evidence would have been admissible.[28]

V. MEDICAL FUNDING COMPANIES AND THE COLLATERAL SOURCE RULE

Courts have yet to clearly identify the extent to which the collateral source rule applies to funding companies. A funding company, otherwise referred to as a "litigation investment company,"[29] "medical factoring company,"[30] or "medical receivable factoring company,"[31] is a non-party that enters into an arrangement with an injured party's medical providers to finance medical treatment and litigation.[32] Unlike traditional factoring companies, medical funding companies agree *in advance* to fund treatment in exchange for an assignment of the bill. They are not simply purchasing receivables. A funding company may enter into an agreement with plaintiff's medical providers with or without plaintiff being a party to the transaction.[33] Funding companies do not collect premiums from the plaintiff and receive no payment of any kind until after the conclusion of the claim through settlement or litigation.[34] If a settlement is reached or a judgment for the plaintiff is entered, the funding company may then receive up to the full amount of the medical bills owed by the injured party.

This process enables medical providers to shift the risk of collection onto funding companies while also receiving immediate cash for services rendered. Theoretically, medical providers discount the plaintiff's bills to compensate the funding company for the time value of money and the risk of collection. The funding company analyzes its investment by weighing whether a settlement will be reached or a judgment entered in favor of the plaintiff to cover enough of plaintiff's medical bills to enable them to earn an acceptable return.

It is interesting to note that the plaintiff may not be a party to the transaction and could be negatively impacted by the purchase of discounted medical bills in that the funding company will have no incentive to accept the same amount or a lesser amount than the provider agreed to accept in payment from the funding company. On the other side, the transaction has removed a potential conflict of interest of the provider in giving testimony because her payment is no longer contingent upon the outcome of the case. That is, unless the medical provider has an interest in the repeat business of the funding company or is considered a "panel" physician for funding company.

Other than noting that funding companies are "not in the nature of the traditional collateral source,"[35] Georgia courts have not delineated the differences between a

funding company and other collateral sources in regards to the collateral source rule.

However, at least one court in Georgia has already signaled a willingness to allow evidence of payments made by medical funding companies at trial for impeachment purposes or to establish the reasonable value of services despite the collateral source rule. As more of the state's courts are faced with this fairly novel issue, the tide should turn in favor of widespread admission of evidence of such payments.

In Georgia, the landmark decision concerning the admissibility of payments by medical funding companies came in an order issued by Judge Thomas W. Thrash, Jr. for the Northern District of Georgia in *Houston v. Publix Supermarkets, Inc.*[36] In *Houston*, the evidence showed that a medical funding company, ML Healthcare Services, LLC, had referred the plaintiff to two of her expert witness healthcare providers in a slip and fall case. In response, the defendant argued that the expert physicians' opinions as to causation of the plaintiff's injuries were affected by the doctors' desire to continue receiving similar referrals.[37] In his order, Judge Thrash observed that evidence of funding company payments was not being entered to mitigate the defendant's liability under the collateral source rule. Therefore, the judge held that evidence of the relationship between the funding company and the plaintiff's physicians was admissible to (1) attack the plaintiff's causation experts' credibility and (2) determine the reasonable value of the medical services provided to the plaintiff.[38]

Moreover, in finding that the evidence of medical funding company payments was admissible, Judge Thrash specifically noted that the funding company "is not in the nature of a traditional collateral source."[39] For example, although a plaintiff would pay a premium to an insurance company *prior* to litigation, a funding company only serves as an investor that receives its payments from plaintiff *after* the conclusion of the lawsuit.[40] Further, the defense was not seeking to offer evidence of the funding company's relationship with the plaintiff and her physicians to mitigate its liability, which the collateral source rule is intended to prevent. Instead, the evidence was being offered for the purposes of impeaching the plaintiff's causation witnesses and the reasonable value of the medical services received.[41] Therefore, the medical funding company evidence in *Houston* did not fall within the bounds of the collateral source rule.

Although few courts have specifically addressed the admissibility of funding company payments, another court in this state

has considered whether such payments are at least discoverable. In *Bowden v. The Medical Center*,[42] the Supreme Court of Georgia also addressed a discovery dispute where the reasonableness of the plaintiff's medical charges was at stake. The plaintiff in *Bowden* sought to avoid having to pay off a hospital lien in a personal injury case as part of a settlement. Consequently, the uninsured plaintiff argued that the hospital's charges were unreasonable when compared to similar charges for an insured patient.[43] The Supreme Court of Georgia held that the injured motorist was allowed access to the hospital's billing schedules in discovery since these documents were relevant to the reasonableness of the charges under O.C.G.A. § 9-11-26(b)(1).[44]

Courts from other jurisdictions have also recognized the importance of accessing funding company payments in discovery. For example, the Western District of Texas faced this issue in *Galaviz v. C.R. England Inc.*[45] In *Galaviz*, the court held that a discovery request regarding payments from Key Health to the plaintiff's healthcare providers was relevant to a determination of whether the amounts paid for healthcare services were reasonable and necessary regarding the plaintiff's claimed damages.[46] Interestingly, the plaintiff and Key Health also objected to the discovery requests on the basis that the information sought would reveal privileged or proprietary material.[47] However, the court there noted that the parties had entered into a confidentiality agreement which provided sufficient protections to Key Health's proprietary interests.[48] Therefore, defense counsel in Georgia could likewise enter into similar confidentiality agreements to ensure enough protection is in place to allow funding company information to be held discoverable and, possibly, admissible at trial.

Similarly, the California Court of Appeal held that funding company information was discoverable in an unpublished opinion in *Dodd v. Cruz*.[49] In *Dodd*, the plaintiff's attorney was also the president of the involved funding company, and the funding company's vice-president was the brother of a partner at the plaintiff's surgery provider.[50] When defense counsel sought certain documents regarding the funding company's payments on "lien contracts," the funding company filed a motion to quash on the basis that the requested documents were confidential, proprietary, and irrelevant.[51] Noting the broad scope of California's Civil Discovery Act, which is in line with Georgia's Civil Practice Act, the court in *Dodd* held that the documents were discoverable since they

showed what the funding company believed to be the reasonable value of the services it paid for, apart from its calculation of the expense and risk of the debt collection. This would be evidence of the reasonable value of the surgery provider's services.[52] In addition, the requested documents showed discoverable information regarding the amount of medical expenses the plaintiff actually incurred.[53] While the *Dodd* court noted that its decision did not go so far as to address the admissibility of the evidence, the court observed that nothing in its opinion prevented the plaintiff from arguing and admitting evidence showing that the funding company's payments for its liens were *less* than the reasonable value of the healthcare provider's fees.[54] This point suggested a counterbalance that defense counsel could possibly use to establish fairness in seeking to have the requested documents later admitted at trial.

Ultimately, while several courts in Georgia and other jurisdictions have held that evidence of medical funding company payments is at least discoverable, few courts have yet to opine whether this evidence is *admissible*. Based on Judge Thrash's recent order in *Houston* and the Supreme Court of Georgia's holding in *Bowden*, the trend appears to favor admissibility in Georgia.

When dealing with such evidence, the key for defense counsel is to know what to ask for in discovery and how to ask for it. For example, in *Galaviz*, defense counsel sought documents showing "the amounts initially charged by the medical/healthcare provider, the amounts paid by Key Health to the medical/healthcare provider, and the amounts not being requested by Key Health after the purchase of the medical/healthcare provider's accounts receivable."[55] Similar discovery requests under Georgia's Civil Practice Act should elicit the information necessary to hopefully impeach a plaintiff's causation expert at trial or challenge the reasonableness of the plaintiff's medical expenses.

VI. A PROPOSED LEGISLATIVE SOLUTION

As with many issues currently facing Georgia's legal system, the clearest solution may come from our General Assembly. While there is some law on point in Georgia, the current law does not go far enough to adequately address the challenges posed by funding companies. O.C.G.A. § 33-24-53, Georgia's "Runner Statute," may take into account the attorney/funding company relationship insofar as attorneys and funding companies reap benefits from the funding company's involvement in the case.

However, the violation penalties may not pose any deterrence as the first offense constitutes a misdemeanor, with possible $1,000 fines, and any subsequent violations a felony, with a fine no greater than $100,000. [56] The legislature could strengthen the statute by mandating disclosure of the amount paid to the healthcare provider in contrast to the amount actually billed.

To more definitively clarify the status of payments from funding companies, Georgia's legislature could regulate the industry from the standpoint of plaintiffs as consumers. For example, other states require that funding companies contract directly with plaintiffs rather than working indirectly through attorneys or healthcare providers. States such as Tennessee, Oklahoma, Maine, Nebraska, and Ohio have statutes that mandate that that the contract between plaintiffs and funding providers be well defined. Part of what provides for that delineation are the following requirements: required disclosures, fee limitations, and certain safeguards.

While most of the statutes have requirements governing the funding contract language's readability and transparency, these states require disclosure of material terms. For example, Maine and Nebraska require that every agreement must contain the total amount received, itemization of all fees, the annual interest rate, the frequency at which that interest rate is compounded, and finally the total repayment amount in six (6) month increments.[57] Oklahoma mandates that each agreement contain a provision that the funding provider will only be repaid through proceeds of the legal claim.[58] If there are no available funds, then the plaintiff owes nothing to the funding provider unless that person violated a material portion of the agreement. Such a provision would disincentive players from boosting a claim's apparent face-value with costly procedures that may not be medically necessary.

In terms of the fee limitations imposed on the funding agreements, some states book-end the length of time which a funding company may assess fees. In Nebraska, a funding provider may not assess fees for any period exceeding three years and those fees may only be compounded semiannually. [59] Tennessee provides that plaintiffs/consumers will not pay an annual fee of more than ten 10% of the original principal amount borrowed and that the term will be no longer than three years.[60] Maine requires that the funding company must register with the state every two years in order to even conduct business. [61] These requirements highlight the extent to which the

funding company possesses a financial interest rather than being what has been typically construed as a collateral source (i.e., insurance).

States also build in safe-guards as an immediate prophylactic. Nebraska requires that the funding company cannot pay or accept commission or referral fees to/from anyone involved in the cause of action (i.e., attorneys, doctors, chiropractors, physical therapists, etc).[62] Oklahoma and Tennessee additionally provide that the funding company cannot make referrals to a specific law firm, medical provider, or chiropractor.[63] In a further move by Oklahoma, a funding company cannot provide funds to a plaintiff who has other outstanding funding agreements.[64]

While disclosing the materials terms of the funding agreement seems to be basic contract law, requiring the explicit disclosure of those terms not only educates potential plaintiff consumers about their choices but may also make them reconsider what they sign. By controlling the extent to which fees may be accrued and added to the principal, states can control potential personal financial exposure and prevent run-away loans from dominating the potential outcome of a claim. Such procedures should return funding companies to the position of only offering financial resources to aid plaintiffs in undergoing procedures that are actually needed and not just prescribed.

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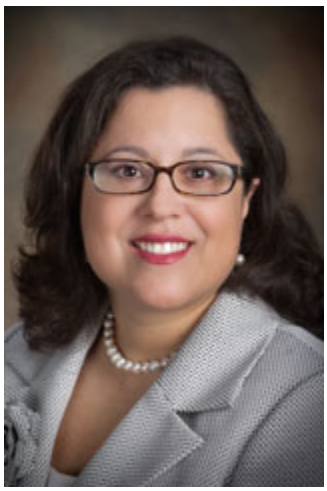
1 *Hoeflick v. Bradley*, 282 Ga. App. 123, 124, 637 S.E.2d 832, 833 (2006).
2 74 Ga. 857 (1885).
3 *Western and Atlantic Railroad v. Meigs*,74 Ga. 857, 868 (1885).
4 *Amalgamated Transit Union Local 1324 v. Roberts*, 263 Ga. 405, 406, 434 S.E.2d 450, 451 (1993).
5 *Id.*
6 *Id.*
7 *Hoeflick v. Bradley*, 282 Ga. App. 123, 124, 637 S.E.2d 832, 833 (2006).
8 *Olariu v. Marrero*, 248 Ga. App. 824, 825, 549 S.E.2d 121, 122-23 (2001) and *Hammond v. Lee*, 244 Ga. App. 865, 868 (2000).
9 *Bennett v. Haley*, 132 Ga. App. 512, 523, 208 S.E.2d 302, 310 (1974) *citing* 22 Am.Jur.2d 286, 287, Damages s 206.
10 *Hoeflick v. Bradley*, 282 Ga. App. 123, 124, 637 S.E.2d 832, 833 (2006) and *Bennett v. Haley*, 132 Ga. App. 512, 523, 208 S.E.2d 302, 310 (1974).
11 *Id.*
12 *Id.*
13 *Id.* at 123-24.
14 *Id.*
15 *Id.*
16 *Doyle v. Liberty Mut. Ins. Co.*, 160 Ga. App. 138, 286 S.E.2d 475, 476 (1981).
17 *Id.*
18 *Amalgamated Transit Union Local 1324 v. Roberts*, 263 Ga. 405, 408, 434 S.E.2d 450, 452 (1993).
19 *Id.*
20 *Id.*
21 Warren v. Ballard, 266 Ga. 408 (1996).
22 *Matheson v. Stilkenboom*, 251 Ga. App. 693, 696 (2001).
23 *Id.*
24 *Kelley v. Purcell*, 301 Ga. App. 88, 90 (2009).
25 *Warren v. Ballard*, 266 Ga. 408, 409 (1996).
26 *Id.*
27 *Id.*
28 *Id.* at 408, 411.
29 *Houston v. Publix Supermarkets, Inc.*, NO.1:13-CV206-TWT.
30 *Galaviz v. C.R. England Inc.,* 2012 WL 1313301 (W.D. Tex.).
31 *Hinojosa v. Chowning*, 2011 WL 2173638 (W.D. Tex).
32 *Houston v. Publix Supermarkets, Inc.*, No. 1:13-CV-206-TWT.
33 *Hinojosa v. Chowning*, 2011 WL 2173638 (W.D. Tex).

[34] *Houston v. Publix Supermarkets, Inc.*, No. 1:13-CV-206-TWT.
[35] *Id.*
[36] No. 1:13–CV–206–TWT, 2015 WL 4581541, at *1 (N.D. Ga. July 29, 2015).
[37] *Id.*
[38] *Id.*
[39] *Id.*, at *2.
[40] *Id.*
[41] *Id.*
[42] 297 Ga. 285 (2015).
[43] *Id.*
[44] *Id.* at 296.
[45] No. A–12–MC–82 LY, 2012 WL 1313301, at *1 (W.D. Tex. Apr. 17, 2012).
[46] *Id.*, at *3.
[47] *Id.*
[48] *Id.*
[49] 167 Cal. Rptr. 3d 601 (Ct. App. 2014).
[50] *Id.* at 604.
[51] *Id.*
[52] *Id.* at 607-08.
[53] *Id.* at 608.
[54] *Id.*
[55] *Galaviz*, *supra* note 46, at *1.
[56] O.C.G.A. § 33-24-53.
[57] ME. REV. STAT. TIT. 9-A, § 12-104; NEB. REV. STAT. ANN. § 25-3303.
[58] OKLA. STAT. ANN. TIT. 14A, § 3-807.
[59] NEB. REV. STAT. ANN. § 25-3305.
[60] TENN. CODE ANN. § 47-16-110.
[61] ME. REV. STAT. TIT. 9-A, § 12-106.
[62] NEB. REV. STAT. ANN. § 25-3304.
[63] OKLA. STAT. ANN. TIT. 14A, § 3-814; TENN. CODE ANN. § 47-16-105
[64] OKLA. STAT. ANN. TIT. 14A, § 3-814.

SPOLIATION: IS FORESIGHT THE NEW TRIGGER TO PRESERVE EVIDENCE?

By Sandra Vinueza Foster



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I. INTRODUCTION

Spoliation refers to the destruction or failure to preserve evidence that is necessary to contemplated or pending litigation. A finding of spoliation may give rise to the rebuttable presumption that the evidence would have been harmful to the spoliator.[1] As a remedy for spoliation, the trial court may charge the jury on spoliation, dismiss the case, or prevent that party's expert witnesses from testifying in any respect about the spoliated evidence.[2] However, in order for the injured party to pursue a remedy for spoliation, the spoliating party must have been under a duty to preserve the evidence at issue. Whether the duty to preserve exists is usually the critical inquiry in the spoliation analysis.

II. THE ELIMINATION OF THE "ACTUAL NOTICE" TRIGGER

In the wake of the Georgia Supreme Court's unanimous decision in *Phillips v. Harmon*[3], potential defendants have a much broader duty to preserve potential evidence. While the Supreme Court may have sought to clarify the triggering of a party's duty to preserve, it has actually eliminated the bright line test formerly used to determine when a duty to preserve is triggered. The *Phillips* case overruled a number of Court of Appeals decisions[4] that have suggested that a duty to preserve is triggered by actual or express notice of litigation from the plaintiff. Simply stated, a defendant can now be put on notice in more ways than just receiving express notice from the plaintiff. Potential defendants must now preserve possible evidence before the plaintiff puts them on notice that they are being sued. Circumstances may show that the defendant actually or reasonably should have anticipated litigation, even without notice of a claim being provided by the injured party/plaintiff.

Notice to the defendant can be constructive, and whether a defendant is on notice that litigation may arise can be determined based on circumstances such as

defendant's own response to an incident or the severity of the injury.

Phillips arose from a medical malpractice claim in which an infant suffered injuries from an allegedly negligent delivery. Plaintiffs alleged that defendants acted negligently in monitoring and responding to Phillips' heart decelerations and periods of bradycardia, which are signs of fetal distress. The evidence at issue was paper strips generated by an electronic fetal heart rate monitor. The defendant hospital nurses often took notes on these paper strips, and although these strips were not part of the official record, nurses referred back to the notes to complete the official record. The defendant hospital retained the strips for 30 days post-delivery and, then, routinely destroyed them. The strips at issue were destroyed in accordance with this procedure. The plaintiffs argued these strips contained relevant and critical information and the defendants were on notice of contemplated or pending litigation at the time of the strips' destruction. They requested a jury charge be given indicating the notes contained information harmful to defendants. The trial court declined to give the charge, finding the defendants had "no knowledge or notice of potential litigation," but the trial court allowed the parties to present evidence and argument concerning the notes made on the fetal monitor paper strips, the use of the strips in creating the official medical record, and the destruction of the strips. The jury returned a defense verdict.

On appeal to the Court of Appeals, plaintiffs maintained that it was error to refuse to give their requested charge because defendant hospital's actions after Phillips's birth showed that it was contemplating litigation regarding the delivery at the time it destroyed the records. In support, plaintiffs cited defendant hospital's triggering of its Sentinel Events/Medical Errors/Disclosures policies and procedures immediately after Phillips's birth, and in accordance with such policies, its launching of an internal investigation, which involved questioning of involved personnel, its subsequent notification to its insurance carrier, and its contacting legal counsel shortly thereafter. The Court of Appeals concluded that defendant hospital did not have notice of "pending or contemplated" litigation at the time of its destruction of the paper fetal monitor strips, and consequently, that it was not an abuse of the trial court's discretion to refuse to give Plaintiffs' requested charge on spoliation of evidence. "In so doing, the Court of Appeals cited its own precedent for the proposition that merely launching an internal investigation and taking some steps pursuant to company policies do not, without more, equate to notice that litigation is contemplated or pending, and that the mere fact that someone is injured, without more, is not notice that the injured party is

contemplating litigation sufficient to automatically trigger the rules of spoliation."[5]

The Supreme Court reversed the Court of Appeals. It stated that, "[l[ogically, the duty to preserve relevant evidence must be viewed from the perspective of the party with control of the evidence and is triggered not only when litigation is pending but when it is reasonably foreseeable to that party."[6] The Court further stated "the duty arises when [the alleged spoliator] knows or reasonably should know that the injured party, the plaintiff, is in fact contemplating litigation, which the cases often refer to in terms of 'notice' to the defendant."[7] The court emphasized that, not only are the plaintiff's actions relevant, but the defendant's actions are relevant in demonstrating whether defendant possessed constructive knowledge of contemplated or pending litigation. The Court then described circumstances relevant to determining whether litigation was reasonably foreseeable to the defendant, such as:

- The type and extent of the injury
- The extent to which fault for the injury is clear
- The potential financial exposure if faced with a finding of liability
- The relationship and course of conduct between the parties, including past litigation or threatened litigation
- The frequency with which litigation occurs in similar circumstances

The Court also held that it may be appropriate to consider, in determining whether the defendant actually did or reasonably should have foreseen litigation by the plaintiff, not only what the plaintiff did or did not do after the injury and before the evidence in question was lost or destroyed, but also what the defendant did or did not do in response to the injury. These factors can include the following:

- the initiation and extent of any internal investigation
- the reasons for any notification of counsel and insurers
- any expression by the defendant that it was acting in anticipation of litigation."[8]

The Supreme Court found that, while the defendant in the *Phillips* case indisputably did not have actual notice that litigation was contemplated or pending, "the defendant actually or reasonably should have anticipated litigation." Therefore, a duty to preserve existed

and, correspondingly, the spoliation jury charge requested by plaintiffs should have been given.

While the Supreme Court's decision may have broadened the duty to preserve evidence, the Court did make clear, albeit in a footnote, that not every accident or injury triggers a duty to preserve evidence. "The defendant's duty also does not arise *merely* because the defendant investigated the incident, because there may be many reasons to investigate incidents causing injuries, from simple curiosity to quality assurance to preparation for possible litigation."[9]

The Supreme Court also cautioned that an "adverse inference jury instruction is to be given as a remedy for spoliation of evidence 'only in exceptional cases,' that 'the greatest caution must be exercised in its application,' and that '[e]ach case must stand upon its own particular facts.'"[10] Further, the Supreme Court stated that the trial court should consider both prejudice to the party seeking the jury charge and whether the party who allegedly destroyed evidence acted in good or bad faith.[11] "The good or bad faith of the party is a relevant consideration because one of the rationales for the presumption is that it deter[s] parties from pretrial spoliation of evidence and serves as a penalty, placing the risk of an erroneous judgment on the party that *wrongfully* created the risk. But, [a] party should only be penalized for destroying the documents if it was wrong to do so."[12]

The Supreme Court specifically approved of the Court of Appeals decision in *AMLI Residential Properties, Inc. v. Georgia Power Co*[13]*.,* which cited five factors that a trial court should weigh before exercising its discretion to impose sanctions for spoliation: (1) whether the party seeking sanctions was prejudiced[14] as a result of the destroyed evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the destroying party acted in good or bad faith; and (5) the potential for abuse if any expert testimony about the destroyed evidence was not excluded[15].

III. MITIGATION OF RISK; THE NEED FOR FORESIGHT

To mitigate the risk of spoliation motions, potential defendants will need to examine existing document retention policies or to develop new policies to determine when and what to preserve. A retention policy needs to address the types of documents and electronically stored information to be covered by the policy and the location for the storage of the documents to be preserved. An effective policy should include a process whereby accidents are proactively evaluated. At a minimum, the Court's five factors must be analyzed to determine whether a duty to

preserve is triggered. Any retention policy must also comply with any statutory, regulatory, or contractual obligations that may apply. If the duty to preserve is even arguably triggered, relevant documents and electronically stored information must be carefully preserved. Potential defendants may need to designate a person to be a contact in the event of employee questions and to be responsible for implementing and enforcing the policy. Retention policies should achieve the goal of mitigating risk without over-preserving documents. In light of the *Phillips* decision, a failure to preserve has a greater probability of adversely impacting an otherwise very defensible case.

The *Phillips* decision will no doubt have significant consequences in many types of cases. We can expect that plaintiffs will become more aggressive in discovery. Plaintiffs will want to conduct discovery to learn what the defendant did or did not do in response to the accident/injury in question, including the initiation and extent of any internal investigation and whether, when, and why the defendant notified defense counsel and insurers of the accident. Plaintiffs may inquire about any expression by the defendant that it was acting in anticipation of litigation. Should the defendant raise objections to any discovery requests based on the fact that a document was prepared "in anticipation of litigation," that objection would be inconsistent with defendant's claim that it was not on constructive notice of potential litigation. Before claiming pre-litigation work product, defense counsel should first ascertain that no documentary evidence which a court may later find to be "necessary" has been destroyed subsequent to the time when it is claimed that litigation was anticipated.

Defendants can also expect to see more requests for charges on spoliation. Should spoliation be an issue, a motion in limine to exclude evidence or argument regarding spoliation should be filed[16].

The Court's ruling has likely created uncertainty where there was previously a bright line. The circumstances of the incident and the defendant's response to the incident may be sufficient to trigger a duty to preserve even if the plaintiff has not given notice of any kind. Actual or express notice of a claim from a potential plaintiff is no longer necessary.

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[1] The spoliation statute is at O.C.G.A. § 24-14-22, which provides as follows: "If a party has evidence in such party's power and within such party's reach by which he or she may repel a claim or charge against him or her but omits to produce it or if such party has more certain and satisfactory evidence in his or her power but relies on that which is of a weaker and inferior nature, a presumption arises that the charge or claim against such party is well founded; but this presumption may be rebutted."

[2] *AMLI Residential Properties, Inc. v. Georgia Power Co.,* 293 Ga. App. 358, 361, 667 S.E.2d 150, 154 (2008).

[3] *Phillips v. Harmon*, 297 Ga. 386, 774 S.E.2d 596 (2015).

