

GEORGIA DEFENSE LAWYERS ASSOCIATION



**2006
JOURNAL**

PRESIDENT'S MESSAGE

It has been an honor, a pleasure, and a privilege to serve as the Georgia Defense Lawyers Association 2005-2006 President. I have gotten to know many of you whom before I only knew by name, but now, as a result of this position, I have had the opportunity to actually meet you face-to-face and/or work with you. I believe that the lawyers who compose this Association represent the best of the best in terms of competence, professionalism, and ethics. This organization is the best organization for lawyers that I have been exposed to.

I am pleased to report that the Georgia Defense Lawyers Association is well managed and financially stable. There are many to thank.

My first thanks go out to Bubba Hughes for agreeing to serve as editor of this Journal and to Clay Ratterree for serving as vice-editor. They have done a fabulous job putting together this excellent Journal in a short period of time. Thanks also to the authors published in this Journal who donated their time, talent and knowledge to enlighten and educate all of us who are members of this Association.

Our Trial Academy continued to be a success this year due to the hard work of Tom Magill and the Trial Academy faculty which consisted of: Jerry Buchanan, Richard W. Fields, Mary Katherine Greene, William D. Harrison, Sandy Owens, Lynn Roberson and Richard H. Willis.

Our second Workers' Compensation Academy was successful as well due to the efforts of Staten Bitting who took the lead on this effort and Luanne Clarke and Lisa Wade who assisted him. Thanks

also to the Honorable Viola Drew, the Honorable David Imahara, the Honorable Richard Thompson, Kevin Gaulke, David R. Smith, Jennifer H. Chapin and Larry N. Hollington who participated as faculty members.

In fact, Staten also served as Editor of our new and improved newsletter, the “Georgia Defense Lawyer.” Our newsletter just keeps getting better and better.

Also getting better and better is the Substantive Law portion of our website which includes our tort reform database, brief bank, and discovery tools. Kirby Mason and David Nelson are to thank for those improvements.

Bob Travis is another who has worn more than one hat during the past year. Not only has Bob done a great job as Secretary/Treasurer, but he is also leading us in an ongoing effort to increase our membership numbers. And if that were not enough, Bob and his Powell-Goldstein partner Tom Richey guided us expertly in the past year through the process of selecting and obtaining an appropriate insurance package and incorporating appropriate exculpation and indemnification language into our Articles of Incorporation.

One committee that seems to get busier and busier every year is our Membership Committee chaired by Salty Forbes. The reason it gets busier and busier each year is that, for several years running, we have consistently broken previous records for the number of new members who have applied for and been approved for membership in this Association. One big reason that this was another record breaking year is Hall McKinley who brought us twenty new members at one time.

One of the smartest things that this Association’s founding fathers did was to structure the leadership of this organization so as to include our past presidents as *ex officio* members of our Board of

Directors. We are blessed with a nucleus of past presidents who continue to endeavor to attend our Board of Directors' meetings whenever they can and actively participate in the business of this Association. Their wisdom, experience, and guidance are invaluable. I extend my heartfelt thanks to each of these gentlemen. You know who you are.

Two of the new projects we have taken up this year are a Judicial Relations Committee and the re-establishment of our Substantive Law Committees. Many thanks to Doug Stewart for agreeing to serve as the first chair of our Judicial Relations Committee and to Lynn Roberson and David Whitworth for agreeing to serve as a steering committee that will ensure that our Substantive Law Committee program takes flight and remains airborne. Other new ideas warrant mention as well. Thanks to Lynn Roberson who, with a little help from Warner Fox, came up with our new slogan: "Advancing the Civil Defense Bar." Thanks to another of Lynn Roberson's ideas, GDLA lapel pins will soon be available. Salty Forbes took Lynn's idea a step further and, through his efforts, GDLA polo shirts are now available and other items will be available in the future.

Thanks also go out to Barry Fleming for serving as our Legislative Liaison, Ted Freeman for chairing our Amicus Committee, Bruce Welch for serving as our DRI State Representative, and Clay Ratterree for chairing our Sponsorship and Exhibitors program. Special thanks also go out to Steve Kyle for setting up our meetings this year and for the previous six as well. Most of us probably don't realize how much time and talent is required to make our meetings occur and to make them run smoothly. This is Steve's job and he performs it superbly.