[4] Court of Appeals decisions prior to *Phillips* must now be considered cautiously. Noting the list of cases was not

exhaustive, the Supreme Court in *Phillips* specifically disapproved of the following Court of Appeals cases as taking too limited a view of contemplated litigation: *Hand v. South Georgia Urology Center, P.C.,* 332 Ga. App. at 155(2), 769 S.E.2d 814, 820(2); *Whitfield v. Tequila Mexican Restaurant No. 1*, 323 Ga. App. 801, 748 S.E.2d 281; *Clayton County v. Austin–Powell*, 321 Ga. App. 12, 740 S.E.2d 831; *Powers v. Southern Family Markets of Eastman, LLC*, 320 Ga. App. 478, 740 S.E.2d 214; *Flores v. Exprezit! Stores 98–Georgia*, *LLC*, 314 Ga. App. 570, 724 S.E.2d 870; *Paggett v. Kroger Co.*, 311 Ga. App. 690, 716 S.E.2d 792; and *Craig v. Bailey Bros. Realty*, 304 Ga. App. 794, 697 S.E.2d 888 (2010).

[5] *Phillips v. Harmon*, 297 Ga. 386 at 395-96.

[6] *Id.* at 396.

[7] *Id.*

[8] *Id.* at 397.

[9] *Id.* at 397, footnote 9 (emphasis in original).

[10] *Id.* at 398.

[11] *Id.*

[12] *Id.* at 398-399 (emphasis in original).

[13] *AMLI Residential Properties, Inc. v. Georgia Power Co.,* 293 Ga. App. 358, 667 S.E.2d 150 (2008).

[14] *See* also *Wilson v. Mountain Valley Cmty. Bank, 328 Ga. App. 650, 652 (2014), reconsideration denied* (July 30, 2014), *cert. denied* (Feb. 2, 2015)(Even if evidence was wrongfully destroyed, the injured party still must show prejudice).

[15] *See* also *Piedmont Newnan Hosp., Inc. v. Barbour,* 333 Ga. App. 620, 774 S.E.2d 822 (2015), *reconsideration denied* (July 30, 2015), *cert. denied* (Oct. 19, 2015).

[16] The United States District Court for the Middle District of Georgia, Macon Division, recently granted a defense motion in limine to exclude evidence or argument regarding plaintiff's spoliation claim. There, the court found that the failure to preserve was not done in bad faith but was deleted pursuant to routine procedure. Even if the routine procedure amounted to more than just mere negligence, the court found that any claimed prejudice to the plaintiff was speculative. *See West v. Sheriff Cullen Talton, et al*, No. 5:13-cv-338.

THE AFFORDABLE CARE ACT: DEFENDING DAMAGES WITHOUT OFFENDING THE COLLATERAL SOURCE RULE

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I. THE AFFORDABLE CARE ACT

The Affordable Care Act (ACA), commonly referred to as "ObamaCare" by many of its conservative opponents, and by the President of the United States himself[1], refers to the "universal healthcare plan" which was signed into law by President Obama on March 23, 2010[2]. The ACA was an attempt to provide all American citizens, regardless of income, employment, or preexisting medical conditions, with access to quality, affordable health insurance. It is regarded as the most significant change in U.S. healthcare regulation since the passage of Medicare and Medicaid in 1965. Although its constitutionality has been challenged on two occasions, the Supreme Court of the United States has upheld most aspects of the ACA in two separate decisions.[3] Given those recent decisions, and the apparent public support for the law since its enactment[4], it is reasonable to assume that the ACA, or at least a large portion of the coverage and requirements implemented thereby, will remain in effect for the expected future.[5] This article is a general discussion regarding the key aspects of the ACA, how defense attorneys across the country are utilizing the mandates of the ACA to bolster or even change how future medical expenses in catastrophic injury cases are defended, and how Georgia defense lawyers may be able to shape future decisions within our state.

A. What the ACA Does/Does Not Cover

In order to appropriately utilize the Affordable Care Act as a defense, it is important to understand what medical care it does and does not cover, since each personal injury case will involve specific treatment, and life care plans will provide a spreadsheet of expected future care and expenses. The ACA ensures that private healthcare plans and government subsidized healthcare plans, available in individual and small group markets, offer a comprehensive package of specific care and services, which are referred to as "essential health benefits."[6] These "essential health benefits" are the first area of the ACA which is important to this analysis. Essential health

benefits must include healthcare and services within at least the following ten (10) categories:

1. Ambulatory patient services;
2. Emergency services;
3. Hospitalization;
4. Maternity and newborn care;
5. Mental health and substance use disorder services, including behavioral health treatment;
6. Prescription drugs;
7. Rehabilitative and habilitative services and devices;
8. Laboratory services;
9. Preventive and wellness services and chronic disease management, and
10. Pediatric services, including oral and vision care.[7]

Although some of the categories listed above are not necessarily crucial when considering potential damages in a personal injury suit, benefits such as ambulance services, emergency services, hospitalization, prescription drugs, and rehabilitation services (physical therapy) cover a large portion of the projected future medical expenses in many of today's life care plans. Moreover, as part of the "habilitative services and devices" category, ACA approved plans cover durable medical equipment and prostheses (to the extent such are medically necessary), and the category of "hospitalizations" includes those for surgery and other typically high-cost procedures. Out-patient surgery is also covered.

On the other hand, the ACA does not typically cover other items which are often included within life care plans for catastrophic or debilitating injuries. For example, ACA approved plans do not cover personal attendant care (in-home care) or long term facility care (nursing homes).[8] Moreover, items like housing or vehicle modifications – often a large expense category of many life care plans - are not covered under the ACA. Finally, although physical therapy, occupational therapy, and durable medical equipment are typically covered, many ACA plans will have annual limitations on the available coverage.

B. The Individual Mandate

When considering the use of the ACA as a defense to inflated medical expenses, a key portion of the Act is the individual mandate which requires all individuals who are not otherwise insured by an employer-sponsored health plan, Medicaid, Medicare, or other public insurance program, to enroll in a private insurance plan which is approved by the ACA.[9] The individual mandate component of the ACA went into effect on January 1, 2014, and enforces a tax penalty on any uninsured

individual after that date who is not otherwise exempt from the requirement due to financial hardship or religious beliefs[10]. Moreover, the ACA provides for government subsidies for low-income individuals or families who may not otherwise be able to afford coverage.[11] Although there is also an employer mandate as part of the ACA, it is not important to this discussion.[12] As will be addressed in more detail below, the individual mandate should completely eliminate one of the foundations utilized by state legislatures and courts to justify the exclusion of evidence of health insurance in personal injury cases.

C. Guaranteed Issue

Another important component of the Affordable Care Act is its elimination of the right of insurance companies to discriminate among policyholders or applicants based upon their pre-application health.[13] "Guaranteed issue" means that insurance carriers must offer policies to any eligible applicant without regard to health status. Under the ACA, health insurers are not permitted to refuse insurance access to individuals based on pre-existing conditions, and must also offer the same premium price to all applicants of the same age and geographical location, without consideration of gender or health.[14] Additionally, insurers cannot cancel or discontinue coverage for reasons relating to the individual's health.[15] As it pertains to personal injury cases, the ACA would now permit an injured claimant to obtain health insurance to cover future medical expenses, even if the claimant was not enrolled in any insurance program at the time of the subject incident.

D. Out-of-Pocket Costs and Annual/Lifetime Limits

Without considering the actual cost of premiums for the insurance, as of today's date, the maximum out-of-pocket cost for an individual in 2016 is $6,850 per year.[16] For families insured under the same plan, the annual out-of-pocket cost is $13,700.[17] Prior to reaching the maximum out-of-pocket limit, the percentage of healthcare costs paid by the individual versus the insurer vary based on the type of plan chosen and the premiums associated therewith.[18] However, under any plan, once an individual has paid $6,850 for covered medical care in the annual policy period, the ACA requires the qualifying insurer to pay 100% of all other covered treatment for the remainder of that particular policy period. For an individual requiring constant care whose expenses far exceed that number on an annual basis, this provides a significant reduction in actual costs. Moreover, qualified insurers under the ACA are not permitted to set either annual or lifetime limits on the amount of benefits paid to any policyholder.[19]

II. THE AFFORDABLE CARE ACT V. COLLATERAL SOURCE ARGUMENTS FOR ADMISIBILITY AND USE

As all defense counsel know, the existence of private or public insurance, or the fact that any third-party has assumed, paid, or agreed to pay any expenses incurred by an injured claimant is inadmissible evidence in Georgia pursuant to the long standing collateral source doctrine.[20] The rule provides as follows:

> The common law rule in Georgia bars the defendant from presenting any evidence as to payments of medical, hospital, disability income, or other expenses of a tortious injury paid for by a plaintiff, governmental entity, or third party and taking credit towards the defendant's liability in damages for such payments, because a tortfeasor is not allowed to benefit by its wrongful conduct or mitigate its liability by collateral sources provided by others.[21]

Georgia courts have adhered to the idea that the admission of evidence of collateral source payments is inherently prejudicial because its "infectious nature" tends to contaminate the entire trial.[22] The collateral source rule has been applied to prohibit the introduction of items like continued wages, workers' compensation benefits, life insurance, an employer's voluntary payment of medical bills and money to live on, payments by relatives, nursing care furnished by relatives, room and board furnished by relatives, retirement benefits, and various other sources of assistance.[23]

However, the suitability of the collateral source doctrine has been challenged in the past. In 1987, the Georgia legislature enacted O.C.G.A. § 51-12-1(b) in an apparent attempt to abolish the common law collateral source rule.[24] O.C.G.A. § 51-12-1(b) provided as follows:

> In any civil action, whether in tort or in contract, for the recovery of damages arising from a tortious injury in which special damages are sought to be recovered or evidence of same is otherwise introduced by the plaintiff, evidence of all compensation, indemnity, insurance (other than life insurance), wage loss replacement, income replacement, or disability benefits or payments available to the injured party from any and all governmental or private sources and the cost of providing and the extent of such available benefits or payments shall be admissible for consideration by the trier of fact. The trier of fact, in its discretion, may consider such available benefits or payments and the cost thereof but shall not be directed to reduce an award of damages accordingly.[25]

This statute permitted evidence of collateral sources at trial, but prohibited any instruction to the jury that any recoverable damages must, or should, be reduced as a result thereof.[26] However, the statute plainly permitted such a reduction based on the discretion of the trier of

fact, and as a result, worked a significant substantive change of Georgia law.[27] If a lawyer did not start to practice until sometime after 1987, he or she probably did not even know this statute existed. The reason being, of course, that the Supreme Court of Georgia in *Denton v. Con-Way S. Exp., Inc.,* declared the statute to be unconstitutional less than four (4) years after it went into effect, making its impact rather brief.[28] The Supreme Court's decision provided, in relevant part, as follows:

> Our courts have consistently held that neither the wealth of the plaintiff nor the defendant is relevant. … Because of its irrelevance and prejudicial value, our courts have also held that a litigant's insurance policy is not only inadmissible, it can be the ground for a mistrial. … Such evidence is highly prejudicial and it can influence the entire case, no matter which side attempts to introduce it. … Evidence of collateral benefits is readily subject to misuse by a jury. It has long been recognized that evidence showing the defendant is insured creates a substantial likelihood of misuse. Similarly, we must recognize that petitioner's receipt of collateral social insurance benefits involves a substantial likelihood of prejudicial impact.[29]

The Supreme Court went on to state that permitting the introduction of such evidence against the plaintiff "could defeat the plaintiff's statutory right to recover the damages that result from another's tortious acts, O.C.G.A. §§ 51–1–6 and 51–1–9, and also defeat the 'prophylactic' factor of preventing future harm."[30] The Court further confirmed, in congruence with various other Georgia decisions, that the fact that plaintiffs may receive a windfall from exclusion of such evidence is not a persuasive argument where the alternative is that the tortfeasor is "relieved of full responsibility for his wrongdoing."[31]

A. How the Affordable Care Act is Different

Although there are still no Georgia appellate decisions which have addressed the impact of the ACA on the admission of evidence of insurance, there are decisions, currently pending cases, and appellate rulings in other jurisdictions which suggest that the significant, substantive changes provided by the ACA may result in similar significant, substantive changes in Georgia evidentiary doctrine. Before addressing those decisions, however, it is important to understand how the ACA alters traditional legal analysis regarding "collateral sources."

First, some of the underlying concerns about the admission of insurance evidence to combat damages are entirely abolished by the ACA. With a federal mandate in place requiring each and every individual to obtain a policy of insurance, there is, in theory, no longer a

question as to whether a particular claimant will have such insurance. Prior to the ACA, it was unreasonable to assume that any particular claimant would have health insurance or the ability to obtain it, since access to health insurance depended on the claimant's employment, pre-existing conditions, financial stability, and countless other factors. However, the individual mandate imposed by the ACA requires all individuals to obtain health insurance in one form or another, whether through an employer, a private plan, or a government program.[32] In just five (5) years since its enactment, the percentage of individuals with health insurance has increased dramatically; the Department of Health and Human Services indicates that 16.4 million previously uninsured persons have gained some form of health coverage since 2010.[33]

While it is certainly possible for a person to avoid purchasing insurance and opt instead to pay the penalty, the individual mandate should result in the assumption in today's culture that any particular claimant *does* have insurance, rather than the opposite. This is especially true since "guaranteed issue" also requires private insurers to offer insurance to <u>all</u> applicants, regardless of pre-existing conditions, gender, or age, and they must do so at a competitive, unvaried rate which is also subsidized by the federal government for persons below the poverty line.[34] Therefore, the concept that a plaintiff should not be punished for his or her *logical* decision to buy insurance, or the similar notion that the potential effect of a reduction of recoverable damages in a personal injury case may discourage a person from buying insurance, are now completely defunct.[35] Likewise, any argument that a claimant may suffer some separate damage by being forced to utilize their own insurance to pay for their treatment (either by the lack of choice of some other deferred compensation by an employer, or as a result of the depletion of the benefits provided) is also outdated and inaccurate.[36] Pursuant to the ACA, most employers are required to provide such insurance and would not be able to offer separate fringe benefits in its place, and even if they could, individuals are required to pay premiums or a comparable tax penalty.[37] Likewise, most insurance benefits provided under the ACA are without lifetime or annual limits, and therefore, cannot be diminished.[38]

Second, the ACA may ensure that a claimant insured under a qualified private plan will receive a windfall as a result of *any* settlement, judgment, or other recovery which utilizes retail medical pricing, or even discounted pricing, in order to calculate future

medical expenses. Georgia courts have stated that "[i]f a windfall must be had, it will inure to the benefit of the injured party rather than relieve the wrongdoer of full responsibility for his wrongdoing."[39] While this language appears to support a windfall to the plaintiff rather than one for the tortfeasor, it implicitly suggests that the Court would not necessarily support the existence of a windfall in *every* case if there was another option. Prior to the ACA, the right of private health insurers to subrogate against a tortfeasor for benefits paid, or to place a lien on amounts recovered by an injured insured, was the natural solution to prevent windfalls to plaintiffs who might otherwise receive double recovery from the tortfeasor and a private insurer. However, the ACA may not allow for the same right of reimbursement to qualified insurers on the private exchange with respect to awards for future medical expenses. Because of the way the insurance exchange is set up, an individual can change insurers on an annual basis, and under the "guaranteed issue" provision of the ACA, private insurers are required to charge the same premiums to every insured, regardless of whether the insured person has obtained a legal award of damages for their future expenses. Therefore, if the right of subrogation were in effect, it cannot belong solely to the insurer under contract at the time of the award, and in theory, should not be applicable to a future insurer, since it could have the effect of charging higher premiums to the injured claimant based on their earlier recovery. It would be difficult, if not impossible, to delineate between future benefits received from an ACA insurer, and the amount of such benefits which are reimbursable from an award or settlement based on potential future expenses. Unlike with ERISA plans, which expressly permit such insurers to bring an action to "enforce any provisions…of the terms of the plan," including claims of reimbursement from litigation or settlements[40], the ACA does not contain any similar subrogation or reimbursement provision.[41]

A remaining justification for the existing collateral source rule is the general aversion among the Courts for allowing a tortfeasor to obtain some mitigation of or reduction in his liability as a result of the injured claimant's contractual agreement with a third-party.[42] Unfortunately, the ACA does not challenge this reasoning directly. However, as will be discussed in further detail below, the ACA can be utilized to support smaller awards, since the logical argument is that a tortfeasor should only be forced to pay those damages which the claimant may actually incur, rather than

imagined or exaggerated damages which do not represent the claimant's true injury.

B. Decisions Addressing the Admissibility of the ACA

Both at the trial court level, and on appeal, various jurisdictions have begun to recognize the potential impact of the ACA, and its relevance and admissibility to reduce or defend against claimed future medical expenses.

An interesting case on this issue comes from the Cuyahoga County Court of Common Pleas in Cleveland, Ohio. The case at issue was *Alijah Jones, et al., v. MetroHealth Medical Center, et al.*, and involved a birth injury.[43] Following a jury trial, the 12-year-old plaintiff and his mother were awarded $14.5 million, with $8 million of the award dedicated to future medical expenses and other related damages. The award was based, at least in part, on a life care plan submitted by the plaintiff during the trial. Defendants moved to reduce the verdict related to future damages based on collateral sources, including Medicare and the ACA. The trial court agreed and stated that since the plaintiff would become Medicare eligible at age 20, and that during the eight years before that time, he would have coverage under the ACA, his future medical expenses for that eight year period would be limited to only $116,000. The trial court figured that amount by calculating eight years of the statutorily defined $8,000 premium and $6,500 annual maximum out-of-pocket expenses. Moreover, because Medicare covers 80% of customary and ordinary care, the trial court reduced the amount awarded to plaintiff for future medical expenses (after age 20) by 80%, and then added the $116,000 the plaintiff would be required to pay during the eight years he would be covered by a policy under the ACA. The total award was reduced to approximately $2.9 million. However, it is important to note that the award reduction was based on an Ohio statutory requirement that any third-party benefits received by a plaintiff be reduced post-judgment when the defendant is a "political subdivision."[44] Therefore, it is more of an example of how such a reduction would work using the ACA than any trend toward a change in law.

Another trial court in Ohio has gone even further, and has permitted defense counsel to reference the ACA to the jury during the presentation of the case, as a method of argument as to the actual recoverable damages. In *Christy v. Humility of Mary Health Partners*, the trial court permitted the defendants to introduce billing records to prove lesser amounts previously accepted by certain providers and to reference the ACA in the same

way, justifying its admission by stating that "it is the law of the land."[45]

Similarly, but with more of a specific emphasis on collateral sources, a trial court in Michigan has recently ruled, on a pre-trial motion filed by the plaintiff, that "health insurance provided under the Affordable Care Act is reasonably likely to continue into the future and that its discussion before the jury is not precluded by the [collateral source statute]."[46] Specifically, the Court permitted defendants to discuss and argue categories of medical care and therapies which are provided by insurance available through the ACA.

California has also addressed the potential application of the ACA to future damages, with the United States District Court for the Central District of California recently providing that "the Affordable Care Act [] ensures that [plaintiff] will have access to insurance covering his future medical care needs as a result of the [alleged incident]."[47] In its decision following a bench trial, the Court in that case reduced the plaintiff's potential damages appropriately, taking the benefits provided by the ACA into account. Interesting to note, the authority relied upon for this reduction was a California statute, Cal. Civ. Code § 3333.1, which permits a defendant, at his election, to introduce evidence of collateral sources in personal negligence claims against a healthcare provider.[48] The statute is very similar to the aforementioned Georgia statute from 1987, which the Georgia Supreme Court determined to be unconstitutional. Moreover, subsection (b) of the California statute prohibits any source of collateral benefits introduced by a defendant from pursuing subrogation against the defendant, or seeking reimbursement from the plaintiff.[49] In that sense, the California statute may provide additional support for the argument that the ACA should be admissible to reduce future damages *because* there is no right of reimbursement against the injured plaintiff.

Another interesting decision from the Supreme Court of Delaware, *Stayton v. Delaware Health Corp.*, has recently addressed the issue of collateral sources.[50] Though it does not analyze the admissibility of the ACA in its decision, it provides an in-depth analysis of the collateral source rule in general and its continued application in similar circumstances. In *Stayton*, the plaintiff's medical bills totaled $3,683,797.11, but were fully satisfied through Medicare, which paid a total of only $262,550.17.[51] Defendants sought to limit the amount of collectable damages to amounts paid by Medicare, arguing that those amounts represented the "reasonable value" of the services provided. In a well-reasoned opinion

analyzing the collateral source rule in detail, the Delaware Supreme Court agreed, and held that the discounted rates or "write-offs" by Medicare did not qualify as collateral sources and the jury should be permitted to hear evidence of the actual rates paid.[52] Most significant, in a concurring opinion, the Chief Judge of the Delaware Supreme Court discussed his concerns regarding whether the collateral source rule should be continued in any form, stating, "the case before us calls into question the wisdom of applying the collateral source rule - itself an exception to the general rule of damages that a plaintiff is entitled to be made whole and nothing more - in its current form, in an era where we are closer to achieving universal healthcare, and where rising healthcare costs are reducing access to care and harming our nation's economic health."[53] In addition to its theoretical insight into the potential movement away from the collateral source rule, it is also one of a host of decisions, many addressed below, analyzing the admission of "actual cost" evidence to combat plaintiffs' evidence of exaggerated billed rates by medical providers.

So far, it appears that the only recent case in Georgia in which any evidence of the ACA has been admitted is *Sodjago v. Pediatrix Medical Group of Georgia*, from the State Court of Fulton County.[54] Although there are few details about the Court's analysis or reasoning, or the arguments raised by counsel on either side, it is understood that the trial judge admitted evidence of the ACA during trial because plaintiff's counsel "opened the door" during direct examination of his life care planner and the discussion of what was provided for under the plan. The case went to verdict and resulted in a $3 million judgment in favor of the plaintiff, despite the life care planner's estimation of future expenses in the amount of $6-15 million.[55] While it is difficult to gauge the effect of this decision without additional context, it does provide some hope that the collateral source rule will not bar admission of the ACA in Georgia in all contexts. The *Sodjago* case was settled post-verdict and therefore not appealed. As such, its apparent admission in that case does not tell us much about its future impact on the collateral source doctrine.

C. Other Avenues for Admissibility in Georgia

With the collateral source rule so obstinately imbedded in Georgia's evidentiary doctrine, it is and will continue to be a challenge to generate persuasive methods for the admission of evidence of the ACA or its potential effect on claimed future medical expenses. Without some change in the current

status of the present rule in Georgia, the ACA is unlikely to form any worthwhile role in defending damages. However, defense attorneys in other states, and in Georgia, have attempted to chip away at the collateral source rule by seeking to admit only evidence of the amounts actually accepted or negotiated by medical providers, rather than evidence that the plaintiff may be entitled to payment of such benefits by another source, such as an insurer. In other words, defendants have sought to admit payment schedules by private insurers, worker's compensation carriers, or Medicaid as evidence of the "reasonable cost" or more accurately, the actual cost, of the treatment plaintiff has undergone or will undergo. This was the method utilized by attorneys in the *Stayton* case, discussed *supra*,[56] and has been utilized effectively in other states as well.[57]

Unfortunately, similar attempts by Georgia attorneys to admit specific evidence of negotiated or discounted insurance rates have so far been unsuccessful. In *Candler v. Dent*, a medical malpractice action from 1997, the plaintiff sought to recover medical expenses which had been incurred while under the care of the defendant hospital, portions of which had been written off by the defendant pursuant to negotiated rates with Medicare.[58] The Court of Appeals ruled that the plaintiff could "prove all damages, argue, itemize on a blackboard, and receive a charge on the recovery of such damages undiminished by any amount written off by the defendant," but it also permitted the defendant to a set-off for all amounts previously written off. It held that a plaintiff can recover from the jury all provable damages, but that plaintiff would not be entitled to a double recovery from the defendant. Given that the defendant was also the party who wrote off the disputed charges, this holding was not in contradiction to the collateral source rule. Attempts to extend this logic to exclude plaintiff's recovery of write-offs by third-party medical providers have been unsuccessful.[59]

With the ACA now in effect, however, these arguments should be more availing, and are likely to be the most effective in advocating for change in the collateral source doctrine in Georgia. Insurance rates, negotiated rates, and discounted rates are the rates regularly accepted by nearly all medical providers, and billed rates do not accurately reflect the "actual" damages incurred. As a result of the ACA, "defendants will rarely, if ever, encounter plaintiffs whose medical bills are paid in full at the billed rate rather than at the lower negotiated rate paid by insurance companies."[60] For that reason, by refusing to permit evidence of these negotiated, discounted rates, a plaintiff will nearly always

receive an inappropriate windfall of damages, and by contrast, a damages calculation based on such rates does not necessarily relieve a tortfeasor of "full responsibility for his wrongdoing."[61] The main reason such evidence may have a chance of being occasionally, if not regularly, admitted is that evidence of negotiated or discounted rates, especially in the context of future damages, can be presented without referencing insurance, the ACA, write-offs, or any other payments by a collateral source. For example, in large damage cases where the life care plan submitted by a plaintiff justifies the extra expense, defense attorneys can hire a medical billing expert (and plenty are already doing this) to testify as to the actual "reasonable cost" of the projected treatment. This includes the expert presenting testimony and evidence of amounts, other than the retail rates, which are typically accepted by local providers for the same treatment. While a medical billing expert will most certainly rely on the negotiated rates by insurers to form his/her opinions, the term "insurance" is not required to be introduced to the jury for the expert testimony to be admissible, and questions which would solicit such a response can be addressed by counsel in pre-trial motions.

Moreover, the expected testimony from a medical billing expert would not be in the form of collateral source payments, but rather would be merely an analysis of reasonable costs as they *may* be paid by collateral sources in the future (which are sure to be available based on the ACA), and which have already been accepted by providers for similar services in the past. This type of evidence is consistent with Georgia law, and should be admissible when introduced correctly. "The law requires proof that the medical expenses arose from the injury sustained, and that they are reasonable and necessary before they are recoverable."[62] In today's society, the billed rates from medical providers bear almost no relationship to the true value of the services provided, and are arguably intentionally inflated by the providers in order to justify a higher discounted rate from the paying insurers.[63] Accordingly, Georgia juries should not be utilizing such rates to determine the true value of a plaintiff's injury. This is especially true now, when the ACA all but ensures that such rates will never be paid.

Many courts around the country have recognized this issue and altered their evidentiary doctrines since the Georgia Court of Appeals made its decision to exclude similar evidence in *Olariu v. Marrero*.[64] Moreover, the Georgia Supreme Court has recently allowed the *discovery* of similar evidence in a hospital lien case, and has ruled that, at least in that

circumstance, "[t]he amounts [the hospital] charged to (and agreed to accept as payment in full from) other patients treated at the same hospital for the same type of care during the same general time frame [as the injured party]" may be relevant to the reasonableness of the charges.[65] Also of note, various Georgia attorneys and firms are currently involved in an appeal to the Eleventh Circuit Court of Appeals regarding the admissibility of evidence that many of a plaintiff's medical bills were paid by a medical funding company at discounted rates.[66] In that matter, counsel for the defendant, Publix, was successful in securing a ruling in the Northern District of Georgia allowing such evidence for the purpose of impeaching the proximate causation opinions of plaintiff's medical providers, and in order to contest the reasonableness of the physicians' charges.[67] Judge Thomas Thrash signed the Order at the district court level, and the parties have just recently briefed the case in the Eleventh Circuit.[68]

Another Georgia case which provides some promise for effecting change to Georgia's collateral source rule is the 2011 decision from the Court of Appeals in *Andrews v. Ford Motor Co.*[69] In *Andrews*, the plaintiff sued Ford to recover for property damage to her vehicles, her home, and her home's contents which resulted from her Ford Expedition spontaneously catching fire in her garage.[70] In discovery, it was revealed that the plaintiff had been compensated for her property losses by her homeowner's policy and automobile insurance policy with State Farm, and State Farm intervened in the case.[71] Ford moved for summary judgment on the theory that the plaintiff was not entitled to recover from Ford those damages for which she has already been compensated by her insurers.[72] Although the trial court, citing the collateral source rule, refused to allow evidence of plaintiff's receipt of compensation from State Farm in front of the jury, it granted Ford's motion for summary judgment, finding that in the event the jury returned a verdict in favor of plaintiff which exceeded the amount she previously received from State Farm, the court would reduce the jury's verdict by the amount of compensation plaintiff previously received.[73] The Court of Appeals thereafter affirmed the trial court's decision, agreeing that the collateral source rule barred Ford from introducing evidence of payments from State Farm, but declining to extend it to prevent a reduction in plaintiff's ultimate recovery.[74] The Court stated: "even when the collateral source rule applies and the court excludes [evidence of insurance payments], the rule does *not* provide that a

plaintiff is entitled to *collect* from both his or her insurer and from the defendant tortfeasor for the same item of damages. Such a double recovery is prohibited under fundamental equitable principles."[75] Although *Andrews* and the cases it relied upon relate specifically to property damage claims only, the same "fundamental equitable principles" are similarly at play in bodily injury cases. This would be particularly true in a case in which an ACA-eligible claimant attempts to recover from a tortfeasor the same future medical expenses to which she is entitled (and statutorily required) to receive lifetime coverage, and for which the ACA has no express right of reimbursement. In that scenario, the collateral source rule should not prevent a defendant tortfeasor from limiting a claimant's recovery to the *actual* damages she will incur, rather than ensuring a double recovery for the same injury. At this time, we are not aware of any past decisions or currently pending cases which address this argument, but it is certainly a practical one to use in future cases when addressing the effect of the ACA on future damages.

III. CONCLUSION

The Affordable Care Act challenges many of the traditional notions which have justified the continued application of the collateral source rule to allow windfall recoveries for injured claimants. It dictates that medical insurance be available and affordable to all individuals, and requires that all individuals purchase insurance or be assessed a penalty. As a result, the suggestion that most claimants do not have insurance is antiquated at best, and even if accurate, it is now a curable circumstance. Equally archaic, given the publicity that the new law has received, is the theory that jurors are not generally aware of the widespread access to such insurance, even in cases where it is never referenced. Additionally, at least with respect to future expenses, ACA-eligible claimants may never have to reimburse their insurers for the double recovery they may obtain from the combination of guaranteed future medical benefits and a judgment against a liable tortfeasor. Given the current law in Georgia, using the Affordable Care Act to reduce or limit an award of future economic damages will be an uphill battle, but there are logical and reasonable arguments to be made that such expenses should be limited to predicted out-of-pocket expenses, premiums, and uncovered care. Alternatively, defendants can argue that an award for medical expenses should be capped at the negotiated, discounted rates paid by insurers and accepted by a

claimant's providers, or at the very least, that defendants should be able to admit those amounts to contest the reasonableness of billed rates. The most difficult task for Georgia defense counsel going forward will be determining in which cases and forums to assert these arguments in order to avoid further unfavorable decisions which may specifically address the ACA. Hopefully such efforts will eventually be fruitful in bringing about much-needed change in Georgia law on this issue.

[1] During the 2012 campaign, President Barack Obama often endorsed the moniker of the law, stating, "I like the name; I do care."

[2] The "Affordable Care Act" is a reference to two separate laws, the "Patient Protection and Affordable Care Act," and the "Health Care and Education Reconciliation Act of 2010."

[3] *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012) (upheld the constitutionality of the ACA's individual mandate as an exercise of Congress's taxing power); *King v. Burwell*, 135 S. Ct. 2480, 192 L. Ed. 2d 483 (2015) (state tax credits under ACA deemed constitutional).

4 Kaiser Health Tracking Poll: April, 2015; http://kff.org/health-reform/poll-finding/kaiser-health-tracking-poll-april-2015/

5http://www.nbcnews.com/storyline/obamacare-deadline/do-not-pub-will-republicans-finally-accept-obamacare-n375581

6 https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/essential-health-benefits12162011a.html

[7] *Id.*; 42 U.S.C. § 18022.

[8] *Id.*; 42 U.S.C. § 18022.

[9] 26 U.S.C. § 5000A; 42 U.S.C. § 18091; *Sebelius*, *supra*, 132 S. Ct. 2566.

[10] 26 U.S.C. § 5000A.

[11] 42 U.S.C. § 18071.

[12] The employer mandate requires employers with more than 50 employees to offer health insurance benefits to at least 95% of its full-time workers and their dependent children, or face a penalty. *See* 26 U.S.C. § 4980H.

[13] 42 U.S.C. §§ 300gg-1, 300gg-3, 300gg-4.

[14] 42 U.S.C. § 300gg.

[15] Health insurers are still permitted to discontinue coverage if the policyholder fails to pay premiums, commits fraud against the insurer, or the insurer stops offering a particular coverage in the geographical area, among other reasons. *See* 42 U.S.C. § 300gg-2.

16 https://www.healthcare.gov/glossary/out-of-pocket-maximum-limit/

[17] *Id.*

18 https://www.healthcare.gov/choose-a-plan/plans-categories/

[19] 42 U.S.C. § 300gg-2.

[20] *Western and Atlantic Railroad v. Meigs*, 74 Ga. 857 (1885); *Candler Hosp., Inc. v. Dent*, 228 Ga. App. 421, 421, 491 S.E.2d 868, 869 (1997).

[21] *Olariu v. Marrero*, 248 Ga. App. 824, 825, 549 S.E.2d 121, 122-23 (2001).

[22] *Collins v. Davis,* 186 Ga. App. 192, 193, 366 S.E.2d 769, 770 (1988).

[23] *Cincinnati, New Orleans & Texas Pac. Ry. Co. v. Hilley*, 121 Ga. App. 196, 202 (fn. 2), 173 S.E.2d 242, 246 (1970).

[24] O.C.G.A. 51-12-1(b).

[25] *Id.* (emphasis added).

[26] *Id.*

[27] *Polito v. Holland*, 258 Ga. 54, 57, 365 S.E.2d 273, 275 (1988).

[28] *Denton v. Con-Way S. Exp., Inc.*, 261 Ga. 41, 43, 402 S.E.2d 269, 270 (1991), disapproved of on other grounds by *Grissom v. Gleason*, 262 Ga. 374, 418 S.E.2d 27 (1992); *Amalgamated Transit Union Local 1324 v. Roberts*, 263 Ga. 405, 406, 434 S.E.2d 450, 451 (1993).

[29] *Denton*, *supra* at 42-43 (internal quotations and citations omitted).

[30] *Id.* at 46 (footnote omitted).

[31] *Id.* at 47, fn. 5.

[32] 26 U.S.C. § 5000A; 42 U.S.C. § 18091; *Sebelius*, *supra*, 132 S. Ct. 2566.

33 http://www.hhs.gov/healthcare/facts-and-features/fact-sheets/aca-is-working/index.html

[34] 42 U.S.C. § 300gg; 42 U.S.C. § 18071.

[35] *See*, e.g., *Bozeman v. State*, 2003-1016 (La. 7/2/04), 879 So. 2d 692, 699 ("if the collateral source rule were not applied, then there would be no reason for an individual to purchase insurance.")

[36] *Id.* (discussing insurance as a fringe benefit, payment of premiums, and diminution of policy benefits as policy reasons supporting the collateral source rule).

[37] 26 U.S.C. § 4980H; 26 U.S.C. § 5000A.
[38] 42 U.S.C. § 300gg-2.
[39] *Broda v. Dzivura*, 286 Ga. 507, 508, 689 S.E.2d 319, 321 (2010).
[40] 29 U.S.C. § 1132(a)(3)
[41] Congdon-Hohman, Joshua; Matheson, Victor A. (2014), Life-care Awards in the Age of the Affordable Care Act. *College of the Holy Cross, Dept. of Economics Faculty Research Series*, *Paper No. 14-06*, p. 7.
[42] *Wardlaw v. Ivey*, 297 Ga. App. 240, 244, 676 S.E.2d 858, 863 (2009).
[43] *Alijah Jones, by and through his Parent and Next Friend, Stephanie Stewart v. MetroHealth Medical Center and Steven Weight, M.D.*, No. CV11-757131, Cuyahoga County Court of Common Pleas, Ohio (April 14, 2015).
[44] Ohio Rev. Code Ann. § 2744.05
[45]*Christy v. Humility of Mary Health Partners*, No. 2013 CV 01598, Trumball County Ohio Court of Common Pleas (May 4, 2015).
[46]*Donaldson v. Advantage Health Physicians PC*, No. 11-69181-NH, Kent County Circuit Court, Michigan (2015).
[47] *Brewington v. United States*, No. CV1307672DMGCWX, 2015 WL 4511296, at *5 (C.D. Cal. July 24, 2015).
[48] Cal. Civ. Code § 3333.1(a).
[49] Cal. Civ. Code § 3333.1(b).
[50] *Stayton v. Delaware Health Corp.*, 117 A.3d 521 (Del. 2015).
[51] *Id.* at 523.
[52] *Id.* at 526-34.
[53] *Id.* at 534-35.
[54] *Sodjago v. Pediatrix Medical Group of Georgia*, No. 12EV015750, State Court of Fulton County, Georgia (2014).
55There were various potential other reasons for a reduction in the verdict, including the mother's pre-admission for fetal distress. *See* Land, Greg, $3M verdict in problem birth. *Fulton County Daily Report.* (September 10, 2014). http://www.popehoward.com/wp-content/uploads/2014/09/PopeandHowardFultonCountyDailyReportReprint9-10-2014.pdf
[56] *Stayton, supra,* 117 A.3d at 526-34.
[57] *See,* e.g.*, Kastick v. U-Haul Co. of W. Michigan*, 292 A.D.2d 797, 798 (2002) (hospital bill write-offs not recoverable, since plaintiff has incurred no liability therefor); *Haygood v. De Escabedo*, 356 S.W.3d 390, 393 (Tex. 2011) ("[f]ew patients today ever pay a hospital's full charges, due to the prevalence of Medicare, Medicaid, HMOs, and private insurers who pay discounted rates."); *Corenbaum v. Lampkin*, 215 Cal. App. 4th 1308, 1327 (2013) ("the collateral source rule is inapplicable to the negotiated rate differential and does not make that amount recoverable as tort damages"); *First Banker's Trust Company v. Memorial Medical Center*, No. 11L184 (7th Judicial Circuit Ill. April 2, 2015) ("Defendants may produce evidence of the [ACA] only as to its effect on the actual reasonable costs of medical services. Defendants may not refer in any manner to the act's effect on out of pocket costs payable by the plaintiff or on insurance coverage that may be available to plaintiff.")
[58] *Dent*, *supra*, 228 Ga. App. at 421.
[59] *See*, e.g., *Olariu v. Marrero*, 248 Ga. App. 824, 825, 549 S.E.2d 121, 123 (2001).
[60] Ann S. Levin, *The Fate of the Collateral Source Rule After Healthcare Reform*, 60 UCLA L. Rev. 736, 742 (2013).
[61] *Denton*, *supra*, 261 Ga. at 47.
[62] *Barnes v. Cornett*, 134 Ga. App. 120, 120-21, 213 S.E.2d 703, 705 (1975) (emphasis added).
[63] "…[T]oday, a hospital's 'list price' or 'rack rate' is almost entirely a fictitious number, the product of many factors unrelated to the cost of the service." *See* James McGrath, *Overcharging the Uninsured in Hospitals: Shifting a Greater Share of Uncompensated Medical Care Costs to the Federal Government*, 26 Quinnipiac L. Rev. 173, 185 (2007); see also Mark A. Hall & Carl E. Schneider, *Patients as Consumers: Courts, Contracts, and the New Medical Marketplace*, 106 Mich. L. Rev. 643, 664-65 (Feb. 2008).
[64] *See,* e.g., cases cited within footnote 57; *Cima v. Sciaretta*, 2011 WL 4509917, at *11 (Conn. Super. Ct. Sept. 14, 2011) aff'd, 140 Conn. App. 167, 58 A.3d 345 (2013); *Goble v. Frohman*, 901 So. 2d 830, 835 (Fla. 2005); *Stanley v. Walker*, 906 N.E.2d 852, 858 (Ind. 2009); *Martinez v. Milburn Enterp., Inc.*, 290 Kan. 572, 575, 233 P.3d 205 (Kan. 2010); *Law v. Griffith*, 457 Mass. 349, 930 N.E.2d 126 (2010); *Swanson v. Brewster*, 784 N.W.2d 264 (Minn. 2010); *Jaques v. Manton*, 125 Ohio St. 3d 342, 928 N.E.2d 434 (2010).
[65] *Bowden v. The Med. Ctr., Inc.*, 297 Ga. 285, 292, 773 S.E.2d 692 (2015).
[66] *Houston v. Publix Supermarkets, Inc.,* No. 1:13-CV-206-TWT, 2015 WL 4581541 (N.D. Ga. July 29, 2015).
[67] *Id.*
[68] *Houston, ML Healthcare Services, LLC v. Publix Supermarkets, Inc.,* Appeal Nos. 15-13851-G, 15-13852-G, 11th Circuit Court of Appeals.
[69] *Andrews v. Ford Motor Co.*, 310 Ga. App. 449, 713 S.E.2d 474 (2011).
[70] *Id.* at 449.
[71] *Id.* at 450.
[72] *Id.* at 449.
[73] *Id.*
[74] *Id.* at 451.
[75] *Id.*; *see also Carter v. Banks*, 254 Ga. 550, 552(1), 330 S.E.2d 866 (1985) ("[A]n insured ought not to collect damages for his [or her] loss from both his [or her] insurer and the tortfeasor, [because that would result in] a double recovery.") (citation omitted); *Overstreet v. Georgia*

Farm Bureau Mut. Ins. Co., 182 Ga. App. 415, 416, 355 S.E.2d 744, 745 (1987) ("plaintiff had the option of seeking indemnification for her loss under her insurance contract or from the tortfeasor. Since it is undisputed that plaintiff accepted payment for her loss in an amount equal to the coverage provided in her insurance contract from the tortfeasor's insurance carrier, she relinquished her right to recover under her insurance policy.")

A DOUBLE-EDGED SWORD: THE DEFENSE OF TRUCKING CLAIMS AFTER THE FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION'S MANDATE FOR ELECTRONIC LOGGING DEVICES

By Wayne S. Melnick, Parker M. Green and Matthew S. Grattan

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I. INTRODUCTION

On December 16, 2015, the Federal Motor Carrier Safety Administration ("FMCSA") adopted long-anticipated regulations mandating the use of electronic logging devices ("ELDs") to track hours-of-service. The ELD mandate applies to any commercial motor vehicle ("CMV") drivers who are currently required to keep paper records of duty status. Motor carriers and interstate drivers operating CMVs have until December 18, 2017, to install and use qualified ELDs to record compliance with hours-of-service regulations.

Although expected, the ELD mandate is a significant change for trucking and the industry is divided regarding its support of the new regulations for recording hours-of-service. As fleets adopt ELD technology across the country, motor carriers will accumulate massive amounts of information on their drivers, CMVs, and trucking operations. The proliferation of ELDs and similar technology – known as "Telematics" – will pose predictable and unique challenges to defense attorneys in future trucking litigation.

In some cases, ELDs will establish compliance with the hours-of-service regulations and other relevant laws. The functionality of certain ELDs and Telematics devices may also yield information critical to rebutting liability and damage claims. However, the impact of the ELD mandate will cut both ways. Many trucking companies lack the resources to properly manage and retain information received from ELDs or are simply

unaware of its relevance to future claims which will give rise to the potential for spoliation of evidence. ELDs will also yield large amounts of data on the driving behavior of employees. In turn, this will raise question regarding the motor carrier's duty to proactively investigate the ELD information in its possession and control in order to avoid claims for negligent hiring, retention, supervision, and entrustment even before a trucking accident ever occurs.

The identification of those critical liability and evidentiary issues today might avoid the pitfalls and complications in litigating trucking claims tomorrow. This article addresses the primary changes to the Federal Motor Carrier Safety Regulations ("FMCSR") related to hours-of-service and electronic logging as well as the relevance of those changes to future trucking litigation. A brief introduction to the purpose and functionality of ELDs and Telematics is also included to frame the challenges each poses to future litigation.

II. COMPLYING WITH THE NEW REGULATIONS AND ELD MANDATE

A. Legislative History

ELDs, in their simplest form, automatically record a driver's driving time and other aspects of the hours-of-service records.[1] An ELD monitors a CMV's engine to collect data on whether the engine is running, whether the CMV is moving, miles driven, and the duration of engine operation (engine hours).[2] Simply stated, ELDs record a driver's record of duty status electronically, eliminating the need for paper logbooks. This makes recording hours-of-service easier and more accurate, and reduces both human error and deliberate violations of the recordkeeping requirements.[3] The FMCSA believes ELDs will foster greater compliance with the hours-of-service and, in turn, overall CMV safety.[4]

FMCSA estimates the new regulations mandating the use of ELDs will avoid 1,844 accidents every year.[5] The FMCSA further estimates the regulations will save at least 26 lives and prevent 562 injuries resulting from collisions with large CMVs on an annual basis.[6] In addition to enhancing roadway safety, the more accurate and consistent recordation of hours-of-service is also expected to support trucking operations such as effective dispatching by motor carriers.[7] In fact, the amount of time and money that motor carriers and drivers save using ELDs instead of current paperwork requirements is estimated to produce an annual net economic benefit in the range of $1.2 billion.[8]

Based on the foregoing reasons, the FMCSA adopted the new regulations mandating installation and use of ELDs. The trucking industry should experience increased efficiency, if ELDs are used properly, and operational savings through fleet optimization and

performance tracking.[9] There is also a potential for insurance premium adjustment based on risk assessment profiles that insurers create using the information generated by ELDs and Telematics devices.[10] Despite the potential benefits, the ELD mandate was and remains a controversial issue in trucking.

The FMCSA's path to adopting new ELD regulations was not without controversy and involved years of debate, legal wrangling, and technical challenges.[11] The Owner-Operator Independent Drivers Association ("OOIDA") vigorously opposed any FMCSA legislation relating to or requiring ELDs at every turn.[12] Conversely, the American Trucking Association ("ATA") and many large, national motor carriers supported an ELD mandate throughout the FMCSA's rulemaking process. The ATA even issued a press release calling the FMCSA's new regulations and ELD mandate "a historic step forward" for the trucking industry that "will change the trucking industry for the better – forever."[13]

The path to the FMCSA's new regulations regarding ELDs started back in 2010 when the FMCSRs were amended to establish new performance standards and technical specifications for electronic on-board recorders ("EOBRs") installed on any CMVs manufactured after June 4, 2012 (the "2010 Regulation").[14] The FMCSA later published a notice of proposed rulemaking to expand the electronic logging requirements of the 2010 Regulation to a broader population of motor carriers.[15] In response to the 2010 Regulation, OOIDA filed a petition in the U.S. Court of Appeals for the Seventh Circuit seeking a review of the regulations regarding EOBRs.[16] The court held that the FMCSA failed to address driver harassment issues despite a statutory requirement to the contrary.[17] As a result, the Seventh Circuit agreed with OOIDA and vacated the 2010 Regulation.[18]

Similarly, once the FMCSA announced the newest set of regulations, OOIDA immediately filed another petition for review with the U.S. Court of Appeals for the Seventh Circuit seeking to vacate any regulations mandating the installation and use of ELDs.[19] The petition is currently pending before the Seventh Circuit (Case No. 15-3756). If the FMCSA's new regulations stand, ELDs will continue to serve as a flashpoint for debate as motor carriers implement the technology into fleet operations over the next two years. The debate might also intensify over the next six months if the FMCSA further mandates installation and use of speed-limiters (otherwise known as "governors") on CMVs as many anticipate.

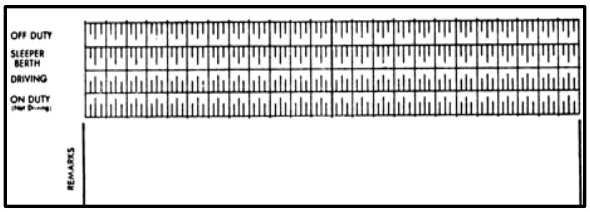
B. New Regulations v. Old Regulations

The new FMCSRs governing CMV drivers' hours-of-service do not change or alter any of the restrictions applying to the hours-of-

service or duty status of CMV drivers. The changes apply, instead, to the methods for recording hours-of-service. Restated, the FMCSA changed the regulations to replace handwritten, paper logs with ELDs to track driver compliance with hours-of-service requirements.

The old regulations and new regulations each prohibit drivers from operating CMVs for more than 14 consecutive hours following 10 consecutive hours of off-duty or sleeper-berth time.[20] A driver is considered on-duty "from the time [he] begins to work or is required to work until the time the driver is relieved from work and all responsibility for performing work."[21] Both the old and new regulations regarding driver's hours-of-service limit CMV drivers to 11 hours of driving time during the 14-hour on-duty period.[22]

To ensure compliance with hours-of-service requirements, drivers must record their duty status for each 24-hour period that they work.[23] Under the old regulations, drivers could record their duty status in one of two ways. First, the driver could use the specific graph-grid format provided in § 395.8.



Exemplar Graph Grid.

The "graph-grid" method often involved keeping paper logbooks to record the driver's hours-of-service and duty status. The second method tracked hours-of-service using an automatic on-board recording device ("AOBRD"). This required the installation and use of an AOBRD satisfying the standard set forth under § 395.15.[24] AOBRDs are similar, but not identical, to ELDs contemplated under the new regulations.[25] Specifically, an ELD must satisfy technical specifications that clearly delineate it from an AOBRD, even though each device tracks a driver's hours-of-service using a similar technology platform.[26]

The new provisions of the FMCSR regarding ELD usage became effective on February 16, 2016, and, with limited exceptions, apply to all interstate CMV drivers who are currently required to maintain records of duty status.[27] The new regulations also apply to intrastate drivers in states that have adopted the FMCSR for intrastate operations. Since Georgia has adopted the FMCSRs set forth in 49 CFR §§ 390-397,[28] the recent changes mandating use of ELDs, found under § 390, will apply to intrastate drivers in Georgia.