Steve Milano continues to do an excellent job as our Executive Director. Steve's work makes this a better organization in

countless way. I would venture to say that no organization anywhere has an executive director more energetic than ours.

This year, for the first time since 1993, we are off to Bermuda for our Annual Meeting. Our Executive Vice President, Warner Fox, has done a great job putting together what I believe will be a truly excellent Continuing Legal Education program.

This is not intended to be a comprehensive list of all of those who have served this organization within the past year and who deserve our thanks; indeed, such a list would probably be impossible to compile.

We still face challenges. As mentioned above, we need to increase our membership. We need more diversity in both our membership and our leadership. We need more diversity not only along the traditional lines of gender, ethnicity, race or national origin, but we also need more diversity as to the practice areas of our members. By that I mean that we need to have more to offer to those Georgia lawyers whose practice is civil litigation defense, but whose practice may not be what has traditionally been known as “insurance defense.” And we need to be able to offer to all of our members more information that will help them in their practice. This information needs to be timely and it needs to be easily accessible. While these goals have not yet been accomplished, I am happy to say that plans are in place and efforts are well underway to achieve these goals.

I believe that this Association benefits its members in numerous ways. Perhaps the most valuable of these is simply the friendship, camaraderie, and fraternity shared by our members. To paraphrase what Joe Chambliss said in this column several years ago, the fraternity of attorneys in this Association can be an important asset to each member in his or her professional life, and I hope that

each member will take full advantage of the opportunity to be a real partner in that fraternity.

Johnny Foster
President

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DUNLAP MEMORIAL

NOW, THEREFORE BE IT RESOLVED, by the Members of the Board of Directors and Officers of the Georgia Defense Lawyers Association Meeting in a meeting assembled that they express, individually and as a body, to James A. “Bubba” Dunlap their recognition and acknowledgment of the outstanding service to the Georgia Defense Lawyers Association rendered by him and acknowledge its eternal gratitude to him for all of his services to the Association and that this Memorial be spread across the Minutes of the Association and a copy be given to his family.

On Motion duly made and seconded the within and foregoing Memorial was adopted this 3rd day of February, 2006.

MEMORIAL RESOLUTION

JAMES ANDERSON “BUBBA” DUNLAP

May 5, 1920 – September 29, 2005

WHEREAS, JAMES ANDERSON “BUBBA” DUNLAP distinguished Past President of the Georgia Defense Lawyers Association died September 29, 2005, and his death constitutes a sad loss to this Association but affords an opportunity for expression of appreciation for his distinguished service to this Association and to the many other organizations and endeavors touched by his long and useful life, and it is fitting that this Association take notice of his passing and adopts a memorial to his life of service.

NOW THEREFORE, the Board of Directors of the Georgia Defense Lawyers Association at its Winter Meeting held on the 3rd day of February, 2006, in Atlanta, Georgia does hereby adopt and declare the following as a Memorial Resolution upon the passing of its distinguished former President, James Anderson “Bubba” Dunlap.

James A. “Bubba” Dunlap, Georgia Defense Lawyers Association President 1976 – 1977, was a lifelong resident of Gainesville, Georgia where he was widely recognized as a visionary leader and valued community friend. Bubba obtained his undergraduate degree from Davidson College and his LLB, cum laude, from the University of Georgia where he was a member of Phi Beta Kappa, Phi Delta Phi and Phi Delta Theta. A decorated member of the United States Army, he participated in five major battles during WWII, including Normandy and the Battle of the Bulge. Following the war, Bubba returned to his hometown, entered the practice of law with his father, and literally married “the girl next door,” Mary Eleanor Hosch.

Bubba was a life member of the American Law Institute, International Association of Insurance Counsel, Federation of Insurance Counsel, a Fellow of the American College of Trial Lawyers and of course an active member and past president of GDL where lifelong friendships were formed. Bubba enjoyed a long and successful law practice representing a wide array of respected clients, including the Gainesville-Hall County Development authority, the Hospital Authority of Hall County, the City of Gainesville, and the Hall County Hospital which he expertly aided through its evolution to the regional medical facility now known as Northeast Georgia Medical Center.

Bubba’s vision and integrity were recognized well beyond the legal sphere. In 1960 he was appointed by Governor Ernest Vandiver to serve on the Board of Regents, where he served as chairman from 1963 – 1967, and then reappointed to a second seven year

term by Governor Carl Sanders. During his tenure as a regent Georgia's Junior College system was born.