The deadline to comply with the new regulations depends on the motor carrier and driver's current method for maintaining records of duty status. Those preparing and retaining records of duty status in accordance with the graph-grid format, as set forth under § 395.8(f),

must comply with the new regulations no later than December 18, 2017.[29] For motor carriers and drivers currently using AOBRDs, the compliance deadline is December 19, 2019.[30] However, any motor carriers or drivers subject to the new regulations will eventually need to install a "certified" ELD, which must be capable of printing recorded information in the same graph-grid format required for paper logbooks.[31]

C. The Functionality, System Architecture, and Recordkeeping Requirements Relating to ELD Information and Data

The FMCSA defines an electronic logging device as "a device or technology that automatically records a driver's driving time and facilitates the accurate recording of the driver's hours of service, and that meets the requirements of subpart B of this part."[32] In short, ELDs sync with a CMV's engine to capture power status, motion status, miles driven, and engine hours.[33]

The technology used in ELDs essentially monitors CMV engines to capture data about whether the engine is running, whether the CMV is moving, miles driven, and the duration of engine operation.[34] The following data elements comprise the ELD dataset required under the FMCSA new regulations and mandate: (1) date, (2) time, (3) CMV location[35], (4) engine hours, (5) vehicle miles, (6) driver or authenticated user identification data, (7) vehicle identification data, and (8) motor carrier identification data.[36] The foregoing dataset is automatically recorded by ELDs pursuant to the new regulations.[37]

Qualified ELDs must also provide for the driver's manual entry of certain data during the process of recording hours-of-service. The drivers are specifically required to use the ELD interface to manually input duty status subject to the following categories: (1) off duty, (2) sleeper berth, (3) driving, and (4) on duty not driving."[38] The driver must also be capable of producing the ELD data to authorized safety officials during roadside inspections, onsite reviews, and other qualified inspections.[39]

Currently, drivers of CMVs are required to submit their records of duty status to the motor carrier within 13 days of the 24-hour period to which the record pertains.[40] The same holds true with the recent mandate for ELDs. However, "a driver must review the driver's ELD records, edit and correct inaccurate records, enter any missing information, and certify the accuracy of the information."[41] The driver must then certify the data entries and record of duty status for the particular 24 hour period are true and accurate."[42]

At that point, the motor carrier is provided the opportunity to review the ELD records submitted by the driver.[43] The new regulations provide that the "motor carrier may request edits to a driver's records of duty status

to ensure accuracy. A driver must confirm or reject any proposed change, implement the appropriate edits on the driver's record of duty status, and recertify and resubmit the records in order for any motor carrier-proposed changes to take effect."[44] The process of jointly reviewing ELD data is, in fact, reflected in the new regulations. Specifically, the new regulations provide that drivers and motor carriers "must ensure that the driver's ELD records are accurate."[45]

Upon completing the joint review of ELD records, the motor carrier must retain the record of duty status and supporting documentation "for a period of not less than 6 months from the date of receipt."[46] The new regulations also require motor carriers to retain a "backup" copy of any information and data recorded by ELDs operating in their fleet.[47] The motor carrier must then store the backup copy separately from the original recording.[48] Additionally, "when requested by an authorized safety official, a motor carrier must produce ELD records in an electronic format either at the time of the request" or pursuant to certain deadlines specified in the new regulations.[49]

III. EVIDENTIARY IMPLICATIONS: SPOLIATION OF EVIDENCE IN GEORGIA

Often times, after a collision involving a CMV occurs, claimants will send pre-suit "spoliation letters" to motor carriers, requesting that they preserve a variety of documents and information regarding the driver and CMV or potentially face spoliation sanctions for the failure to preserve the same.[50] Although these letters normally include requests for relevant documents and information, they also seek to burden motor carriers by requiring them to gather and preserve a large amount of irrelevant and untimely information. With the ELD mandate, motor carriers will be required to accumulate and retain an increased amount of information about their drivers and CMVs. Motor carriers should, therefore, anticipate ever more expansive document preservation requests from plaintiffs, with the goal being to set motor carriers up for potential spoliation sanctions if they do not comply with the requests.

Spoliation generally refers to a party's destruction or alteration of evidence. The precise definition of spoliation varies across jurisdictions, but it normally involves the destruction or alteration of evidence that is relevant to pending or anticipated litigation.[51]

In Georgia, spoliation is defined as "the destruction or failure to preserve evidence that is necessary to contemplated or pending litigation."[52] Before a party can pursue a remedy for spoliation, they must establish that the spoliating party had a duty to preserve the evidence at issue.[53] A duty to preserve exists under Georgia law when the following two

elements are satisfied: (1) the evidence at issue is "necessary" to the litigation; and (2) there is "contemplated or pending litigation" at the time of the alleged spoliation.[54]

What evidence is "necessary to the litigation" depends on the specific facts of each case. In regards to ELDs, even though the new FMCSAs do not require motor carriers to record a driver's speed, braking information, and acceleration, this data is normally captured in ELDs currently marketed to the trucking industry. As was noted by the plaintiff's accident reconstruction expert in *Howard v. Alegria*, such data is almost uniformly relevant and necessary to lawsuits involving CMV accidents, as it provides "the highest and best evidence of what actually occurred at the time of the collision."[55] The safe assumption, therefore, is that the loss or destruction of ELD information will provide plaintiffs with legitimate grounds for requesting the imposition of sanctions from the trial court.

As for the second element, the question of whether there is contemplated or pending litigation has been significantly complicated by the Georgia Supreme Court's ruling in *Phillips v. Harmon*. Prior to that decision, it had been clear for some time that the duty to preserve evidence was triggered by actual notice of contemplated or pending litigation. For motor carriers, the duty was normally triggered after receipt of a preservation letter or letter of representation. As a result of *Phillips*, it is now the law in Georgia that a motor carrier's duty to preserve evidence can also be triggered through constructive notice, that is, when the "the [motor carrier] … reasonably should have anticipated litigation, even without notice of a claim."[56]

To determine whether a party reasonably should have expected litigation, the Court in *Phillips* explained that the duty to preserve "must be viewed from the perspective of the party with control of the evidence and is triggered not only when litigation is pending but when it is reasonably foreseeable to that party."[57] The Court then described other circumstances from which it might be reasonably inferred that the defendant is contemplating litigation. Those "other circumstances" include (1) the type and extent of injury; (2) the extent to which fault for the injury is clear; (3) the potential financial exposure if faced with a finding of liability; (4) the relationship and course of conduct between the parties; and (5) the frequency with which litigation occurs in similar circumstances.[58] Finally, the Court held that in determining whether the defendant did or should have foreseen litigation by the plaintiff, courts should consider the "initiation and extent of any internal investigation, the reasons for any notification of counsel and insurers, and any

expression by the defendant that it was acting in anticipation of litigation."[59]

Phillips raises particular concerns for motor carriers. Collisions involving CMVs and passenger vehicles often result in severe bodily injury, are frequently litigated potentially leading to high financial exposure for motor carriers, their insurers, and their drivers. Additionally, many motor carriers have standard procedures that they follow after an accident occurs including interviewing drivers, preparing incident reports, and notifying the insurance carrier. Under the reasoning of *Phillips*, a court could conclude that these fairly routine circumstances put a motor carrier on notice of potential or contemplated litigation, triggering a duty to preserve all relevant evidence.[60]

To combat potential spoliation charges, motor carriers need to ensure that they develop an effective policy for preserving relevant documents and information. With the move to ELDs and the significant amount of relevant data they yield, this means confirming the reliability of the motor carrier's electronic storage units and ensuring the retention of these records pursuant to company policy and federal regulations. The *Phillips* opinion also underscores how important it is for motor carriers and defense counsel to conduct prompt and thorough investigations after a collision to determine the extent of the injuries and the potential for liability.

Therefore, in all but the most minor collisions, motor carriers would be wise in implementing their document retention policies, inclusive of ELD data, immediately after a collision involving a CMV. Although this may seem onerous, the failure to preserve evidence can adversely impact an otherwise defensible claim. Since the determination of whether to impose spoliation sanctions is so fact-intensive and difficult to predict, it is safer for a motor carrier to preserve evidence upfront, rather than wait and potentially face sanctions later.

IV. LIABILITY IMPLICATIONS: INDEPENDENT NEGLIGENCE CLAIMS AGAINST MOTOR CARRIERS IN GEORGIA IN THE AFTERMATH OF THE ELD MANDATE

The ELD mandate will result in motor carriers possessing large amounts of information regarding their driver's driving behavior, tendencies, timeliness, and various other factors that give insight into safety and compliance with the FMCSRs. The duty of motor carriers to proactively review this information and, if necessary, take remedial action is unclear. The duty to review ELD records as part of the annual inquiry and review of process is similarly unclear.[61]

With increasing amounts of available information from ELDs and vague statutory responsibilities for reviewing it, defense

attorneys can expect an uptick in claims against motor carriers under theories of liability for negligent retention, supervision, and entrustment. Georgia generally favors summary judgment on those theories of liability absent unique circumstances warranting punitive damages. However, as ELDs gather information about driver behavior in larger quantities, the opposition to summary judgment is expected to rely on stronger factual and substantive grounds going forward.

Georgia trucking cases follow a general rule: if the motor carrier admits *respondeat superior* applies with respect to the driver, it is entitled to summary judgment on claims for negligent hiring, retention, supervision, and entrustment. [62] The rationale is that since *respondeat superior* establishes liability for the driver's negligence, the claims against the motor carrier are "merely duplicative" of the *respondeat superior* claim.[63] The only exception exists where the plaintiff has a valid claim for punitive damages.[64]

Punitive damages are only recoverable in Georgia if the plaintiff meets the increased burden provided by O.C.G.A. §51-12-5.1.[65] In trucking cases, punitive damages may be awarded for negligent hiring, supervision, and retention when "an employer had actual knowledge of numerous and serious violations on its driver's record, or at the very least, when the employer has flouted a legal duty to check a record showing such violations."[66] Georgia courts will grant summary judgment on punitive damages if the employer complied with applicable regulations and investigated the background of its drivers.[67] As a practical matter, this typically leads to a review of the motor carrier records during litigation. The chances of satisfying the burden for punitive damages on claims for negligent hiring, retention, supervision, and entrustment are, in most cases, slim.[68]

Summary judgment is, therefore, appropriate for negligent entrustment, hiring, retention, and supervision claims when (1) the motor carrier complied with the FMCSA safety regulations when hiring the driver, (2) the driver was qualified to drive under the FMCSRs at the time of the accident, and (3) the motor carrier did not know nor should it have known that a driver had a tendency to act in a manner that plaintiff alleges caused the accident at issue.[69] The simplified version of the foregoing analysis entitles a motor carrier to summary judgment on independent theories of liability if a plaintiff fails to show "actual knowledge" that a driver committed "numerous and serious violations" prior to the accident.[70]

It is here that ELD and Telematics devices may present issues in the future. The question becomes: because motor carriers will receive large amounts of information from ELDs potentially showing "numerous and serious violations" of employee drivers, what

impact will it have on the motor carrier's ability to defend claims for negligent hiring, retention, supervision, and entrustment? Furthermore, what duty does a motor carrier have going forward to proactively review ELD or Telematics data during annual reviews or when, say, it receives notice (formally or informally, *e.g.*, motorist calls to 1-800 safety numbers posted on the rear of a motor carrier's trailer) of an employee-driver's potentially unsafe driving or violations?

The potential implications to Georgia's "actual knowledge" requirement for sustaining negligent entrustment, hiring, retention, and supervision claims are even more troubling. Motor carriers will now possess ELD information that potentially reveals disqualifications or other violations at the time of the accident, *e.g.*, operating a CMV in violation of the hours-of-service. Defense counsel can expect increased opposition summary judgment briefs based on a motor carrier's mere *possession* of information that was recorded by ELD and Telematics devices. If actual knowledge is required, there is a valid argument for motor carriers to remain "willfully blind" of the ELD information recorded. This willful blindness would, in turn, support a motor carrier's argument for summary judgment on grounds that it lacked "actual knowledge" as required under Georgia law.

The authors do not expect Georgia courts to tolerate a willful blindness defense. The FMCSR provide that motor carriers "must consider ***any evidence*** that the driver has violated any applicable [federal safety regulations]" during the mandatory annual inquiry and review of a driver's record.[71] The "any evidence" standard could extend, arguably, to the consideration of large quantities of ELD information that are now in possession of motor carriers by virtue of the ELD mandate. If the duty to consider any evidence extends to ELD information within the motor carrier's possession or control, plaintiffs will argue the motor carrier flouted its legal duty to review that information for violations in lieu of establishing actual knowledge.[72]

Further complications may arise from ELDs and Telematics devices allowing motor carriers to easily review driver conduct and, thus, propensity for certain unsafe driving practices. The availability of that information could put more emphasis on the analysis of summary judgment as to whether a motor carrier "knew or should have known" about those propensities. The additional layer of analysis could, in turn, provide plaintiffs with easier methods to establish constructive knowledge and defeat motions for summary judgment on claims for negligent entrustment and related theories of independent tort liability.

Currently, Georgia allows plaintiffs to establish constructive knowledge with evidence showing that a motor carrier flouted a legal duty to review information for violations, as described above. The threshold for establishing constructive knowledge in connection with negligent entrustment claims varies, somewhat, from one jurisdiction to the next.[73] Although complications will inevitably arise as to what constitutes knowledge, it is worth noting Georgia's high tolerance for prior driver violations upon review of negligent hiring, supervision, and retention. In *Ballard v. Keen Transp., Inc.*, the plaintiff claimed punitive damages for negligent entrustment. In granting summary judgment, the District Court stated:

> Plaintiff "has presented evidence that [the driver] may have had five speeding tickets in the eight years preceding the collision. Ballard has shown that [the motor carrier] was aware of two of them; one possibly being only a log book violation. The myriad of other stop sign, stop light, log book, and seatbelt violations that [plaintiff] cites are irrelevant because he has not put forward any evidence showing that similar conduct contributed to this collision. . . Even considering [the driver's] three other alleged speeding tickets over eight years, as the Court must in examining [plaintiff's] claim against [the driver, the plaintiff's] proof falls short. [74]

Therefore, the District Court held: "[The driver's] speeding tickets, however, are not such 'numerous and serious violations' . . . as to suggest that this collision 'resulted from a pattern or policy of dangerous driving. . . " [75] Furthermore, Georgia requires a causative relationship between the allegations of negligent entrustment and the driver's negligent conduct as it relates to the proximate cause of the accident at issue.[76] For example, if a driver was previously convicted of disobeying traffic signals on multiple occasions, what relevance do those convictions have regarding the driver who causes an accident because he failed to stop because he was following the vehicle in front too closely?

For negligent entrustment claims, Georgia requires plaintiffs to satisfy a "higher standard requiring actual knowledge of the employee's incompetence."[77] This theory of liability undergoes the same analysis applied in *Ballard* to claims for negligent hiring, retention, supervision, and training. Without "actual knowledge" of a driver's prior violations bearing a causative relationship to the accident at issue, or evidence showing the motor carrier flouted a legal duty to check for driver violations, a negligent entrustment claim must fail. Once again, the chances of establishing a valid claim for punitive damages based on allegations of negligent entrustment are, in most cases, slim under Georgia law.

In *Danforth v. Bulman*, the Georgia Court of Appeals affirmed summary judgment on the

plaintiff's claim of negligent entrustment. The opinion sets forth the applicable standard, stating: "'Under the doctrine of negligent entrustment, a party is liable if he entrusts someone with an instrumentality, with actual knowledge that the person to whom he has entrusted the instrumentality is incompetent by reason of his age or inexperience, or his physical or mental condition, or his known habit of recklessness.'"[78] Thus, a motor carrier can prevail on summary judgment in the absence of "numerous and serious violations."

Nevertheless, the plaintiffs' bar will rely on ELD information to argue that numerous and serious violations of state law, federal law, or internal policies of the motor carrier existed at the time of the accident. That will, at the very least, complicate the analysis of the motions for summary judgment filed in future cases.[79] As more plaintiffs argue for a constructive knowledge standard, *i.e.*, a motor carrier "knew or should have known" based on the "any evidence' standard applied during the annual review of CMV drivers, the FMCSA's new regulations mandating use of ELDs will complicate the defense of motor carriers going forward.

On the opposite side of the coin, however, the ELD information could potentially firmly establish a driver's lack of prior violations or unsafe driving, strengthening the grounds for dispositive motions. Thus, ELDs are equally capable of providing defense counsel with an excellent opportunity to show certain allegations about the accident are unsubstantiated and, if desired, pursue an early resolution through motion practice or settlement. Indeed, ELD and Telematics information can and will cut both ways going forward, and will lead plaintiffs and defendants to closely scrutinize the evidence in future trucking litigation.

V. CONCLUSION

The information that ELDs record – both good and bad – will be critical to effectively defending transportation claims in the future. Georgia law still favors summary judgment for defendant motor carriers on independent negligent claims, so defense counsel can potentially overcome any harm from ELD-related evidence. However, the future of the "actual knowledge" standard appears uncertain based on a motor carrier's statutory duty to possess and, possibly, review ELD information on an annual basis. The new statutory requirement for motor carriers to possess large amounts of relevant and easily accessible ELD and Telematics information, which could certainly reveal driver behavior, does not bode well for the longevity of summary judgments relying on "willful blindness."

Spoliation of evidence is also particularly concerning in light of the decision in *Phillips v. Harmon*. Since almost every CMV accident gives rise to a reasonable anticipation of litigation, the spoliation of ELD information (which is almost potentially relevant to a future litigation in almost every claim) could ultimately erase its potential strategic benefits (*i.e.*, confirming driver compliance), undermine summary judgment arguments, and even lead trial courts to impose sanctions against motor carriers. If at all possible, defense counsel should attempt to overcome the destruction or loss of ELD information with the "supporting documents" required under the FMCSRs.[80] Otherwise, the loss or destruction of ELD information could undermine a dispositive motion notwithstanding Georgia's current case law favoring summary judgment for motor carriers.

Ultimately, the potential implications of the ELD mandate make it abundantly clear proactive steps are necessary to avoid future headaches. Defense attorneys should work with trucking clients to implement effective procedures for preserving information that ELDs record on employee-drivers, which should go well beyond the FMCSA's 6 month document retention requirements. Defense attorneys should also encourage trucking clients to take appropriate steps to properly investigate ELD information, possibly even proactively during annual reviews, and pursue corrective action if and when necessary. Otherwise, motor carriers could face exposure to future claims for negligent hiring, retention, supervision, and entrustment as Georgia law adapts to current trucking technologies.

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1 https://www.fmcsa.dot.gov/faq/what-is-an-eld

2 *Id.*

3 https://www.fmcsa.dot.gov/faq/benefits-of-elds

4 *See*, 80 Fed. Reg. 78293, Electronic Logging Devices and Hours-of-Service Requirements Supporting Documents, (December 16, 2015) (amending 49 C.F.R. Parts 385, 386, 290, and 395), available at https://www.gpo.gov/fdsys/pkg/FR-2015-12-16/pdf/2015-31336.pdf

5 80 Fed. Reg. 78294 (December 16, 2015).

6 80 Fed. Reg. 78294 (December 16, 2015), at Table 2 – Estimated Reductions in Crashes, available at https://www.gpo.gov/fdsys/pkg/FR-2015-12-16/pdf/2015-31336.pdf

7 https://www.fmcsa.dot.gov/faq/benefits-of-elds

8 80 Fed. Reg. 78294 (December 16, 2015), at Table 1 – Summary of Annualized Costs and Benefits, available at https://www.gpo.gov/fdsys/pkg/FR-2015-12-16/pdf/2015-31336.pdf

9 *See generally*, Thomas Bray, *What the electronic logging device rule means to your business*, The Business Journals (December 1, 2015), available at http://www.bizjournals.com/bizjournals/how-to/human-resources/2015/12/what-the-electronic-logging-device-rule-means.html?page=all.

10 *See supra* note 9.

11 For a complete regulatory history and background relating to the FMCSA's legislative efforts relating to ELD regulations, see 75 Fed. Reg. 17208 (April 5, 2010), 76 Fed. Reg. 17208 (February 1, 2011), and 79 Fed. Reg. 17656 (March 28, 2014).

12 To view OOIDA objections, see the Comments filed on June 26, 2014 in response to the FMCSA's supplemental notice of proposed rulemaking and request for public comments (Docket No. FMCSA-

2010-0167), available at http://www.ooida.com/issuesactions/regulatory/issues/docs/eobr-2014-comments-in-response-to-notice.pdf

[13] http://www.trucking.org/article.aspx?uid=f67bf572-5552-446f-b709-34aa51d3cafc

[14] *See supra* notes 4-6, at 78297, citing Electronic On-Board Recorders for Hours-of-Service Compliance, 75 Fed. Reg. 17208 (April 5, 2010). According to the new regulations mandating ELDs, the 2010 regulations regarding EOBRs "would have required that motor carriers with demonstrated serious noncompliance with the HOS rules be subject to mandatory installation of EOBRs meeting the new performance standards included in the 2010 rule. If FMCSA determined, based on HOS records reviewed during a compliance review, that a motor carrier had a 10 percent or greater violation rate . . . or any HOS regulation listed in a new Appendix C to part 385, FMCSA would have issued the carrier an EOBR remedial directive."

[15] *See supra* note 11, at 78297, which cites Electronic On-Board Recorders for Hours-of-Service Supporting Documents, 76 Fed. Reg. 17208 (February 1, 2011).

[16] *Owner-Operator Indep. Drivers Ass'n v. Fedc. Motor Carrier Safety Admin.*, 656 F.3d 580 (7th Cir. 2011); also see *supra* note 11, at 78297.

[17] *See supra* note 11, at 78297, citing 656 F.3d at 589 (7th Cir. 2011)/

[18] *656 F.3d* 580 (7th Cir. 2011).

[19] *See Owner-Operator Indep. Drivers Ass'n, et al. v. Fed. Motor Carrier Safety Admin., et al.*, Case No. Case No. 15-3756, in the U.S. Court of Appeals for the Seventh Circuit.

[20] 49 C.F.R. § 395.1(g)(i)(A), 395.3(a)(2).

[21] 49 C.F.R. § 395.2.

[22] 49 C.F.R. § 395.3(a)(3).

[23] 49 C.F.R. § 395.8(a).

[24] 49 C.F.R. § 395.8(a)(1) and (2).

[25] The FMCSA's website provides a general explanation on how ELDs differ from AOBRDs, available at https://www.fmcsa.dot.gov/faq/eld-vs-aobr, which states: "An ELD must be certified, and registered with FMCSA. Each ELD model will have a unique registration number that can be found on its display or printout. A list of registered devices will be available on the ELD Rule Effective Date, February 16, 2016."

[26] See the FMCSA's table comparing logbooks, AOBRDs and ELDs, available at https://www.fmcsa.dot.gov/hours-service/elds/methods-recordkeeping.

[27] 49 C.F.R. § 395.8(a)(1)(iii)(A) ("A motor carrier may require a driver to record the driver's duty status manually in accordance with this section, rather than require the use of an ELD, if the driver is operating a commercial motor vehicle: (1) In a manner requiring completion of a record of duty status on not more than 8 days within any 30-day period; (2) In a driveaway-towaway operation in which the vehicle being driven is part of the shipment being delivered; or (3) That was manufactured before model year 2000.").

[28] Georgia Public Service Commission Safety Regulation 555-16-4-.01.

[29] 49 C.F.R. § 395.8(a)(1)(i).

[30] 49 C.F.R. § 395.8(a)(1)(ii).

[31] *See generally*, 49 C.F.R. § 395, Subpt. B., App. A, at ¶ 4.8.1.2; the FMCSR has given Appendix A to Subpart B of the new regulations the title of "Functional Specifications of Electronic Logging Devices."

[32] 49 C.F.R. § 395.2 (2016).

[33] *See generally*, 49 C.F.R. § 395, Subpt. B., App. A, at ¶ 1.4 (System Design); the FMCSR has given Appendix A to Subpart B of the new regulations the title of "Functional Specifications of Electronic Logging Devices." In the Appendix to the new regulations, titled "Functional Specifications for All Electronic Logging Devices," the FMCSA provides a detailed overview on ELD functionality and the minimum performance standards for "certified" ELDs. *See generally*, 49 C.F.R. § 395, Subpt. B., App. A, at ¶ 1.4 (System Design); the FMCSR has given Appendix A to Subpart B of the new regulations the title of "Functional Specifications of Electronic Logging Devices."

[34] 49 C.F.R. § 395, Subpt. B., App. A, at ¶ 4.3.1, which the FMCSR has given the title of "Functional Specifications of Electronic Logging Devices."

[35] 49 C.F.R. § Pt. 395, Subpt. B, App. A at ¶ 4.3.1.6 (CMV Position), which requires that certified ELDs satisfy the following standards when recording the position or location of a CMV: (1) an ELD must determine automatically the position of the CMV in standard latitude/longitude coordinates with the accuracy and availability requirements of this section, (2) the ELD must obtain and record this information without allowing any external input or interference from a motor carrier, driver, or any other person, (3) the CMV's position measurement must be accurate to

±0.5 mile of absolute position of the CMV when an ELD measures a valid latitude/longitude coordinate value, (4) the position information must be obtained in or converted to standard signed latitude and longitude values and must be expressed as decimal degrees to hundreds of a degree precision, *i.e.*, a decimal point and two decimal places, (5) the measurement accuracy combined with the reporting precision requirement implies that position reporting accuracy will be on the order of ±1mile of absolute position of the CMV during the course of a CMV's commercial operation, (6) during periods of a driver's indication of personal use of the CMV, the measurement reporting precision requirement is reduced to tenths of a degree, *i.e.*, a decimal point and single decimal place as further specified in ¶ 4.5.1 of Appendix A, *supra*, and (7) an ELD must be able to acquire a valid position measurement at least once every 5 miles of driving; however, the ELD records CMV location information only during ELD events as specified in ¶ 4.5.1 of Appendix A, *supra*. The FMCSA does not require the use of a satellite based global positioning system ("GPS") based on the foregoing, however, even the communication of ELD data and hours of service is transmitted over a mobile network.

[36] 49 C.F.R. § 395.26(b), which the FMCSR has given the title of "ELD data automatically recorded."

[37] 49 C.F.R. § 395.26(b) (2016).

[38] 49 C.F.R. § 395.24(b) (2016).

[39] 49 C.F.R. § 395.22(j) (2016), which the FMCSR has given the title of "Motor Carrier Responsibilities – In General."

[40] 49 C.F.R. § 395.8 (2016).

[41] 49 C.F.R. § 395.30(b)(1) (2016)

[42] 49 C.F.R. § 395.30(b)(2) (2016)

[43] 49 C.F.R. § 395.30(d) (2016)

[44] 49 C.F.R. § 395.30(d)(1) (2016)

[45] 49 C.F.R. § 395.30(a) (2016).

[46] 49 C.F.R. § 395.8(k) (2016).

[47] 49 C.F.R. § 395.22(i) (2016), which the FMCSR has given the title of "Motor Carrier Responsibilities – In General."

[48] 49 C.F.R. § 395.22(i) (2016).

[49] 49 C.F.R. § 395.22(j) (2016).

[50] For example, in *Frey v. Gainey Transp. Servs., Inc.*, 2006 WL 2443787, at *1-5 (N.D. Ga. Aug. 22, 2006), plaintiff's counsel sent a post-accident letter demanding a trucking company preserve 46 different categories of documents or potentially face spoliation sanctions.

[51] *See, e.g., West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779, 42 Fed. R. Serv. 3d 1161 (2d Cir. 1999) (defining spoliation as the "destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."); *Aaron v. Kroger Ltd. P'ship I*, No. 2:10CV606, 2012 WL 78392, at *3 (E.D. Va. Jan. 6, 2012) (explaining that spoliation occurs when a party destroys evidence relevant to pending litigation); *Vesta Fire Ins. Corp. v. Milam & Co. Const., Inc.*, 901 So. 2d 84 (Ala. 2004) ("Spoliation of evidence is an attempt by a party to suppress or destroy material evidence favorable to the party's adversary.").

[52] *AMLI Residential Properties v. Georgia Power Co.*, 293 Ga. App. 358, 361, 667 S.E. 2d 150 (2008) (citing *Bridgestone/Firestone N. Am. Tire, LLC v. Campbell*, 258 Ga. App. 767, 768, 574 S.E.2d 923 (2002)).

[53] *See Whitfield Mexican Restaurant No. 1*, 323 Ga. App. 801, 807(6), 748 S.E.2d 281 (2013).

[54] *See AMLI*, 293 Ga. App. at 361, 667 S.E. 2d at 153-154 (citing *Bouve & Mohr, LLC v. Banks*, 274 Ga. App. 758, 764(2), 618 S.E.2d 650 (2005)).

[55] *Howard v. Alegria*, 321 Ga. App. 178, 185, 739 S.E.2d 95, 2012 (2013).

[56] *Phillips v. Harmon*, 297 Ga. 386, 774 S.E.2d 596 (2015).

[57] *Id.* 297 Ga. at 396, 774 S.E. 2d at 604 (citing *Graff v. Baja Marine Corp.*, 310 Fed. Appx. 298, 301 (11th Cir. 2009)).

[58] *See id.* 297 Ga. at 397, 774 S.E. 2d at 605.

[59] *Id.*

[60] Other jurisdictions have also held that a duty to preserve evidence is triggered in cases where litigation is reasonably foreseeable. *See, e.g.*, *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) ("Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.") (citing *West*, 167 F.3d at 779, 42 R. Serve. 3d)); *Yelton v. PHI, Inc.*, 279 F.R.D. 377 (E.D. La. 2011); *Marceau v. Int'l Bhd. of Elec. Workers*, 618 F. Supp. 2d 1127, 1174 (D. Ariz. 2009).

[61] 49 C.F.R. § 391.25(b).

[62] Like Georgia, most jurisdictions follow the general rule that an employer's admission of vicarious liability obviates the need for negligent hiring, retention, or supervision claims. *See e.g., Durben v. Am. Materials, Inc.*,

232 Ga. App. 750, 503 S.E.2d 618 (1998); *Cole v. Alton*, 567 F.Supp. 1084, 1086 (N.D. Miss. 1983); *Neff v. Davenport*, 268 N.E.2d 574, 575 (Ill. App. 1971).

[63] *Durben v. Am. Materials, Inc.*, 232 Ga. App. 750, 751, 503 S.E.2d 618, 619 (1998). In *Durben*, the court further held that admitting *respondeat superior* rendered the need for proof of negligent retention, supervision, and entrustment both "unnecessary and irrelevant."

[64] *Durben v. Am. Materials, Inc.*, 232 Ga. App. 750, 751, 503 S.E.2d 618, 619 (1998).

[65] Pursuant to the requirements of O.C.G.A. §51-12-5.1, punitive damages are to be awarded only in tort actions where it is proven by "clear and convincing evidence" that the defendants' actions showed "willful 4 misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences."

[66] *Frey v. Gainey Transp. Servs.*, 2006 U.S. Dist. LEXIS 90639, 12-13 (N.D. Ga. Dec. 14, 2006) (citing *Western Industries, Inc. v. Poole*, 280 Ga. App. 378, 380 634 S.E.2d 118 (2006)).

[67] *Ortiz v. Wiwi*, 2012 U.S. Dist. LEXIS 137881 (M.D. Ga. Sept. 26, 2012).

[68] *See, e.g., Bartja v. Nat. Union Fire Ins. Co.,* 218 Ga. App. 815, 818-19, 463 S.E.2d 358 (1995) (no punitive damages where employer complied with federal regulations and driver was qualified to drive under regulations despite fact that driver's record showed two moving violations, a citation for driving his truck into a car parked on an emergency lane, and clipping the side mirror of an oncoming van on a two-lane highway").

[69] *Bartja v. Nat. Union Fire Ins. Co.,* 218 Ga. App. 815, 819, 463 S.E.2d 358 (1995).

[70] *See e.g., Ballard v. Keen Transp., Inc.*, 2011 U.S. Dist. LEXIS 5487 (S.D. Ga. Jan. 19, 2011).

[71] 49 C.F.R. § 391.25(b).

[72] *See*, *e.g.*, *Mastec N. Am., Inc. v. Wilson*, 325 Ga. App. 863, 866, 755 S.E.2d 257 (2014); *Smith v. Tommy Roberts Trucking Co.*, 209 Ga App. 826, 829-30, 435 S.E.2d 54 (1993) (reversing the entry of summary judgment on claims for negligent entrustment and punitive damages where the defendant/motor carrier ignored regulations requiring license record check, where such a check would have unearthed numerous violations, including DUI, and where the evidence otherwise supported an inference that the defendant/motor carrier had actual knowledge that its driver was incompetent or had a propensity to drive dangerously).

[73] In Alabama, an employer is "held responsible for his [employee's] incompetency when notice or knowledge, either actual or presumed, of such unfitness has been brought to him. Liability depends upon its being established by affirmative proof that such incompetency was actually known by the master or that, had he exercised due and proper diligence, he would have learned that which would charge him in the law with such knowledge. *Coleman v. Flagstar Enters., Inc.*, 1999 U.S. Dist. LEXIS 8500 (S.D. Ala. May 19, 1999) (*quoting Big B. v. Cottingham*, 634 So. 2d 999, 1003 (Ala. 1993). Therefore, constructive knowledge is established by showing that the employer knew or should have known about the employee's incompetence. Alabama's appellate courts have not addressed whether an employer's admission of agency precludes recovery on claims for negligent entrustment, hiring, supervision, training, and retention. Federal courts, on the other hand, determined that Alabama would follow the minority view and allow the plaintiff to maintain independent claims against the employer. *Poplin v. Bestway Express*, 286 F. Supp. 2d 1316, 1318-1320 (D. Ala. 2003).

In Texas, to establish a claim for negligent entrustment, plaintiffs plaintiff must prove (1) entrustment of a vehicle by the owner; (2) to an unlicensed, incompetent, or reckless driver; (3) that the owner knew or should have known to be unlicensed, incompetent, or reckless; (4) that the driver was negligent on the occasion in question and (5) that the driver's negligence proximately caused the accident. *Schneider v. Esperanza Transmission Co.*, 744 S.W.2d 595, 596 (Tex. 1987). However, Texas law precludes a plaintiff from pursuing causes of action for negligent entrustment or negligent hiring if the employer has admitted liability under the theory of respondeat superior. *See, e.g., Arrington's Estate v. Fields*, 578 S.W.2d 173, 178-79 (Tex. Civ. App. – Tyler 1979, writ ref'd n.r.e.).

According to Tennessee law, claims for negligent entrustment require (1) an entrustment of a chattel, (2) to a person incompetent to use it, (3) with knowledge that the person is incompetent, and (4) that is the proximate cause of injury or damage to another. *Nichols v. Atnip*, 844 S.W.2d 655, 559 (Tn. Ct. App. 1992). The admission of an agency relationship does not defeat claims for negligent entrustment, however, which is considered a "distinct and separate issue from the [driver's negligence]." *See, e.g., Darnell v. Flour Daniel Corp.*, No. 94-5757, 70 F.3d 115, at *2 (M.D. Tenn. 1995).

Arkansas law sets for the following elements for negligent entrustment claims:: (1) the entrustee was incompetent, inexperienced, or reckless, (2) the

entrustor knew or had reason to know of the entrustee's condition or proclivities, (3) there was an entrustment of the chattel, (4) the entrustment created an appreciable risk of harm to the plaintiff and a relational duty on the part of the defendant, and (5) the harm to the plaintiff was proximately or legally caused by the negligence of the defendant. *Arkansas Bank & Trust Co. v. Ervin*, 300 Ark. 599, 603, 781 S.W.2d 21, 23 (1989). If the defendant generally denies liability, it is subject to both negligent entrustment and respondeat superior claims. *See LeClair v. Commercial Siding and Maint. Co.*, 308 Ark. 580, 582, 826 S.W.2d 247, 248 (1992). However, if liability is admitted under either theory, the plaintiff may only pursue liability under the admitted theory of recovery. *See Elrod v. G. & R. Constr. Co.*, 275 Ark. 151, 154, 628 S.W.2d 17, 19 (1982).

In Mississippi, several federal district court determined that Mississippi would adopt the majority view that once an employer has admitted the agency relationship between it and the employee, it is improper to allow a plaintiff to proceed against the employer on any other theory of derivative or dependent liability. *Hood v. Dealers Transport*, 459 F.Supp. 684 (N.D.Miss. 1978). The appellate courts have not address the interplay of admitting vicarious liability and direct negligence claims against employers though.

[74] 2011 U.S. Dist. LEXIS 5487, at *10-12(citing *Hutcherson v. Progressive Corp.*, 984 F.2d 1152, 1155-56 (11th Cir. 1993) (dismissing punitive damages because employer obeyed regulations, despite evidence that the truck driver was on amphetamines at the time of the collision, received four speeding tickets in the previous three years, had his license suspended for refusing an alcohol test, and had a history of DUI)).

[75] *Ballard v. Keen Transp., Inc.*, 2011 U.S. Dist. LEXIS 5487, at *10-12.

[76] *Ballard v. Keen Transp., Inc.*, 2011 U.S. Dist. LEXIS 5487, at *10-12; *see also*, *Cherry v. Kelly Services, Inc.*, 319 S.E.2d 463 (Ga. App. 1984); *Spencer v. Gary Howard Enterprises, Inc.*, 256 Ga. App. 599 (2002); *Western Industries, Inc. v. Poole*, 280 Ga. App. 378, 634 S.E.2d 118 (2006).

[77] Under Georgia law, "an employer may be liable for hiring or retaining an employee the employer knows or in the course of ordinary care should have known was not suited for the particular employment." *Munroe v. Universal Health Services, Inc.*, 277 Ga. 861, 862; 596 S.E.2d 604, 605 (2004). "An employer 'is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency.'" *Id.* However, a claim for negligent entrustment has a higher standard requiring actual knowledge of the employee's incompetence. *See Danforth v. Bulman*, 276 Ga. App. 531, 623 S.E.2d 732 (2005).

[78] *Danforth v. Bulman*, 276 Ga. App. at 535, 535; 623 S.E.2d 732 (2005), citing *Gunn v. Booker*, 259 Ga. 343, 347, 381 S.E.2d 286 (1989).

[79] Traditional summary judgment arguments will also face mounting opposition to motions for summary judgment on claims for negligent hiring, retention, supervision and entrustment based on a novel argument which relies on Georgia's apportionment statute, O.C.G.A. § 51-12-33. The argument first gained acceptance in *Little v. McClure*, 2014 WL 4276118 (M.D. Ga. Aug. 29, 2014), wherein the defendant/motor carrier moved for partial summary judgment as to plaintiffs' negligent hiring, retention, and training claims based on its admission that the driver was its employee, and that he was acting in the course and scope of his employment at the time of the accident. The plaintiffs contended Georgia's abolishment of joint and several liability under the apportionment statute removed the basis for the "general rule" that motor carriers are entitled to summary judgment when *respondeat superior* is admitted. *McClure*, 2014 WL 4276118, at *3.

The District Court described the apportionment argument as "persuasive," and ultimately denied the defendant/motor carrier's motion for partial summary judgment as to the claims for negligent hiring, retention, and training. Based on Georgia's apportionment statute, the District Court reasoned that a defendant "is only liable for the percentage of a plaintiff's damages attributable to his apportioned fault, so the employee's negligence (for which the employer would be liable by virtue of *respondeat superior*) would be apportioned separately from the employer's independent negligence." *Id.* at *3. Therefore, "it is clear the apportionment statute removes the rationale for granting summary judgment on negligent hiring, retention, and training claims purely based on the employer's admission of *respondeat superior*." *Id.* at *3. In reaching that decision, the District Court ignored established case law and Georgia's continued application of the "general rule" long after the enactment of the apportionment statute. *Id.*, citing *Mastec N. Am., Inc. v. Wilson*, 325 Ga. App. 863, 755 S.E.2d 257 (2014).

[80] *See*, 49 C.F.R. § 395.2 (2016) ("Supporting document means a document, in any medium, generated or received by a motor carrier in the normal course of business as described in § 395.11 that can be used, as produced or with additional identifying information, by the motor carrier and enforcement officials to verify the accuracy of a driver's record of duty status.").

ARBITRATION: AN OVERLOOKED METHOD FOR DEFENDING COMPLEX CLAIMS

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I. INTRODUCTION

An often overlooked method of defending liability cases is to consider whether or not the plaintiff's claims can be compelled to arbitration.[1] There are several benefits to choosing arbitration over a jury trial. Principally, arbitration can help reduce the uncertainty of trying a case – typically involving medically complex claims – before unwary jurors. Moreover, as the Eleventh Circuit and United States Supreme Court have recognized, arbitration benefits the court system as a whole because it increases the speed of resolution and reduces litigation costs.[2]

This article will examine the procedural mechanism in which parties can move to enforce arbitration in Georgia, and assuming an agreement containing an arbitration clause is in place, how to respond to arguments that challenge the enforceability of the agreement.

II. THE FEDERAL ARBITRATION ACT

The Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA") requires arbitration of claims that are subject to a written arbitration agreement:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, ***shall be valid, irrevocable, and enforceable***, save upon such ground as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added). Most arbitration agreements include a provision that states the contracting parties agree that any arbitration will be governed by the FAA. Thus, the applicability of the FAA is generally not an issue.

To the extent a party moving to enforce arbitration faces opposition to the application of the FAA, however, there is extensive federal authority to support the FAA's sovereignty. The FAA itself expresses a strong national

policy in favor of arbitration,[3] and "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." [4]

The FAA requires courts to enforce arbitration agreements as written to prevent parties from avoiding their contractual obligations to arbitrate.[5] The FAA "overrule[s] the judiciary's longstanding refusal to enforce agreements to arbitrate,"[6] by placing them "upon the same footing as other contracts." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1, 2 (1924)).[7] Indeed, the United States Supreme Court has gone as far as to say the FAA leaves "no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed."[8]

Consequently, Georgia courts have observed that our state law must give way to federal law, and "the FAA governs the agreement to arbitrate."[9] In other words, "the FAA preempts any state law that conflicts with its provisions or undermines the enforcement of private arbitration agreements. To the extent that state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, it will be preempted by the FAA." [10]

A. Interstate Commerce Requirement

Since, under Georgia law, the FAA is controlling, a threshold consideration that must be met in order to enforce an arbitration agreement under the FAA is to demonstrate that the agreement at issue evidences "a transaction involving interstate commerce." 9 U.S.C. § 2. "Commerce," within the meaning of the FAA, means interstate commerce, and the determination of whether a contract evidences transactions in interstate commerce is a question on which federal rules of contract construction and interpretation govern.[11] The moving party must simply show that the arbitration agreement bears a sufficient nexus to interstate commerce, and as the Fifth Circuit has noted, "this is not a rigorous inquiry" because the threshold for satisfaction of the interstate-commerce requirement is relatively low. [12]

This broad nexus requirement signifies a congressional intent to give the FAA a very wide reach, extending the scope of its coverage to the fullest extent of authority granted by the Commerce Clause. *Allied-Bruce Terminix Companies, Inc.*, 513 U.S. at 274.[13]

"The Supreme Court has stated that the FAA's 'involving commerce' requirement reaches not only the actual physical interstate shipment of goods but also contracts relating to

interstate commerce." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 n.7 (1967) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924)).[14] The term "involving" commerce in the FAA is construed in the broadest permissible sense under the Commerce Clause. *See Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (per curiam) (citation omitted). The interstate commerce requirement is met if "in the aggregate the economic activity in question would represent "a general practice. . .subject to federal control." *Citizens Bank*, 539 U.S. at 56-57 (citation omitted).

Given this admittedly low, aggregate standard, the moving party must simply point to evidence – generally by way of affidavit – to demonstrate that the business giving rise to the agreement at issue affects interstate commerce. In the medical context, for instance, if the facility is certified to accept Medicare patients it will generally meet this burden. Accepting Medicare payments, in and of itself, affects interstate commerce because the transactions typically involve a fiscal intermediary that processes Medicare claims across multiple states.[15] Additionally, if the company accepts products and supplies used in its business, most of which are likely purchased from out-of-state vendors and shipped across state lines, it is considered a form of interstate commerce.[16]

Having demonstrated that the FAA is controlling and the contract at issue affects interstate commerce, the moving party must then fulfill these two fundamental elements to successfully compel arbitration: (1) there is a valid and enforceable arbitration agreement, and (2) the subject dispute is within the scope of the agreement.[17]

B. Demonstrating An Arbitration Agreement Is Valid and Enforceable[18]

Arguing the validity of an arbitration provision is largely a fact intensive inquiry. Things courts consider are the parties' capacity, who executed the contract at issue, the date of execution and so on. A more frequent challenge, however, to the validity of an arbitration provision is where the signatory to the agreement is someone other than the person whom the moving party seeks to compel to arbitration against. What follows are several potential avenues to enforce the arbitration provision under these circumstances.

1. Actual Authority

Agency relationships in Georgia are defined by statute: "[t]he relation of principal and agent arises wherever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another in his behalf." O.C.G.A. § 10-6-1. In the arbitration context, "[t]raditional principles of agency law may bind a nonsignatory to an arbitration agreement."[19] The Eleventh Circuit

has similarly "explained that, as a matter of federal law, arbitration is a matter of consent, not coercion."[20] "Accordingly, a party ordinarily will not be compelled to arbitrate unless that party has entered into an agreement to do so. . .[c]ommon law principles of contract and agency law allow a signatory. . .to bind a non-signatory. . .to an arbitration agreement. . .."[21]

The "gold standard" for enforcing an arbitration agreement using an actual authority argument is where the signatory who signed the arbitration agreement holds a power of attorney. *See*, *e.g.*, *Triad Health Mgmt.*, 298 Ga. App. at 207 (finding the signatory was the patient's expressly appointed agent and the arbitration agreement was within the scope the agency); *but see Life Care Centers of Am. v. Smith*, 298 Ga. App. 739 (2009) (finding a health care power of attorney was insufficient to compel claims to arbitration).

2. Apparent Authority

Although it is somewhat less persuasive, arbitration can also be compelled against a non-signatory where the signatory has "apparent authority" to sign an agreement containing an arbitration provision. "[A]pparent authority to do an act is created as to a third person when the statements or conduct of the alleged principal reasonably cause the third party to believe that the principal consents to have the act done on his behalf by the purported agent."[22]

Thus, if the non-signatory undertook additional "statements or conduct" or signed additional documents, this extraneous information could support an argument that the signatory was exercising apparent authority to make decisions for the non-signatory, which included submitting to arbitration. *But see Ashburn Health Care Ctr., Inc. v. Poole*, 286 Ga. App. 24, 27, 648 S.E.2d 430, 433 (2007) ("Simply put, [the moving party] failed to establish that [the signatory] acted with actual or apparent authority in signing the arbitration agreement, thereby waiving his wife's litigation rights.").

3. Third-Party Beneficiary

Both the United States Supreme Court and Georgia State Courts have held that Congress, by enacting the FAA, "precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon **the same footing as other contracts**."[23] Therefore, one must look to general contract principles in determining whether or not the parties agreed to arbitration.

Georgia Courts have held that "general law provides that a beneficiary need not be specifically named in a contract, so long as the contract shows that it was intended for the third-party's benefit."[24] "Third-party

beneficiaries under the contract 'are bound by any valid and enforceable provisions of the contract in seeking to enforce their claims.'" [25]

All that needs to be present in order to apply the third-party beneficiary doctrine is an underlying contract, the performance of which is intended to benefit a third-party beneficiary. To support this argument, the moving party can cite to specific language in the subject agreement where the parties acknowledge that the signatory was acting in more than one capacity, or that they parties intended to bind not only themselves but also their successors, assigns, etc.

The next question to consider is whether the non-signatory is a third-party beneficiary of that contract. The moving party must, again, cite to language in the agreement that demonstrates how the non-signatory benefits from the agreement.

To be clear, this argument can be difficult to prevail on.[26] Georgia courts and a number of courts throughout the country, however, have relied upon third party beneficiary contract principles to compel a non-signatory to arbitration.[27]

4. Equitable Estoppel

Georgia law recognizes that a non-signatory to an arbitration agreement may also be bound by it, under the doctrine of equitable estoppel.[28] Equitable estoppel precludes a party from repudiating an arbitration provision in a contract if the party has received a "direct benefit" from the contract.[29]

Thus, equitable estoppel can be used to compel a party to arbitrate because their claims against the moving party arise from alleged breaches of obligations and duties of care that spring from the contract agreement, of which the arbitration provision is a part.

III.ESTABLISHING THE SCOPE OF THE ARBITRATION AGREEMENT

After establishing that the arbitration agreement is valid, the next inquiry is determining whether or not the claims giving rise to the dispute fall within the scope of the arbitration provision. One of the most important things to consider in addressing this argument is the following: any doubts regarding the scope of the agreement should be resolved in favor of arbitration.[30]

This posture can be likened to the summary judgment standard of review, which, in the arbitration context, arguably construes facts in favor of the party moving to compel arbitration. Moreover, where an arbitration clause is drafted in broad terms, courts have held such provisions should be broadly construed.[31] Given to the deference to the authority of the FAA, the trial court is required to construe any doubts in favor of arbitration.

A potential response to this argument is that "[a]ny silence or ambiguity. . .should not be construed in favor of arbitration because a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration."[32]

Namely, in the personal injury and wrongful death context, an increasing trend is the party opposing arbitration may concede some claims are subject to arbitration, while others are not subject to arbitration because the scope of the arbitration provision does not cover them.

This precise issue was recently brought before the Georgia Court of Appeals in *Norton v. United Health Servs. of Georgia, Inc.*.[33] In *Norton*, the husband of a deceased health care facility resident brought a malpractice action against the facility, seeking recovery for wrongful death on behalf of the decedent's beneficiaries and to recover claims on behalf of the decedent's estate.[34] The facility moved to compel arbitration on all claims based on an arbitration agreement the resident's husband signed on his wife's behalf under a general power of attorney.[35] The trial court agreed with the facility, granted the motion to stay the litigation and compelled all of the plaintiffs' claims to arbitration.[36]

The plaintiff appealed the trial court's ruling, impliedly conceding that, while the estate's claims may be subject to arbitration, enforcing the arbitration provision against the wrongful death beneficiaries was error.[37] The appellate court agreed.[38]

Although the Court of Appeals initially agreed with the defendant's argument "that a suit for wrongful death is derivative to the decedent's right of action", the court qualified this statement by noting that a "wrongful death action presents a new, distinct, and separate cause of action." [39] The appellate court went on to find that the wrongful death claims were not subject to arbitration because the court essentially equated arbitration to a "procedural defense such as expiration of the statute of limitations", and as such, found that it "may bar a claim by the decedent, but not a wrongful death action by her beneficiaries."[40] The court reasoned that the wrongful death claims "never 'belonged' to [the decedent], so neither she nor her power of attorney could bind the beneficiaries to arbitration."[41]

The Court of Appeals' decision in *Norton* is significant because it dramatically changes the landscape of what claims are subject to arbitration. The result of *Norton* requires the parties to essentially bifurcate the case into two separate claims – the estate claims and wrongful death claims – arbitrating the former and litigating the latter. Not only does this approach undermine the congressional

intent of favoring arbitration over litigation, but it also frustrates one of the primary purposes behind arbitration: increasing the speed of resolution and reducing litigation costs.[42] Indeed, the decision in *Norton* actually **increases** those costs by forcing the parties to litigate two separate claims in two separate venues.

The heart of the court's reasoning in *Norton* appears to be that arbitration is similar to a procedural defense, and as a consequence, it could apply to the decedent's claims but not to those claims brought by her beneficiaries. This rationale appears to have enabled the court to stray from the longstanding rule that a wrongful death claim is entirely derivative of a cause of action the decedent would have had if he or she had lived.[43]

Stated another way, the court impliedly held that arbitration did not inure to the wrongful death beneficiaries' benefit, and thus those claims were not subject to arbitration. Interestingly, this conclusion completely overlooks the actual language of the agreement at issue in *Norton* which specifically stated that the agreement "shall inure to the benefit of and bind the Patient/Resident and the Healthcare Center, their successors, assigns, and intended and incidental beneficiaries."[44]

More importantly though, the *Norton* decision departs from other Georgia case law, which has held that "[a]lthough it is true that the action created by the wrongful death statute is different from the cause of action which [the decedent] would have possessed had he lived, any defense which would have been good against [the decedent] is good against his representatives in a wrongful death action."[45] Furthermore, the decision in *Norton* avoids the United States Supreme Court's recognition that any doubts regarding the scope of the agreement should be resolved in favor of arbitration.[46]

The preceding decision from the Northern District Court – which held that all disputes related to the merits of the claims, including procedural defenses "are for the arbitrator to resolve" – is noticeably different from what the Court of Appeals found in *Norton* that "a procedural defense may bar a claim by the decedent, but not a wrongful death action by her beneficiaries." [47]

The ability to raise the same defense, such as dismissing to compel arbitration, against two distinct causes of action is significant because it reinforces the notion that a wrongful death claim is entirely derivative of the estate's claims, a concept the *Norton* court even recognized.

The *Norton* court, however, ultimately overlooked the derivative nature of estate's claims in reaching the conclusion it did. By

contrast, the District Court for the Southern District of Georgia has recognized the practical implications of dividing the two claims, find it "odd to think that this statutory mechanism would negate a bargained for agreement as to how the claim should be resolved simply because, as a matter of convenience, the claim passes to the decedents' beneficiaries."[48]

Indeed, the Southern District Court noted further that "most courts hold that the beneficiary is bound by the decedent's promise to arbitrate a wrongful death claim." *Id.* at *24 (citing *Bowen v. Spring Valley Health Care Ctr.*, No. 06EV166J at 4 (Sup. Ct. of Elbert County, Ga., Feb. 16, 2007); *Bales v. Arbor Manor*, 2008 WL 2660366 (D. Neb. July 3, 2008) (unpublished); *Wilkerson ex re. Estate of Wilkerson v. Nelson*, 395 F. Supp. 2d 281, 288-89 (M.D.N.C. 2005); *see also In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 647 (Tex. 2009) (rejecting the rationale that "wrongful death beneficiaries in Texas [should] be bound by a decedent's contractual agreement that completely disposes of the beneficiaries' claims, but . . . not be bound by a contractual agreement that merely changes the forum in which the claims are to be resolved. Not only would this be an anomalous result, we believe it would violate the FAA's express requirement that states place arbitration contracts on equal footing with other contract."). [49]

Likewise, the Florida Supreme Court recently ruled that, under Florida's wrongful death statute – which, like Georgia's wrongful death act, creates a derivative right of action – a wrongful death plaintiff is bound by a decedent's agreement to arbitrate.[50] In fact, the Florida Supreme Court declined to follow contrary decisions from courts in other states because the wrongful statutes in those jurisdictions, unlike Georgia's wrongful death act, create *non-derivative* causes of action.[51] Moreover, because under Florida's wrongful death statute (and Georgia's as well) an estate representative would be bound by a decedent's settlement or release of her personal injury claims that extinguishes a future wrongful death claim, the Florida Supreme Court properly observed "no reason that a different result is compelled for the decedent's choice of forum, and it would be anomalous to give greater rights to the estate and heirs than to the decedent."[52]

Compelling all claims to arbitration also promotes judicial economy. Contesting two claims in two different venues creates judicial redundancy, which, again, frustrates the congressional intent behind implementing the FAA.

In the end, the effect of the Court of Appeals' decision in *Norton* is yet to be seen, but given the wealth of authority that precedes the decision both in Georgia and nationwide, it is clearly a departure from these other decisions,

thus leaving room for ambiguity.

IV. OTHER COMMON CHALLENGES TO ARBITRATION

The final part of this article will discuss responses to other challenges parties, who move to enforce arbitration, may face.

A. Consideration

Non-moving parties may challenge an arbitration agreement on the grounds that it lacks consideration. The Georgia Court of Appeals has disposed of this argument in *Rushing v. Gold Kist, Inc.*, holding that "an arbitration agreement was supported by consideration because both parties are bound by the agreement to arbitrate." [53] "Georgia law clearly states that mutual promises and obligations are sufficient consideration to support a contract."[54]

2. Unconscionability

Particularly in the context of an individual signing an arbitration agreement on behalf of someone else, a party moving to enforce arbitration may be faced with a claim that the circumstances giving rise to the execution is procedurally unconscionable. Like other defenses, responding to this argument is largely fact based. It should be remembered, however, that "the FAA does not permit a. . .court to consider claims alleging the contract as a whole was adhesive. . .therefore, adhesion claims are for an arbitrator, not a federal court, to decide."[55]

3. Effect of Medicare and State Medicaid Law

Using clever statutory construction, another potential argument in the medical context one may face is that Medicare and Medicaid laws forbid facilities from accepting any other "money donation, or other consideration as a precondition of admi[ssion]." 42 U.S.C. § 139r(c)5(A)(iii); 42 CFR § 4823.12(d)(3). Thus, the argument continues by claiming that forcing a patient to arbitration constitutes additional consideration as a precondition of admission, which violates these federal statutes.

While crafty, this argument has been disposed of fairly quickly when brought before the court.[56] "While Defendants argument is novel in this Circuit, every court that has been confronted with this issue has determined that [arbitration] agreements are not prohibited under the [foregoing] statute[s]."[57] "Other consideration" within the meaning of these federal statutes contemplates only items similar to the terms "gift, money or donation," not agreements between the parties as to where to settle any dispute that may arise between them. *See id.* Therefore, this claim is arguably simply a red herring.

4. Waiver

Failing to assert an arbitration defense

in an answer and participating in discovery can prevent a party from moving to compel arbitration.[58] In *M. Homes, LLC v. S. Structural, Inc.* the Court found the appellant waived its right to arbitration because "it failed to raise the defense of arbitration in its answer, participated in discovery, and agreed to extend the discovery period, all without raising the issue of arbitration."[59] It is prudent, therefore, to assert arbitration as an affirmative defense out of an abundance of caution in any responsive pleading.

In order to find that a party moving to compel arbitration waived its right to do so, the Eleventh Circuit has established a two-part test. "First, [the Court should] decide if, under the totality of the circumstances, the party has acted inconsistently with the arbitration right, and, second, [the Court] look[s] to see whether, by doing so, that party has in some way prejudiced the other party."[60] However, mere delay is insufficient.[61] In fact, "[b]ecause federal policy strongly favors arbitration, the party who argues waiver bears a **heavy burden** of proof under this two-part test."[62]

Accordingly, when faced with a waiver argument, one needs to be prepared to present facts that show, under the totality of the circumstances, the moving party has not acted inconsistently with the intent to arbitrate. The party should also attempt to eliminate the concern that the opposing party has suffered any prejudice for the delay.

V. CONCLUSION

The law surrounding arbitration is numerous and complex. As recent as this year, the Georgia Court of Appeals has seemingly changed the landscape of enforcing arbitration in personal injury and wrongful death claims. The future remains uncertain and it is the author's hope that this article will help to clarify some of these competing issues.

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[1] For purposes of this article, the author is focusing on arbitrability of personal injury and/or death claims and not arbitrating business disputes.
[2] *See*, *e.g.*, *Booth v. Hume Pub., Inc.*, 902 F.2d 925, 932 (11th Cir. 1990) ("Our circuit has noted that '[t]he purpose of the Federal Arbitration Act was to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation.'" (citation omitted); *accord Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984) (recognizing that one of the primary reasons parties choose to arbitrate is to avoid the expense and delay often associated with litigation).
[3] *See Southland Corp. v. Keating*, 465 U.S. 1, 10 (1983).
[4] *Moses H. Cone Mem. Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983).
[5] *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985) ("The preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate. . ..").
[6] *Volt Informational Serv., Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989) (citation omitted),
[7] *See also AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1745 (2011) ("The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements.").
[8] *Byrd*, 470 U.S. at 218.

[9] *Triad Health Mgmt. of Georgia, III, LLC v. Johnson*, 298 Ga. App. 204, 205, 679 S.E.2d 785, 787 (2009) (reversing the trial court's denial of the defendant's motion to compel arbitration).
[10] *Id.* at 208, 679 S.E.2d at 790 (citing *Langfitt v. Jackson*, 284 Ga. App. 628, 634-635, 644 S.E.2d 460 (2007).
[11] *ADC Construction Company v. McDaniel Grading Inc.*, 177 Ga. App. 223, 338 S.E.2d 733, 735 (1985).
[12] *Trans Chemical Ltd. v. China Nat. Machinery Import and Export Corp.*, 161 F.3d 314, 319 (5th Cir. 1998).
[13] *See also Citizens Bank*, 539 U.S. at 56, 123 S.Ct. at 2040 ("Because the statute provides for the enforcement of arbitration agreements within the full reach of the Commerce Clause. . . it is perfectly clear that the FAA encompasses a wider range of transactions than those actually 'in commerce' – that is, 'within the flow of interstate commerce. . .."").
[14] *See also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74 (1995) (holding that "involving commerce" is the functional equivalent of "affecting commerce").
[15] *Miller v. Cotter*, 863 N.E.2d 537, 544 (Mass. 2007) ("[A]ccepting payment from Medicare, a Federal program, [] constitutes an act in interstate commerce" for FAA purposes); *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005) (per curiam) (same).
[16] *See Katzenbach v. McClung*, 379 U.S. 294, 298-300 (1964) (restaurant's purchase of $70,000 worth of goods that have moved across state lines sufficiently affect interstate commerce); *Owens v. Coosa County Healthcare, Inc.*, 890 So. 2d 983 (Ala. 2004) (affirming order compelling arbitration of personal injury and wrongful death claims against nursing home where medical supplies and equipment were purchased out of state, several residents at nursing home were from other states, and funding was received from Medicare).
[17] *See, e.g., Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 214 (5th Cir. 2003).
[18] The moving party should consider the potential of moving to compel arbitration in federal court, rather than state court, under diversity jurisdiction. *See* 28 U.S.C. § 1332(a)(1) and 9 U.S.C. § 4.
[19] *Triad Health Mgmt. of Georgia, III, LLC*, 298 Ga. App. at 207.
[20] *Bd. of Trustees of City of Delray Beach Police & Firefighters Ret. Sys. v. Citigroup Global Markets, Inc.*, 622 F.3d 1335, 1342 (11th Cir. 2010) (citations and quotations omitted).
[21] *Id.*; *see also Import Export Steel Corp. v. Mississippi Valley Barge Line Co.*, 351 F.2d 503, 505-506 (2d Cir.1965).
[22] *Augusta Surgical Ctr., Inc. v. Walton & Heard Office Venture*, 235 Ga. App. 283, 286, (1998).
[23] *Triad Health Mgmt.*, 298 Ga. App. at 205, 679 S.E.2d at 787 (citing *Doctor's Assoc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652 (1996) (emphasis added)).
[24] *Lankford v. Orkin Exterminating Co., Inc.*, 266 Ga. App. 228, 229, 597 S.E.2d 470, 473 (2004) (quoting *Northern v. Tobin,* 262 Ga. App. 339, 344, 585 S.E.2d 681 (2003)).
[25] *Lankford*, *supra* (quoting *Fidelity & Deposit Co. v. Gainesville Iron Works,* 125 Ga. App. 829, 830, 189 S.E.2d 130 (1972).
[26] *See McKean v. GGNSC Atlanta, LLC*, 329 Ga. App. 507, 513 (2014) (finding that "the premise" of a third party beneficiary argument was "flawed" because the person bound by the arbitration, the non-signatory, never signed the agreement).
[27] *See*, *e.g.*, *Lankford v. Orkin Exterminating Co.*, 266 Ga. App. 228 (2004) (enforcing arbitration, noting that "[t]hird-party beneficiaries under the contract are bound by any valid and enforceable provisions of the contract in seeking to enforce their claims"); *McCutcheon v. THI of S.C. at Charleston, LLC*, 2:11-CV-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011) (holding that the non-signatory resident "was an intended beneficiary to the contract, and the court finds that the arbitration provision was binding on her and remains binding on her estate"); *THI of S. Carolina at Columbia, LLC v. Wiggins*, CA 3:11-888-CMC, 2011 WL 4089435 (D.S.C. Sept. 13, 2011) reconsideration denied (finding that the non-signatory resident "was an intended third-party beneficiary of the Contract which was signed by. . .an immediate family member. It follows that [the resident] was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate"); *Cook v. GGNSC Ripley, LLC*, 786 F. Supp. 2d 1166, 1172 (N.D. Miss. 2011) (holding arbitration agreement in contract for nursing home care was enforceable against third-party beneficiary and her estate under analogous third-party beneficiary law); *Owens v. Coosa Valley Health Care, Inc.,* 890 So.2d 983 (Ala. 2004) (same); *THI of New Mexico at Vida Encantada, LLC v. Lovato*, 848 F. Supp. 2d 1309 (D.N.M. 2012) (same).
[28] *See SCSJ Enterprises, Inc. v. Hansen & Hansen Enterprises, Inc.*, 319 Ga. App. 210, 734 S.E.2d 214 (2012) (holding that the doctrine of equitable estoppel could be applied to require a nonsignatory to participate in arbitration).
[29] *See THI of S. Carolina at Columbia, LLC v. Wiggins*, CA 3:11-888-CMC, 2011 WL 4089435 (D.S.C. Sept. 13, 2011).
[30] *See Image Software, Inc. v. Reynolds and Reynolds Co.*, 459 F.3d 1044, 1055 (10th Cir. 2006); *Krut v. Whitecap Hous. Grp., LLC*, 268 Ga. App. 436, 441 (2004) ("The policy of the FAA in favor of arbitration 'requires a liberal reading of arbitration agreements.'" (citing *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 23 (1983))).
[31] *See e.g. Anders v. Hometown Mortg. Services, Inc.*, 346 F.3d 1024 (11th Cir. 2003) (concluding that the agreement

that provided for arbitration of any and all claims was broad enough to cover the plaintiff's underlying claim).
[32] *Galindo v. Lanier Worldwide, Inc.*, 241 Ga. App. 78, 83 (1999) (citations omitted).
[33] No. A15A2268, 2016 WL 802948 (Ga. Ct. App. Mar. 2, 2016).
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.* at *2 (citation omitted).
[40] *Id.*
[41] *Id.*
[42] *See Booth v. Hume Pub., Inc.*, 902 F.2d 925, 932 (11th Cir. 1990).
[43] *See Mowell v. Marks,* 269 Ga. App. 147 (2004) (quoting *Atlanta Cas. Co. v. Gordon,* 266 Ga. App. 666 (2004)).
[44] *Id.* at *1.
[45] *Turner v. Walker Cty.*, 200 Ga. App. 565, 566 (1991) (emphasis added) (quoting *Wade v. Watson*, 527 F. Supp. 1049 (N.D. Ga. 1981)); *see also THI of Georgia at Shamrock, LLC v. Fields*, No. CV 313-032, 2013 WL 6097569, at *3-4 (S.D. Ga. Nov. 18, 2013) (finding Georgia's wrongful death statute essentially "places a beneficiary in the same shoes as the decedent; thus, a beneficiary is bound by the decedent's promise to arbitrate").
[46] *Moses H. Cone Mem. Hosp.*, 460 U.S. 1 (1983); *see also Hornor, Townsend & Kent, Inc. v. Hamilton*, No. CIV.A.1:02 CV 2979 J, 2003 WL 23832424, at *8 (N.D. Ga. Sept. 29, 2003) (holding that "[o]nce a court has determined that the parties did, in fact, agree to arbitrate the particular dispute, however, then all disputes related to the merits of the claims, including procedural defenses, such as statute of limitation defenses, are for the arbitrator to resolve").
[47] *Cf. Int'l Union of Painters Allied Trades Dist. Council Local No. 15 v. Diversified Flooring Specialist, Inc.*, No. 206-CV-0358-RLH-PAL, 2007 WL 923936, at *4 (D. Nev. Mar. 23, 2007) (noting that the "Ninth Circuit has declined to resolve the merits of a party's procedural defenses to arbitrability flatly stating, "[o]ur inquiry ends upon determining that the dispute is subject to arbitration.") (citing *International Union of Operating Engineers v. Morrison-Knudsen Company, Inc.,* 786 F.2d 1356, 1358 (9th Cir.1986)).
[48] *Kindred Nursing Centers Limited Partnership v. Cynthia Jones. et. al.,* CV 409-105-WTM-GRS (SD Ga. March 16, 2011)
[49] As the Texas Supreme Court explained in *Labatt*, this reasoning imposes special rules and restrictions on arbitration agreements that are inapplicable to other contracts, and therefore is preempted by FAA § 2. *See Labatt*, 279 S.W.3d at 646.
[50] *See Laizure v. Avante at Leesburg, Inc.*, 109 So. 3d 752, 754, 762 (Fla. 2013).
[51] *See Id.* at 761 n. 3 (collecting cases).
[52] *Id.* at 762; *see also THI of N.M. at Vida Encantada, LLC v. Archuleta*, No. Civ. 11-399 LH/ACT, 2013 WL 2387752, at *10 (D.N.M. Apr. 30, 2013) (same result under New Mexico's wrongful death statute).
[53] *Rushing*, 256 Ga. App. 115, 119, 567 S.E.2d 384, 388 (2002); *see also Se. Stud & Components, Inc. v. Am. Eagle Design Build Studios, LLC*, 7:07-CV-077, 2008 WL 2967230 (M.D. Ga. July 30, 2008) (finding that the arbitration agreement at issue was enforceable because the parties exchanged mutual promises).
[54] *Caley v. Gulfstream Aerospace Corp.*, 333 F. Supp. 2d 1367, 1377 (N.D. Ga. 2004) *aff'd,* 428 F.3d 1359 (11th Cir. 2005) (citing *Atlanta Six Flags P'ship v. Hughes*, 191 Ga. App. 404, 381 S.E.2d 605 (1989)); *see also W.L. Jorden & Co. v. Blythe Indus., Inc.,* 702 F.Supp. 282, 284 (N.D.Ga.1988) ("[W]here the agreement to arbitrate is integrated into a larger unitary contract, the consideration for the contract as a whole covers the arbitration clause as well.").
[55] *Jenkins v. First Am. Cash Advance of Georgia, LLC*, 400 F.3d 868, 877 (11th Cir. 2005) (emphasis added); *accord Crawford v. Great Am. Cash Advance, Inc.*, 284 Ga. App. 690, 693, 644 S.E.2d 522, 525 (2007) (determining that an arbitration agreement was not unconscionable, notwithstanding numerous arguments from the signatory to the contrary).
[56] *Kindred Nursing*, at *25.
[57] *Kindred Nursing*, at *25 (citing *Gulledge v. Trinity Mission Health & Rehab of Holly Springs, LLC.*, 3:07CV008MA, 2007 WL 3102141 (N.D. Miss. Oct. 22, 2007); *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983 (Ala. 2004); *Sanford v. Castleton Health Care Ctr., LLC*, 813 N.E.2d 411 (Ind. Ct. App. 2004)).
[58] *See M. Homes, LLC v. S. Structural, Inc.*, 281 Ga. App. 380, 636 S.E.2d 99 (2006).
[59] *Id.*
[60] *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1315-16 (11th Cir. 2002).
[61] *Maxum Founds., Inc. v. Salus Corp.*, 779 F.2d 974, 981 (4th Cir. 1985) (explaining that arbitration is waived "by so substantially utilizing the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay").
[62] *Krinsk v. SunTrust Banks, Inc.*, 654 F.3d 1194, 1200 (11th Cir. 2011) (emphasis added).

WAGE LITIGATION: THE POTENTIAL IMPACT OF *ANDERSON v. SOUTHERN HOME CARE SERVICES, INC.* ON GEORGIA EMPLOYERS

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I. A TALE OF TWO MINIMUM WAGE LAWS.

In late 2015, the Georgia Supreme Court struck fear in employers of potential unpaid wage claims throughout Georgia when it quite unexpectedly decided that employees who are not entitled to minimum wage and overtime under the federal Fair Labor Standards Act may pursue a minimum wage claim against their employers under the Georgia Minimum Wage Law. Yes, Georgia, with its unwavering devotion to employment at will interpreted the relationship between a state and federal statute in a manner that helps *employees*.

The case is *Anderson, et al. v. Southern Home Care Services, Inc., et al.*[1] This article will explain the history, limited powers, and judicial interpretations of the Georgia Minimum Wage Law, briefly address the provisions of the Fair Labor Standards Act, and analyze the potential practical implications of the *Anderson* decision on Georgia employers.

II. GEORGIA'S MINIMUM WAGE LAW

The Georgia Minimum Wage Law ("GMWL"), just like its name suggests, establishes the minimum wage requirements for certain employers and employees in the State of Georgia.[2] Aside from the 2004 addition of a code section addressing preemption of local government mandates on wage and employee benefit requirements, the GMWL has largely remained unchanged since its adoption in 1970.[3]

A. Employers and Employees Covered by the GMWL

The GMWL generally requires all nonexempt Georgia employers, defined as any person or entity that employs one or more employees, to pay their covered employees a set amount for each hour the covered employee "worked in the employment of such employer."[4] 2016 marks the fifteenth year of Georgia's $5.15 per hour minimum wage.[5]

Of course, as all lawyers know, every rule usually contains a laundry list of exceptions. The GMWL does not apply to any employer (1) with sales of $40,000.00 per year or less[6]; (2) with five or fewer employees[7]; (3) that employs

domestic employees[8]; (4) that is a farm owner, sharecropper, or land renter[9]; or (4) is "subject to the minimum wage provisions of any act of Congress as to employees covered thereby if such act of Congress provides for a minimum wage which is greater than the minimum wage which is provided for in this Code section[10]." The GMWL also does not apply to any employee who is (1) compensated in whole or part by gratuities[11]; (2) a high school or college student[12]; (3) employed as a newspaper carrier[13]; or (4) employed by a nonprofit child-caring institution or long-term care facility serving children or mentally disabled adults enrolled in the institution if certain additional requirements are met.[14]

Since 2007, the Georgia House of Representatives has regularly introduced significant revisions to O.C.G.A. §34-4-3, the GMWL code section governing the minimum wage rate and exceptions.[15] One set of proposed legislation sought to add progressive minimum wage increases and remove the minimum wage exemptions for domestic employees, farm owners, sharecroppers, land renters, and employees whose compensation consists wholly or partially of gratuities.[16] It also completely sought to remove subsection (c), which makes the GMWL inapplicable to any employer subject to Congressional minimum wage provisions if that minimum wage is greater than the GMWL.[17] Perhaps most interestingly, the proposed house bill sought to a section that directly references the Fair Labor Standards Act by allowing employers who employ individuals meeting the tip credit eligibility requirements under the Fair Labor Standards Act, 29 U.S.C. §203(t), to use tips to credit up to fifty percent (50%) of the minimum wage required by the GMWL.[18]

B. Powers of the Georgia Commissioner of Labor

The Georgia Commissioner of Labor is granted certain powers in connection with the GMWL, although these powers remain largely unused. O.C.G.A. §34-4-2 places the responsibility of administering and enforcing the GMWL on the Commissioner, and further allows the Commissioner of Labor to make rules and regulations for this administration. As of March 20, 2016, the Georgia Commissioner of Labor has adopted any rules or regulations in administering the GMWL.[19]

The Georgia Commissioner of Labor is also allowed to grant exemptions from the GMWL's minimum wage requirements to "certain categories of organizations and businesses".[20] These exemptions must be based on "considerations of the value of allowing certain classes of persons to be employed at rates below the minimum rate because of overriding considerations of public policy to allow employment of certain persons with disabilities and others who cannot otherwise compete effectively in the labor market."[21] The

Commissioner of Labor is authorized to investigate and compile information identifying the reasons to grant an exemption permitted by O.C.G.A. §34-4-4(a), and must maintain as public record a list of all exemptions granted and the records from the underlying investigation.[22]

C. Employer Record Requirements

The GMWL requires every subject employer to maintain records showing the hours worked by and the wages paid to each employee.[23] Employers governed by the GMWL must allow the Georgia Commissioner of Labor, its deputy, or any authorized agent to inspect these records, and must also furnish, upon demand, a sworn statement of the hours worked and wages paid to each employee.[24] While the GMWL imposes these record keeping requirements, it does not contain any corresponding penalty provisions for an employer's failure to maintain this wage and hour information.[25]

D. Preemption of Local Government Mandates

For the first thirty four (34) years of its life, the GMWL applied only to private employers. It was not until 2004 that the Georgia legislature amended the GMWL to preempt certain hourly pay requirements adopted by local governments.[26] Notably, this additional code section, O.C.G.A. §34-4-3.1, only expanded the GMWL to counties, municipal corporations, consolidated governments, boards of education, or other local public boards, bodies, or commissions.[27] The GMWL is currently silent as to minimum hourly requirements of persons employed by the State of Georgia.[28]

A long set of legislative findings accompanied this new code section, which impliedly evidenced a reticence to impose minimum hourly rate requirements on any employer other than private individuals and businesses. The legislature found that mandated wage rates and employment benefits are major costs to private businesses, and local differences in wage rate and benefit requirements place businesses in localities with higher wage rates and benefit requirements at a competitive disadvantage.[29] The General Assembly concluded (1) that private businesses must be able to transact business in a state with uniform mandated wage rates and employment benefits in order to "remain competitive and yet attract and retain the highest possible caliber of employees," and (2) that "[l]egislative wage and employment benefit disparity between local government entities of this state creates an anticompetitive marketplace that fosters job and business relocation."[30]

The Georgia legislature immediately amended O.C.G.A. §34-4-3.1 the following year, in 2005, by adding a subsection prohibiting local governments from controlling

or affecting the wages or benefits provided by any entity or individual doing business with the local government entity.[31] The new subsection also prohibits local governments from awarding preferences to any entity or individual doing business with the local government based on the wages or employment benefits provided by those businesses and individuals to their employees.[32]

The GMWL's preemption of local government mandates codified in O.C.G.A. §34-4-3.1 appears to be a diluted version of previous legislative efforts to impose hourly rate requirements on the State of Georgia and certain related employers. In 2002, the Georgia Senate adopted a resolution creating a Senate Study Committee on Wage Restructuring based, in part, on the Senate's finding that public policy and economic issues required additional research and analysis to determine legislative and other ways "to reduce or eliminate the livable income gap for Georgians without creating negative economic or fiscal impacts."[33] The state Senate tasked this committee with studying the conditions, needs, issues, and problems related to this public policy issue making a report of its findings, recommendations, and proposed legislation on or before December 31, 2002.[34]

The Georgia Senate introduced Bill 303 the following year, in 2003, which proposed adding a chapter "4A" to Title 34 of the Official Code of Georgia Annotated immediately after the GMWL.[35] Chapter 4A would require the State of Georgia and certain contractors and recipients of financial assistance to pay any employee not receiving health care benefits an hourly wage of at least "the living wage for the market area," calculated by a very specific equation.[36] Chapter 4A as proposed also contained anti-retaliation and discrimination provisions and allowed employees to file claims with the Georgia Commissioner of Labor if the employee did not receive the wages required by this chapter or was retaliated or discriminated against by the employer.[37] As we know, Chapter 4A did not successfully become a law, and O.C.G.A. §34-4-3.1 became effective the next year.

Despite the failure of Chapter 4A and the adoption of very specific findings to support O.C.G.A. §34-4-3.1, this particular portion of the GMWL continued to cause controversy. The Georgia House of Representatives unsuccessfully tried to pass a nearly identical Chapter 4A to Title 34 in 2007.[38] Further, as recently as January 2016, certain members of the Georgia Senate introduced a bill to repeal O.C.G.A. §34-4-3.1 in its entirety.[39]

E. Employee Enforcement Rights

Employees may file a civil lawsuit in superior court to recover the difference between the amount paid by their employers

and the minimum wage required by the GMWL at any time within three (3) years.[40] Employees are also entitled to liquidated damages in the amount equal to their original claim, and may be awarded reasonable attorney's fees as allowed by the court.[41] These lawsuits are not barred by either (1) a contract or agreement with the employer for a lesser hourly wage than permitted by the GMWL or (2) the employee's acceptance of hourly wages less than the permitted by the GMWL.[42]

III. THE FAIR LABOR STANDARDS ACT

A. Brief History and Purpose

Enacted in 1938, Congress's principal purpose behind the Fair Labor Standards Act (the "FLSA") "was to protect all covered workers from substandard wages and oppressive working hours…'".[43] Congress specifically found that permitting

> labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.[44]

Congress thus declared its policy "to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."[45]

Almost a decade later, Congress passed the Portal-to-Portal Pay act[46] in response to two United States Supreme Court cases that expanded "compensable time" to include certain pre and post-shift activities.[47] Within six months of these decisions, over 1,000 lawsuits had been filed based on those pre and post-shift activities, which collectively sought nearly $6 *billion* in back pay and liquidated damages.[48] Not surprisingly, the Portal-to-Portal Pay act specifically provides that employers are not liable for unpaid minimum wage or overtime compensation for the following activities that occur before the start or after the conclusion of the employee's principal activities:

> 1. Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> 2. Activities which are preliminary to or postliminary to said principal activity or activities.[49]

B. Some of These Things Just Aren't Like the Other: Comparison to the GMWL

The FLSA and GMWL share the overarching requirement for employees to

receive at least a certain amount of pay for each hour worked, and both set of laws proscribe the minimum amount of hourly compensation. The main similarities and differences between the GMWL and FLSA are highlighted below.

Minimum Hourly Compensation. The FLSA requires employers to compensate nonexempt employees at a rate of at least $7.25 for each hour worked in a workweek.[50]

Overtime. Unlike the GMWL, the FLSA contains maximum hour limitations (i.e., overtime requirements), which prohibit employers from working employees more than forty (40) hours per week unless those employees are compensated at a rate one and one-half times their regular rate.[51]

Hours Worked. Not all time an employee may spend on behalf of or benefit of the employer is compensable under the FLSA.[52] For example, "hours worked" does not include time changing clothes or washing at the beginning or end of each workday as long as that time is excluded from hours worked by the express terms, custom, or practice under a bona fide collective-bargaining agreement applicable to that employee.[53] Whether wait time is "hours worked" under the FLSA depends on whether the employee was "engaged to wait" or "waited to be engaged".[54] An employee required to be on duty fewer than 24 hours is working even if allowed to sleep or engage in other personal activities during that time.[55] A sleeping time of eight (8) hours may be applied if the employee is required to be on duty for 24 hours or more, the employer provides adequate sleeping facilities, the employee can usually enjoy an uninterrupted eight (8) hours of sleep, and the employer and employee agree to this credit.[56] If the credit applies, any interruption in the sleep qualifies as "hours worked," and if the eight (8) hour period is so interrupted that the employee cannot get a reasonable night's sleep, then the entire period qualifies as "hours worked".[57]

Exempt Employees. See the "Exemptions" section, below.

Retaliation/Discrimination Protections. The FLSA does prohibit employers from retaliating or discriminating against employees who file a complaint or instituted a proceeding under the FLSA, testify in the proceeding, or serve on an industry committee.[58] The GMWL contains no such anti-retaliation or discrimination prohibitions.[59]

Record Keeping Duties. Like the GMWL, the FLSA also requires employers to maintain certain information on both exempt and nonexempt employees, but the information required by the FLSA is more comprehensive than that required by the GMWL.[60] For employees subject to the FLSA's minimum wage and overtime requirements, the information includes each employee's regular hourly rate for any week in which overtime is owed, the hours worked for each workday and

workweek, total daily or weekly straight-time and overtime compensated due, total premium pay for overtime hours, the total additions to or deductions from wages in each pay period, the total wages paid, and the date of pay and pay period covered by the wages paid.[61] Further, if the employer fails to keep time records, the employee's burden of proving the amount of uncompensated time under the FLSA is relaxed, and courts are allowed to award damages "even though the result be only approximate."[62]

Circumvention. Neither the GMWL nor the FLSA permit employers and employees to privately contract or negotiate around or abridge the minimum compensation requirements in these laws.[63]

Statute of Limitations. While the GMWL contains a three year statute of limitations, claims under the FLSA must be brought within two (2) years unless the violation is "willful," in which case the claims may be brought within three (3) years of the alleged violation.[64]

Damages. The GMWL and the FLSA both award (i) the amount of unpaid wages, (ii) an additional amount equal to the unpaid wages as liquidated damages[65], and (iii) attorneys' fees and costs to the prevailing plaintiff.[66] These compensation laws appear to differ slightly on liquidated damages. Courts must award liquidated damages under the FLSA unless the employer proves "that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act."[67] The GMWL's statutory language allowing employees to sue for unpaid wages "plus an additional amount equal to the original claim, which shall be allowed as liquidated damages" appears to mandate liquidated damages, but courts have not yet interpreted this provision.[68]

IV. COMMON FSLA EXEMPTIONS

The FLSA allows employers to exempt from the minimum wage[69] and overtime[70] requirements certain employees who perform specific job duties and receive a certain amount of pay.[71] The requirements for each exemption are highly individualized, but overall, they focus on the employee's job duties, responsibilities, and authority. The arguably most common exemptions include the following:

- Bona fide executive, administrative, or professional capacity (which includes employees employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools)[72]
- Outside sales[73]
- Domestic employees and "companion services"[74]

- Computer systems analysts, computer programmers, software engineers, or similarly skilled workers[75]

- Highly compensated.[76]

The relevant exemption, for purposes of this paper, is employees providing companion services.

A. The (Prairie Home) Companionship Exemption

In 1974, the FLSA added employees providing companionship services to its list of exemptions.[77] This exemption includes (i) employees "employed on a casual basis in domestic service establishment to provide babysitting services" and (ii) employees "employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)".[78] The U.S. Department of Labor recently gave a substantial makeover to the regulations governing the companionship services exemption, and these new and improved regulations became effective on January 1, 2015.[79] Because the *Anderson* opinion applied the pre-2015 language, both the former and current version of the applicable regulations are included in this article.

Before January 1, 2015, federal regulations defined "companionship services" as "those services which provide fellowship, care, and protection of a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs."[80] Examples of "companionship services" included meal preparation, bed making, and washing clothes.[81] General household work was also permitted, but only if that work did not exceed twenty percent (20%) of the total weekly hours worked.[82]

The January 1, 2015 regulations significantly changed the role of the "companionship services" employee. Now, "companionship services" means "the provision of fellowship and protection for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself," which includes "engag[ing] the person in social, physical, and mental activities, such as conversation, reading, games, or crafts, or accompanying the person on walks, on errands, to appoints, or to social events."[83] The care activities identified in the previous version of the regulation, such as dressing, grooming, feeding, bathing, toileting, are now only exempt if those activities do not exceed twenty percent (20%) of the total time worked per person, per week.[84]

Interestingly, the companionship exemption still requires those employees to receive minimum wage and, if the employee lives outside the employer's household, time-

and-a-half overtime.[85] Instead, this exemption allows the employer to credit nonmonetary benefits provided to the employee against compensation owed to the employee.[86] The exemption identifies specific percentages of credit employers can take for providing meals and, for live-in domestic service employees, furnishing lodging.[87] The combined credits cannot exceed 150% of the statutory minimum hourly wage for any work day, however.[88]

V. *ANDERSON V. SOUTHERN HOME CARE SERVICES, INC.*

A. Just the Facts, Ma'am

The plaintiffs formerly worked for defendants Res-Care, Inc. and Southern Home Care Services, Inc., an at-home care company and its subsidiary.[89] The plaintiffs provided personal support services, such as bathing, grooming, dressing, and toileting transfers, as well as limited general housework, to the defendants' medically home-bound clients.[90] While the defendants required the plaintiffs to drive to various clients in a single day, the defendants did not permit the plaintiffs to report that travel time, nor did the defendants compensate the plaintiffs for this travel time.[91]

The plaintiffs filed a lawsuit against the defendants in February 2013, alleging violations of the GMWL based on that unpaid travel time and requesting to certify a class action.[92] The defendants removed to the U.S. District Court, Northern District of Georgia based on diversity jurisdiction, and the fight began between the GMWL and FLSA.[93]

The defendants landed the first blow in their motion for judgment on the pleadings, arguing, in pertinent part, that they were subject to the FLSA and, since the plaintiffs failed to identify any FLSA exception, the defendants were thus exempt from the FMWL under O.C.G.A. §34-4-3(c).[94] The plaintiffs countered with an amended complaint alleging they were exempt from the FLSA minimum wage requirements as "companionship services" employees, and thus the GMWL did apply.[95] Barely phased by this counter attack, the defendants moved again for judgment on the pleadings, this time arguing the plaintiffs are not covered by the GWML because (1) the defendants are subject to the FLSA, so the GMWL does not apply pursuant to O.C.G.A. §34-4-3(c), and (2) the plaintiffs are "domestic employees" exempted under O.C.G.A. §34-4-3(b)(3).[96]

The district court called a time-out and certified the following two (2) questions to the Georgia Supreme Court:

> 1. Is an employee that falls under an FLSA exemption effectively "covered" by the FLSA for purposes of O.C.G.A. §34-4-3(c) analysis, thereby prohibiting said employee from receiving minimum wage compensation under the GMWL?
>
> 2. Is an individual whose employment consists of providing in-home personal

> support services prohibited from receiving minimum wage compensation under the GMWL pursuant to the "domestic employees" exception articulated in O.C.G.A. §34-4-3(b)(3)?[97]

Surprisingly, the Georgia Supreme Court answered both questions with a simple "no." Well, not quite a *simple* no, but the Georgia Supreme Court did answer both questions in the negative.

Question #1: FLSA v. GMWL: Are They Mutually Exclusive?

In addressing the first question, the Georgia Supreme Court efficiently concluded that, because the GMWL applies to "any person or entity that employs one or more employees," the defendants are clearly subject to the GMWL.[98] The court next tackled the true substance of the defendants' arguments – that the GMWL did not apply because the parties were subject to the FLSA. The defendants based this argument on O.C.G.A. §34-4-3(c), which states, *inter alia*, that

> This chapter shall not apply to any employer who is subject to the minimum wage provisions of any act of Congress as to employees covered thereby if such act of Congress provides for a minimum wage which is greater than the minimum wage which is provided for in this Code section.[99]

The defendants' argument, on its face, appeared to articulate the correct outcome. No question existed that the defendants were "subject to" the minimum wage provisions of the FLSA. Likewise, no question existed that the FLSA minimum wage was and is equal to or greater than the GMWL minimum wage during the relevant times of this lawsuit. How did the court reach the exact opposite conclusion?

What defeated the defendants' argument was the "as to employees covered thereby" language contained in O.C.G.A. §34-4-3(c).[100] The court found that the phrase "as to employees covered thereby" creates an additional requirement to impose the exception under this code section.[101] In other words, for the GMWL's exception in O.C.G.A. §34-4-3(c) to apply, (i) the employer must be subject to the FLSA, (ii) the specific employee(s) at issue must be subject to the FLSA, ***and*** (iii) the FLSA's minimum wage must be greater than the GMWL's minimum wage.

Clearly, the first and third elements were satisfied, leaving the Court to answer the question: "did the plaintiffs fall under the 'companionship services' exemption?" The Court found that yes, under the pre-January 2015 regulations, the plaintiffs fell under the FLSA's "companionship services" exemption and thus were not entitled to the FLSA's minimum wage.[102]

The defendants tried to avoid the Court's fatal blow to their position by arguing that the plaintiffs were covered by other FLSA provisions, just not the minimum wage and maximum hour requirements.[103] The Court

rejected that argument as well, citing to the GMWL's language that O.C.G.A. §34-4-3(c) only applies to employees "covered" by the minimum wage provisions of a federal statute. Because the plaintiffs were not entitled to minimum wage set by the FLSA during their employment with the defendants, they were not "covered by" a federal statute with a higher minimum wage than the GMWL.[104]

Question #2: Were plaintiff's exempt as domestic employees?

The defendants rallied their troops to defeat the plaintiffs in the second battle over whether the plaintiffs were exempt as "domestic employees" under O.C.G.A. §34-4-3(b)(2). Neither the GMWL nor the Georgia Commissioner of Labor have defined this term, leaving the Georgia Supreme Court to "apply the most natural and reasonable meaning of the term."[105]

The Court explored a wide array of sources to define "domestic employees," including O.C.G.A. §34-8-35(1), Encyclopedia Britannica, U.S. Department of Labor regulations, laws from other states, and even Wikipedia.[106] The Court noted that the sources essentially provided minor variations on a theme because all limited the scope of domestic employees to work done in the home of the employer.[107] The Court therefore held that the term "domestic employees" in O.C.G.A. §34-4-3(b)(2) is limited "to work in or about the homes of their employers."[108] Because it was undisputed that the plaintiffs provided services in the homes of the defendants' clients, the plaintiffs did not work in the homes of their employers and the defendants were not exempt from the GMWL under this provision.[109]

VI. THE BATTLE WAGES ON: *ANDERSON'S* POTENTIAL IMPACT ON GEORGIA EMPLOYERS

The obvious takeaway from the *Anderson* opinion is that just because the employer is subject to the FLSA does not mean that the employee cannot sue under the GMWL; in other words, *Anderson* recognizes and establishes that employees who are not entitled to the minimum wage provisions of the FLSA may have legally enforceable rights under the GMWL. As argued by the defendants in *Anderson*, this result means that the GMWL applies to other categories of Georgia employees who are exempt from the FLSA's minimum wage protections.[110]

While that argument is true, will *Anderson* really make much of a difference?

The Georgia Supreme Court did not seem to think so. It reasoned that the math alone establishes that the Georgia minimum wage of $5.15 per hour will affect few, if any, employees exempt under the FLSA.[111] As an example, the Court stated that "even an FLSA-exempt professional working double-time year-

round – 80 hours a week for all 52 weeks – would have to make less than $21,424 per year to run afoul of the GMWL and therefore trigger its protections."[112]

But what about time spent by nonexempt employees that is not compensable under the FLSA? Bear with me here for a minute. As explained above, the FLSA and Portal-to-Portal Pay act place certain limitations on what is and is not compensable time.[113] The GWML, however, only requires payment of at least $5.15 for each hour worked, meaning that unlike the FLSA, the GMWL places no restrictions on "hours worked."[114] Arguably, nonexempt employees would not be "covered by" the FLSA during the time they performed work that is not compensable under the FLSA but is time "worked in the employment of such employer" under the GMWL. Of course, the response to this argument is the GMWL does not consider the compensation parameters of an act of Congress other than requiring that the federal minimum wage be greater than the Georgia minimum wage, so the nonexempt employee would not have a GMWL claim.[115]

The potential "compensable v. non-compensable" time argument may come into play sooner than one might think. In May 2014, President Barak Obama signed a Presidential Memorandum requiring the U.S. Department of Labor regarding the salary requirements for certain employees exempt under the FLSA.[116] Finding that the FLSA regulations "regarding exemptions from the [FLSA's] overtime requirement, particularly for executive, administrative ,and professional employees . . have not kept up with our modern economy," President Obama required the Department of Labor to "propose revisions to modernize and streamline the existing overtime regulations."[117]

And, the U.S. Department of Labor did just that in September 2015, when it issued proposed changes to the regulations governing the salary requirements for certain exempt employees.[118] While the exact amount of increased salary is based on the 40th percentile of weekly earnings for full-time salaried workers, it is expected that the salary requirements will increase from $455.00 per week to at least $921.00 per week in 2016.[119] If adopted as proposed, the new FLSA regulations will also annually increase the salary requirements for certain exemptions.[120] Practically, this means that it may be less expensive for employers to switch exempt employees to nonexempt employees and pay them an hourly rate with overtime, as applicable. Under *Anderson*, these employees would now be "covered" by an act of Congress, and thus not subject to the GMWL, unless, of course, whether an employee's time is covered by *and* compensable under the FLSA affects the application of the GMWL.

The times, they are a changin', especially in labor and employment law. As recognized by the *Anderson* opinion, the Georgia minimum wage is so low it is doubtful that many lawsuits will result from this case. *Anderson* should serve as a timely reminder to employers, corporate counsel, and labor law attorneys throughout Georgia, however, of the importance of both minimum wage statutes. Between the *Anderson* opinion and the upcoming changes in salary requirements for certain FLSA exempt employees, there is no time like the present for employers to audit the classification of exempt and nonexempt employees and the business's timekeeping systems and policies to ensure compliance with the FLSA and the GMWL.

[1] *Anderson v. Southern Home Care Services, Inc.,* 298 Ga. 175 (2015).
[2] O.C.G.A. §34-4-1, *et seq.*
[3] O.C.G.A. §34-4-3.1, *see* generally, O.C.G.A. §34-4-1, *et seq.*
[4] O.C.G.A. §34-4-3(a)
[5] O.C.G.A. §34-4-3(a). While the 2015-2016 Georgia legislative session included multiple attempts to raise the state minimum wage, none were successful (see 2015 GA H.B. 8, 2015 GA H.B. 272, 2015 GA S.B. 15, 2016 GA S.B. 293)
[6] O.C.G.A. §34-4-3(b)(1)
[7] O.C.G.A. §34-4-3(b)(2)
[8] O.C.G.A. §34-4-3(b)(3)
[9] O.C.G.A. §34-4-3(b)(4)
[10] O.C.G.A. §34-4-3(c)
[11] O.C.G.A. §34-4-3(b)(5)
[12] O.C.G.A. §34-4-3(b)(6)
[13] O.C.G.A. §34-4-3(b)(7)
[14] O.C.G.A. §34-4-3(b)(8)
[15] 2007 GA H.B. 845; 2009 GA H.B. 290; 2010 GA H.B. 1308; 2013 GA H.B. 97; 2015 GA H.B. 8; 2015 GA H.B. 272.
[16] 2007 GA H.B. 845; 2009 GA H.B. 290; 2010 GA H.B. 1308; 2013 GA H.B. 97; 2015 GA H.B. 8.
[17] *Id.*
[18] *Id.*
[19] *See* generally Ga. Comp. R. & Regs, 300-1-1-.01, *et seq.*
[20] O.C.G.A. §34-4-4(a)
[21] *Id.*
[22] O.C.G.A. §34-4-4(b)
[23] O.C.G.A. §34-4-5
[24] *Id.*
[25] O.C.G.A. §34-4-1, *et seq.*
[26] O.C.G.A. §34-4-3; O.C.G.A. §34-4-3.1
[27] O.C.G.A. §34-4-3.1
[28] *See* generally O.C.G.A. §34-4-1, *et seq.*
[29] 2004 GA H.B. 1258
[30] *Id.*
[31] *Id.;* O.C.G.A. §34-4-3.1(c)
[32] O.C.G.A. §34-4-3.1(c)
[33] 2002 GA S.R. 552
[34] *Id.*
[35] 2003 GA S.B. 303
[36] *Id.*
[37] *Id.*
[38] 2007 GA H.B. 572
[39] 2016 GA S.B. 292
[40] O.C.G.A. §34-4-6
[41] *Id.*
[42] *Id.*
[43] *Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728, 739 (1981)
[44] 29 U.S.C. §202(a)
[45] 29 U.S.C. §202(b)
[46] 29 U.S.C. §251, *et seq.*
[47] *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944) held that an employee's time traveling between mine portals and underground work areas was compensable time under the FLSA; *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-691 (1946) held that an employee's time walking from timeclocks to work benches was compensable under the FLSA.
[48] *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 516 (2014), citing S.Rep. No. 37, 80th Cong., 1st Sess., pp.2-3 (1947)
[49] 29 U.S.C. §254(a)
[50] 29 U.S.C. §206(a)(1)
[51] 29 U.S.C. §207(a)(1)
[52] See generally 29 C.F.R. §785.1, *et seq.* and the Portal-to-Portal Pay act, 29 U.S.C. §251, *et seq.*
[53] 29 U.S.C. §203(o)
[54] 29 C.F.R. §285.14, citing *Skidmore v. Swift*, 323 U.S. 134 (1944)
[55] 29 C.F.R. §785.21
[56] 29 C.F.R. §785.22(a)
[57] 29 C.F.R. §785.22(b)
[58] 29 U.S.C. §215(a)(3); 29 U.S.C. §218(c)
[59] O.C.G.A. §34-4-1, *et al.*
[60] See 29 C.F.R. §516.2, *et seq.*
[61] 29 C.F.R. §516.2(6)-(11)

[62] *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 687-688 (1946)
[63] O.C.G.A. §34-4-6; *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 707 (1945)
[64] 29 U.S.C. §255(a)
[65] 29 U.S.C. §216(b)
[66] Id.
[67] 29 U.S.C. §260, *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1163 (11th Cir.2008)
[68] O.C.G.A. §34-4-6
[69] 29 U.S.C. §206
[70] 29 U.S.C. §207
[71] 29 U.S.C. §213
[72] 29 U.S.C. §213(a)(1); 29 C.F.R. §541.100, *et seq.*
[73] 29 U.S.C. §213(a)(1)
[74] 29 U.S.C. §213(a)(15); 29 C.F.R. §552.1, *et seq.*
[75] 29 U.S.C. §213(a)(17)
[76] 29 C.F.R. §541.601
[77] *Buckner v. Florida Habilitation Network, Inc.*, 489 F.3d 1151, 1154 (11th Cir.2007)
[78] 29 U.S.C. §213(a)(15)
[79] 78 Fed.Reg. 60454, 60480-60486 (Oct. 1, 2013)
[80] 29 C.F.R. §552.6, effective until January 1, 2015
[81] *Id.*
[82] *Id.*
[83] 29 C.F.R. §552.6(a)
[84] 29 C.F.R. §552.6(b)
[85] 29 C.F.R. §552.100(a)
[86] *See* 28 C.F.R. §552.100
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Anderson v. Southern Home Care Services, Inc.*, 298 Ga. 175 (2015)
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Anderson v. Southern Home Care Services, Inc.*, 298 Ga. 175 (2015)
[99] O.C.G.A. §34-4-3(c*); Anderson v. Southern Home Care Services, Inc.,* 298 Ga. 175 (2015)
[100] *Anderson v. Southern Home Care Services, Inc.,* 298 Ga. 175 (2015)
[101] "O.C.G.A. §34-4-3(c) looks not only to whether the employer is 'subject to the minimum wage provisions of any act of Congress' but also to whether the employees in question are 'covered thereby'…" Id.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.,* citing *Deal v. Coleman*, 294 Ga. 170, 172-173 (2013)
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *See* Section III(A), *supra.*
[114] *See* O.C.G.A. §34-4-1, *et seq.*
[115] O.C.G.A. §34-4-3(c)
[116] 79 FR 18737 (Apr. 3, 2014), http://op.bna.com.s3.amazonaws.com.
[117] Id.
[118] http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-0001; see Section III(C), *supra.*
[119] *Id.*
[120] *Id.;* http://www.dol.gov/whd/overtime/nprm2015/ot-nprm.pdf

ARE CLAIMS FOR ATTORNEY FEES IN TORT CASES COVERED BY GENERAL LIABILITY POLICIES? THE ANSWER IS NOT-S0-SIMPLE

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I. INTRODUCTION

Under the so-called "American Rule," litigants bear their own legal costs absent a statutory or contractual authorization to recover these costs from an opposing party. In Georgia, which largely adheres to this familiar rule, plaintiffs in tort cases (but not defendants) can recover their legal costs under O.C.G.A. § 13-6-11 if there was no *bona fide* dispute on liability or the defendant acted in bad faith.[1] More recently, as part of "tort reform," the legislature enacted O.C.G.A. § 9-11-68 which shifts the burden of legal costs to the opposing party in tort cases in certain circumstances.[2] Depending on the amount of compensatory or punitive damages sought, fee awards can constitute a large portion of a plaintiff's recovery.

In reviewing a tort claim for coverage, meanwhile, liability insurers are instructed to consider whether the substantive allegations asserted against the insured fall within the applicable policy's terms of coverage. In doing so, insurers often overlook the distinct question of whether coverage exists for the attorneys' fees sought in connection with a covered claim. Recently, federal courts in Georgia that have addressed this issue have concluded that attorney fees may *not* be covered as "damages" within the meaning of that term in standard general liability policies.[3] These rulings, if upheld, have obvious impacts on the rights and obligations of insurers and insureds as well as the resolution of claims by plaintiffs.[4] This article analyzes the underpinnings of these decisions and discusses the practical implications for all parties involved.

II. GENERAL RULES OF POLICY INTERPRETATION

In the standard language of many liability policies, the insurer agrees to pay for sums that the insured party becomes legally obligated to pay as "damages" that result from covered losses such as bodily injury, property damage, or personal and advertising injury. Although the policies define the types of losses that fall within these substantive terms, the term "damages" is ordinarily construed as seeking monetary relief. At first glance, therefore, it

would seem that a claim for attorney fees associated with a covered loss would fall within the scope of "damages" resulting from that loss so as to be covered by the policy.

This impression would be fortified by the established rule that insurance policies "will be liberally construed in favor of the object to be accomplished, and the conditions and provisions of contracts of insurance will be strictly construed against the insurer who prepares such contracts."[5] This rule applies with such force that the same words can be construed broader when used in a provision that creates coverage as opposed to a provision that excludes coverage. So, for example, whereas the phrase "arising out of" in a grant of coverage is construed in such a manner that "almost any causal connection or relationship will do," the *identical* phrase in an exclusion from coverage requires the much narrower "cause-in-fact" analysis.[6]

Consistent with this standard, the phrase "because of bodily injury or property damage" has been construed broadly to mean "by reason of" or "on account of."[7] Based on that broad construction, punitive damages easily fall within the term "damages," because "an insurer, having affirmatively expressed coverage in broad promissory terms, has a duty to define any limitations or exclusions clearly and explicitly."[8] Similarly, in *Greenwood Cemetery v. Travelers Indemnity Company*, the policy covered claims "for mental anguish because of any professional malpractice, error or mistake in any conduct by the insured."[9] The court concluded that the word "for" should be construed broadly in favor of the insured to mean "by reason of" or "because of" or "on account of", rather than the narrower definition advanced by the insurer, i.e., "equivalent to" or "to the amount, value or extent of".[10]

III. CONSTRUCTION OF "DAMAGES" IN LIABILITY POLICIES

Given the exceedingly broad constructions of terms in grants of coverage in particular, it would seem that a claim for attorney fees that has any connection with a covered loss would be considered "damages" unless the policy specifically provided otherwise. The Eleventh Circuit and one state court decision have taken a closer look at fee-shifting statutes in tort cases, however, and reached the opposite result.[11]

In *Alea London, Ltd. v. American Home Services, Inc.* one of the issues was whether an award of attorney fees under O.C.G.A. § 13-6-11 would be covered as "damages because of personal injury or advertising injury."[12] *Alea* was a declaratory judgment action brought by the insurer to determine whether it owed coverage for a class action suit against the

insured who was accused of faxing thousands of unsolicited advertisements in violation of the Telephone Consumer Protection Act (TCPA).[13] In addition to seeking compensatory and punitive damages, the class plaintiff sought attorney fees under O.C.G.A. § 13-6-11, which provides as follows:

> The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.[14]

The district court hearing the coverage action found, in the first instance, that the TCPA claim was covered under the "advertising injury" provisions of the policy, but that the insurer did not have a duty to indemnify based on other provisions in the policy.[15] The district court further found that legal fees under Section 13-6-11 would be covered "damages" if awarded in the case.[16] The insured appealed to the Eleventh Circuit which found the insurer did have a duty to indemnify and reversed on that basis.[17] Further, although the liability case had not yet gone to trial, the Eleventh Circuit found that attorney fees, if allowed under the statute, would *not* be covered by the policy.[18]

In reaching that conclusion, the court noted that Georgia law considers attorneys fees to be "ancillary" to damages because they are not recoverable absent a favorable finding on the merits of the underlying claim.[19] The court determined that attorney fees are "expenses of litigation," which are distinct from "damages" covered by the policy, reasoning as follows:

> That "attorneys' fees" would be subsumed within the Policy's reference to "damages" is not consistent with a plain, ordinary-meaning reading of the Policy. Furthermore, that attorneys' fees are part of the "expenses of litigation" under § 13–6–11 does not mean they become "damages" under the Policy. The Policy covers damages and costs but notably does not mention attorneys' fees.[20]

The court further noted that the insurer had agreed to pay the insured's legal fees in defending a claim and whereas there was no language "that leads to the conclusion that the insurance contract contemplated that Alea would indemnify AHS for its opponents' attorneys' fees."[21] Essentially, therefore, the Eleventh Circuit found attorney fees would not be covered because they were not expressly included in the term "damages."[22] Thus, even though the language of Section 13-6-11 creates an exception to the rule that "expenses of litigation are generally not allowed as damages," the Eleventh Circuit found an award under the statute would not be considered "damages" under the policy.[23]

Although *Alea* focused on Section 13-6-11, a district court has applied its holding to

O.C.G.A. § 9-11-68, which shifts the burden to pay legal fees to the other party in tort cases under certain circumstances.[24] The issue arose in a case where the prevailing plaintiff in the underlying tort claim had settled a claim for fees under a provision in the statute that allows the factfinder to find that a claim or defense was frivolous, and "to award damages" that "may include reasonable and necessary attorney's fees and expenses of litigation."[25] Even though the statute expressly authorized legal fees to be awarded as "damages," the district court cited the *Alea* decision which had found that attorney fees were construed not to be "damages" under the policy despite similar language in O.C.G.A. § 13-6-11.[26] Because attorney fees awarded under both statutes are "ancillary" to the underlying claim, Judge Sands concluded that the *Alea* case compelled the conclusion that payment of the fees was outside the policy (and therefore did not reduce the limits applicable to the claim).[27] Judge Sands buttressed this conclusion by noting (as did the *Alea* court) that the policy covered attorney fees incurred in defending the insured but did not explicitly obligate the insurer to indemnify the insured for the claimant's fees.[28] Accordingly, attorney fees under Section 9-11-68(e) were found *not* to be covered as "damages because of bodily injury" within the meaning of the insurance policy.

Although not cited in either decision, there is one state court decision that appears to concur with *Alea's* analysis. In *Smith v. Stoddard*, 294 Ga. App. 679, 669 S.E.2d 712 (2008), coverage was sought under a UM policy for attorneys' fees sought under O.C.G.A. § 13-6-11. The court first reviewed the UM statute and found that the legislature had not provided for an award of fees against the tortfeasor. The court did not stop there, however, because it noted that an insurer can provide broader coverage than required by law. Turning to the policy, the court then found that the coverage provided was for "damages for bodily injury and property damage an insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle." The court concluded that this language did not include fees and expenses under Section 13-6-11, reasoning as follows:

> Attorney fees and expenses based on the tortfeasor's stubborn litigiousness or bad faith conduct are not incurred "because of" bodily injury or property damage, as the claims in this case illustrate. Smith's stubborn litigiousness claim was based upon Stoddard's conduct of refusing to pay the amount of damages sought in advance of the lawsuit. Smith's bad faith claim was based upon Stoddard's conduct prior to the collision. Thus, Smith did not incur attorney fees and expenses " 'because of' the bodily injury or property damage [that he] sustained ..., but rather 'because of' some aspect of the

> tortfeasor's conduct which caused [Smith's] loss."[29]

Although *Smith* arose in the UM context, the reasoning in the quoted passage mirrors that of *Alea* and would appear to apply equally in the tort liability context.

III. ANALYSIS

The reasoning of these cases is intriguing because it cuts against the grain of construing insurance policies broadly. Given the rules of construction discussed above, the Eleventh Circuit might have found that attorney fees are awards of money that resulted from a covered loss so as to fall within the term "damages." Instead, it found that attorney fees are not covered precisely because they were not expressly defined as within the policy's coverage for "damages." [30] The decision makes sense when viewed in the broader context of the legal meaning of damages as compensation for harm or injury that is covered by the policy. The distinction based on attorney fees being "ancillary" to damages starts to fall apart, however, when one considers that punitive damages are likewise not available absent a recovery for the underlying injury.[31] In addition, no weight was given to the statutory language that refers expressly to awarding fees or expenses of litigation as "damages."[32]

Whatever the ultimate outcome of these decisions may be, they have several practical implications. To begin with, the question of a duty to defend is based, at least initially, on an evaluation of the allegations of the complaint in light of the substantive terms of the policy.[33] Beyond the allegations, insurers are instructed that they must consider the "facts" to determine whether there is a duty to defend.[34] In undertaking this analysis, insurers generally focus on the facts and circumstances of the injury claimed and overlook the extent to which some of the relief sought may not be covered even if the loss is otherwise within the terms of the policy.

This becomes significant when one considers that an insurer that undertakes the defense of the insured without reserving its rights may be estopped from asserting coverage defenses as a consequence.[35] Whether this estoppel rule will be extended to preclude coverage defenses from being asserted to portions of an otherwise covered claim remains to be seen. Certainly, an argument can be made that a reservation of rights is not needed where the substantive claim would itself be covered. Yet given *Alea's* rationale, insurers might be well-advised to reserve rights where attorney fees are requested in the complaint so as to avoid the possibility of an estoppel argument altogether.

Moreover, the estoppel rule is based on the conclusive presumption of prejudice to the insured from relying on the insurer's provision of a defense instead of protecting its own interests. Given the focused purpose of the rule, the estoppel defense is personal to the insured and cannot be asserted by the claimant or any other party who is not in privity of contract with the insurer.[36] This limitation becomes significant when one considers that once there is a liability judgment, "the injury party may bring an action directly against the insurer to satisfy the judgment from the available insurance proceeds."[37] In that circumstance, the insurer might not be estopped from contesting coverage for attorney fees whether or not a reservation of rights was provided or even required. For this reason, plaintiffs who are pursuing tort claims against insureds need to be aware that an attorney fee award may not be covered by the policy.

The cases may have particular significance if the injury is relatively small compared to the exposure for attorney fees if the plaintiff prevails. The potential can exist under different scenarios including when fees are compensable to the prevailing party by contract or by statute. If "damages" under liability policies do not include these types of recoveries, there could be less motivation to litigate claims to completion than if there is coverage for fees that could be awarded.

The practical implications of the cases reach beyond simply whether an award of fees is covered. Given that the vast majority of cases settle due to questions of liability, damages and collectability of judgments, whether there is coverage for fees can become relevant in determining the value of the case, from the perspective of the defendant as well as the plaintiff or the claimant. The potential absence of coverage, in other words, could become relevant to assessing the value of a claim forsettlement negotiations, should there be a significant exposure to fees.

IV. CONCLUSION

Although *Stoddard* was decided in 2008 and *Alea* in 2011, the holdings that an award of fees would not be considered "damages" covered by standard language in general liability policies have yet to take root beyond the *Richardson* decision.[38] All those involved in tort claims should be aware of this embryonic line of cases and its potential impact, particularly where the litigation is driven by the availability of insurance proceeds to satisfy a judgment that may include an award of fees and other legal expenses.

[1] O.C.G.A. § 13-6-11.
[2] O.C.G.A. § 9-11-68.
[3] *Alea London, Ltd. v. American Home Services, Inc.*, 638 F.3d 768 (11th Cir. 2011); *Canal Indemn. Co. v. Richardson*, 2016 WL 1274392, (M.D. Ga. Mar. 31, 2016)
[4] *Id.*
[5] *Hartford Cas. Ins. Co. v. Smith*, 268 Ga. App. 224, 226, 603 S.E.2d 298, 301 (2004) (citation omitted).
[6] *Barrett v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 304 Ga. App. 314, 321, 696 S.E.2d 326, 331 (2010); *see also BBL-McCarthy, LLC v. Baldwin Paving Co.*, 285 Ga. App. 494, 501, 646 S.E.2d 682, 688 (2007).
[7] *Lunceford v. Peachtree Cas. Ins. Co.*, 230 Ga. App. 4, 8, 595 S.E.2d 88, 90 (1997).
[8] *Id. (citing MAG Mut. Ins. Co. v. Gatewood,* 186 Ga.App. 169, 173, 367 S.E.2d 63 (1988)).
[9] 238 Ga. 313, 316, 232 S.E.2d 910, 913 (1977).
[10] *Id.*
[11] *Alea London, Ltd. v. American Home Services, Inc.*, 638 F.3d 768 (11th Cir. 2011); *Smith v. Stoddard*, 294 Ga. App. 679, 669 S.E.2d 712 (2008)
[12] 638 F.3d 768 (11th Cir. 2011).
[13] *Id.*
[14] O.C.G.A. § 13-6-11.
[15] *Alea London, Ltd. v. American Home Services, Inc.*, 638 F.3d 768 (11th Cir. 2011).
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* at 780.
[21] *Id.* at 781.
[22] *Alea London, Ltd. v. American Home Services, Inc.*, 638 F.3d 768 (11th Cir. 2011).
[23] *Id.*
[24] *Canal Indemn. Co. v. Richardson*, 2016 WL 1274392, (M.D. Ga. Mar. 31, 2016).
[25] O.C.G.A. § 9-11-68(e)(2).
[26] *Canal Indemn. Co. v. Richardson*, 2016 WL 1274392, (M.D. Ga. Mar. 31, 2016).
[27] *Id.*
[28] *Id.*
[29] Id. at 715, n. 3, 669 S.E.2d at 681, n. 3 (*quoting Roman v. Terrell*, 195 Ga.App. 219, 221, 393 S.E.2d 83 (1990)).
[30] *Alea London, Ltd. v. American Home Services, Inc.*, 638 F.3d 768 (11th Cir. 2011).
[31] *See e.g., Southern Gen. Ins. Co. v. Holt*, 262 Ga. 267, 270(2), 416 S.E.2d 274 (1992*); Flynn v. Allstate Ins. Co.,* 268 Ga.App. 222, 601 S.E.2d 739, 740 (2004).
[32] O.C.G.A. § 9-11-68(e).
[33] *Landmark Am. Ins. Co. v. Khan*, 307 Ga. App. 609, 705 S.E.2d 707 (2011).
[34] *Shafe v. Am. States Ins. Co.*, 288 Ga. App. 315, 316, 654 S.E.2d 870 (2007) ("if the complaint fails to allege facts that bring the claim within policy coverage, a duty to defend may nevertheless exist where the insured informs the insurer of additional facts related to the claim that would entitle him to a defense of the same under the policy.")
[35] *World Harvest Church, Inc. v. GuideOne Mut. Ins. Co.*, 287 Ga. 149, 695 S.E.2d 6 (2010).
[36] *Boatright v. Old Dominion Ins. Co.*, 304 Ga. App. 119, 123, n. 14, 695 S.E.2d 408, 412, n. 14 (2010).
[37] *State Farm Fire & Cas. Co. v. Bauman*, 313 Ga. App. 771, 723 S.E.2d 1, 2 (2012).
[38] *Canal Indemn. Co. v. Richardson*, 2016 WL 1274392, (M.D. Ga. Mar. 31, 2016).

GREEN V. WILSON – ALL BARK AND NO BITE?

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I. INTRODUCTION

With summer already upon us, the weather getting warmer and the days getting longer, your summer evenings may involve a walk around the block, a trip to your local park, or even grilling in the backyard with family and friends. And many times, all of the above activities involve an important member of the family, your dog. But what if Sanford, your 20 pound cockapoo, with his 20 pounds of enthusiasm and affection, knocks over your 86 year old neighbor while she is visiting in your backyard, breaking her wrist? Is it time to trade in the filet for discount isle hot dogs?

This article focuses on the Georgia Court of Appeals' recent opinion in *Green v. Wilson*[1] which represents a departure from Georgia's longstanding precedence in dog bite cases. In *Green*, the Georgia Court of Appeals reversed the State Court of Baldwin County's grant of summary judgment to a homeowner whose housekeeper was injured while running away from the homeowner's dog. There was no evidence the dog, Nani, had ever injured any person before this event. There was no evidence the dog had ever chased someone before this event. Instead, there was conflicting testimony that, on at least one prior occasion, Nani growled, barked and "lunged" at the housekeeper while a member of the family held Nani by the collar. Based merely on this prior dog behavior, the Court of Appeals held that trial court erred in granting summary judgment. This result begs the question: Does this case represent a serious shift from Georgia's first bite rule, or is it simply an outlier whose "bark" is truly worse than its long-term "bite"?

II.. HISTORY OF DOG BITE LAW IN GEORGIA

Dog ownership in Georgia has never been a strict liability proposition.[2] Rather, "Georgia's first bite rule holds that a dog owner is liable for damages only if he has knowledge that his dog has the 'propensity to do the *particular act* which caused injury to the

complaining party.'"[3] This rule has its origin, like many of our common law legal concepts, in the common law of England.[4]

The first bite rule requires Plaintiff to bear the burden on two elements: "(1) whether the dog has the propensity to do the act which caused the injury (biting, etc.), and (2) if so, whether the owner had knowledge of that propensity."[5] Growling, barking, or other "menacing behavior" is insufficient, as a matter of law, to demonstrate vicious propensity. As the Georgia Court of Appeals has expressly stated, this principle reflects the "well recognized adage that a dog's bark is often worse than its bite."[6] Thus, "acts of aggressive or menacing behavior" do not demonstrate a dog's propensity to bite.[7]

Barking or growling at a next door neighbor is not evidence of vicious propensity.[8] Neither is actually biting a strangely-dressed visitor on a prior occasion.[9] Neither is actually chasing people and causing one person to run on top of a car to get away from the dog.[10] Even when a dog jumps on a plaintiff on a prior occasion "in an aggressive manner" upon her first encounter with the dog, this is not evidence of the dog's vicious propensity, where plaintiff was later bitten by this dog in a different encounter.[11] Thus, as the Georgia Court of Appeals has made clear in these decisions, a plaintiff in a dog bite case faces a very specific burden of proof on the owner's knowledge of the dog's tendencies which cannot be met by speculation based on typical dog behavior.

There is also a Georgia code section defining the parameters of a dog owner's liability, O.C.G.A. § 51-2-7, but this code section does not change the requirement that the Plaintiff show vicious propensity and prior knowledge of that propensity, as defined above.[12] The code section does provide an alternative method of proving vicious propensity, namely that the dog was required to be at heel or on a leash by a city of county ordinance at the time of the incident.[13] However, if a leash law violation is not an issue in the case, such as when the dog is properly controlled on the owner's property, O.C.G.A. § 51-2-7 does not relieve plaintiffs of the burden of proving vicious propensity and prior knowledge.

And although it may be tempting to discriminate against a particular dog because of its breed, Georgia law actually makes no distinction between breeds when it comes to dog owner liability. As the Georgia Court of Appeals held in *Eason v. Miller*,[14] in response to a plaintiff's arguments that a dog was dangerous simply because of its breed (Great Dane), there is "no rule of law that the owner of a tall, massive, powerful dog is ipso facto liable for injury" and that "all dogs are considered to be domestic animals regardless of breed."[15] Thus,

your 20 pound cockapoo or 5 pound Pomeranian is treated the same as a 100 pound pit bull. This means that Georgia's scheme of dog owner liability is focused on the particular dog and its history, as known by its owner, rather than on some general perception of that dog or its breed to the public at large.

III. *GREEN V. WILSON*

Given Georgia courts' historical treatment of dog ownership, the *Green v. Wilson* case is certainly an outlier. In *Green*, the dog owners regularly employed housekeepers to do in home housekeeping.[16] On at least one prior occasion, when the housekeepers came to the home, the owner or a member of his family had to restrain the dog as the housekeepers came in the door.[17] While being restrained, the dog barked, growled, and lunged.[18] The homeowner then closed the dog in an adjacent room of the house, and the housekeepers went about their tasks.[19] Importantly, there was no record evidence that this dog had ever bitten, chased, or injured anyone before the incident at issue.[20]

On the date of the incident, housekeepers arrived at the home to perform their cleaning services.[21] When the housekeepers arrived, the dog was in a fenced enclosure on the property. [22] As the housekeepers were walking to the home, the dog unexpectedly and uncharacteristically vaulted the fence and chased the plaintiff.[23] The plaintiff was injured, not from physical contact with the dog, but when she hit her arm against her vehicle as she was attempting to avoid the dog.[24]

The Court of Appeals concluded that the past behavior of the dog (lunging while being restrained by the owner), was similar enough to the behavior that allegedly caused the injury (vaulting a fence and chasing the plaintiff in the yard), to create a question for the jury.[25] The Court reasoned that a prudent dog owner who restrains a lunging dog must anticipate what that same dog may do if left unrestrained.[26]

The Court acknowledged the weight of prior precedent requiring a plaintiff to show a specific, prior behavior that would place the owner on notice of the dog's propensities, but summarily concluded that none of those prior cases involved prior dog conduct that was "as similar" to the conduct causing the injury in the case at issue.[27] Thus, even without evidence that this dog had ever bitten, injured, or chased anyone, the Court of Appeals reversed the summary judgment entered in favor of the dog owner.[28]

Not surprisingly, the majority's opinion drew a dissent, authored by Judge Dillard, and joined by Justices Ray and McMillian.[29] In the dissent, Judge Dillard discussed the majority's departure from the well-established rule that a plaintiff must show the dog had a propensity to perform the behavior that caused the injury,

and that the owner knew or should have known about that propensity. [30] Moreover, Judge Dillard highlighted the problem with the Plaintiff's case: the prior dog behavior cited by the majority—lunging, barking and growling, is not, according to an *en banc* opinion from this same Court, evidence of vicious propensity.[31] Thus, the majority opinion took what can be construed as typical dog behavior, and turned it into behavior that might trigger liability for countless dog owners whose pet might growl, bark and lung, as dogs tend to do.[32] Naturally, the justices supporting the dissenting opinion would have let the trial court's entry of summary judgment stand.[33]

IV. CONCLUSION

While the majority's reasoning in the *Green* case is cause for concern for every dog owner in this state, the good news is that the weight of Georgia's caselaw is still decidedly in favor of your four-legged companion. First, the *Green* case is physical precedent only. Thus, while it may be persuasive to some panels of the Court of Appeals in the future, it does not carry the same weight as the Court's *en banc* decision in *Hamilton v. Walker*. Moreover, although the appeal was subsequently withdrawn voluntarily, the Georgia Supreme Court granted certiorari in the case to consider whether the Court of Appeals erred in reversing the award of summary judgment.

Although it would be speculative to assume what the Georgia Supreme Court would have decided given the chance, it is certainly notable that it considered the case interesting enough, amongst the many it declines to exercise certiorari over, to garner a second look. Finally, in one subsequent decision, the Georgia Court of Appeals, while reaffirming the first bite rule, has all but limited the *Green* case to its facts.[34] Thus, the Court's decision in *Green* is likely limited.

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[1] *Green v. Wilson*, 333 Ga. App. 631, 631, 773 S.E.2d 872, 872 (2015), *reconsideration denied* (July 30, 2015), *cert. granted* (Jan. 11, 2016), *appeal voluntarily withdrawn* (March 21, 2016).
[2] *See Is There (and Should There Be) Any "Bite" Left in Georgia's "First Bite" Rule?*, 34 Ga. L. Rev. 1343 (2000).
[3] *Hamilton v. Walker*, 235 Ga. App. 635, 635-36 (1998)(en banc)(emphasis in original)(internal citations omitted)
[4] *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 76, at 542 (5th ed. 1984).
[5] *Hamilton*, 235 Ga. App. at 635-636.
[6] *Banks v. Adair,* 148 Ga.App. 254, 255 (1978).
[7] *Hamilton*, 235 Ga. App. at 635.
[8] *Durham v. Mooney*, 234 Ga. App. 772, 773 (1998)(affirming summary judgment to defendant dog owners).
[9] *Rowlette v. Paul*, 219 Ga.App. 597 (1995).
[10] *Starling v. Davis*, 121 Ga. App. 428, 429 (1970).
[11] *Stennette v. Miller*, 316 Ga. App. 425, 428 (2012).
[12]*Durham v. Mason*, 256 Ga. App. 467, 468 (2002)(" Unless there is evidence that the animal was not "at heel or on a leash" as required by local ordinance at the time of the incident, a plaintiff in a dog bite case must show that the owner

had knowledge that the dog had the propensity to commit the act that caused the injury."); *Rowlette v. Paul*, 219 Ga. App. 597, 599 (1995)("In order to support an action for damages under O.C.G.A. § 51-2-7, it is necessary to show that the dog was vicious or dangerous and that the owner had knowledge of this fact.")

[13] . *See* O.C.G.A. § 51-2-7.

[14] *Eason v. Miller*, 153 Ga. App. 420 (1980).

[15] *Id.*

[16] *Green,* 333 Ga. App. at 632.

[17] *Id.* at 633.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 636.

[21] *Id.* at 633.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id. at 633-634.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at 635.

[30] *Id.* at *637.*

[31] *Id.(citing* Hamilton v. Walker, 235 Ga. App. 635, 635-36 (1998)(en banc)).

[32] *See id.*

[33] *Id.*

[34] *See Swanson v. Tackling*, 335 Ga. App. 810, 814, 783 S.E.2d 167, 171 (2016)("Under these particular circumstances….")