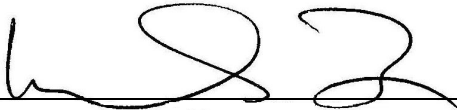
Bubba's home community service is legendary. He served as Hall County attorney from 1953 – 1957, was founding director of Home Federal Savings and Loan, a driving force in the chartering of Gainesville Junior College, instrumental in procuring I-985 to connect Gainesville to Atlanta, and played a key role in Johnson & Johnson's decision to donate some 3,000 acres in Hall County for the creation of the Chicopee Woods nature preserve area. His public activities were surpassed only by his private and longstanding philanthropic support of the many foundations and organizations that continue to benefit from his generosity. James A. Dunlap will be greatly missed but fondly remembered by a host of colleagues, friends, beneficiaries and a beloved family.

With the passing of James Anderson "Bubba" Dunlap, this Association and the Bar in general have suffered a great loss, but the Association can and does take pride in his accomplishments and his record of service.

GEORGIA DEFENSE LAWYERS ASSOCIATION



President



Vice President

RICHARDSON MEMORIAL

NOW, THEREFORE BE IT RESOLVED, by the Members of the Board of Directors and Officers of the Georgia Defense Lawyers Association Meeting in a meeting assembled that they express, individually and as a body, to Willis Jenkins “Dick” Richardson, Jr. their recognition and acknowledgement of the outstanding service to the Georgia Defense Lawyers Association rendered by him and acknowledge its eternal gratitude to him for all of his services to the Association and that this Memorial be spread across the Minutes of the Association and a copy be given to his family.

On Motion duly made and seconded the within and foregoing Memorial was adopted this 3rd day of February, 2006.

MEMORIAL RESOLUTION

WILLIS JENKINS “DICK” RICHARDSON, JR. (The GDLA President In Perpetuity)

WHEREAS, Willis J. “Dick” Richardson, Jr. distinguished Past President of the Georgia Defense Lawyers Association died October 10, 1999, and his death constitutes a sad loss to this Association but affords an opportunity for expression of appreciation for his distinguished service to this Association and to the many other organizations and endeavors touched by his long and useful life, and it is fitting that this Association take notice of his passing and adopt a Memorial to his life of service.

NOW, THEREFORE, the Board of Directors for the Georgia Defense Lawyers Association at its Winter Meeting held on the 3rd of February, 2006, in Atlanta, Georgia, does hereby adopt and declare the following as a Memorial Resolution upon the passing of its distinguished former President, Willis J. “Dick” Richardson, Jr.

Dick was taken from us on Sunday, October 10, 1999, after a long illness. Dick was born in Cincinnati, Ohio and graduated from Savannah High School in 1941.

Dick played football for the University of Georgia on the team which defeated UCLA (9 – 0) in the 1943 Rose Bowl. That weekend was also noteworthy because of his date with Actress Betty Grable. It seems some of his fraternity brothers played a prank on him, except it became a dream come true for the then 19-year old sophomore. Ms. Grable's husband, Harry James, was not far away, but Dick did have a date with Betty Grable who those of us who are old enough would know as "the Pinup Girl". Dick was a member of the 1942 National Championship Team. He played End. Other notables who played on the 1942 Georgia Football Team, were Frank Sinkwich and Charlie Trippi. Dick served during WWII as a navigator on a B-17 flying fortress. Upon his return from service, he graduated in 1949 having completed both his undergraduate and received his Bachelors of Law.

Dick served as an FBI Special Agent from 1950 to 1954. He was a partner in the law firm of Myrick & Myrick until he formed his own firm. He was elected to the Georgia House of Representatives in 1963 and served six (6) years in the Georgia House. He was Chairman of the Rules Committee during the administration of Governor Carl Sanders. He practiced law in Chatham County for 45 years. He was a member of the Georgia Young Lawyers, the Georgia Defense Lawyers Association (a founding member and its Second President), the Savannah

Civitan Club, the vestry of St. Paul's Episcopal Church, and the Savannah Football Officials Association. He was a member of Sigma Alpha Epsilon Fraternity and the University of Georgia Gridiron Society.

Dick served as Chairman of the Chatham County Elections Board from 1978 to early 1999, shortly after he became ill. It was through his support and his lobbying of the Chatham County Commission that the county was able to purchase a new, faster voting system that was used successfully beginning in 1998. A trial lawyer by vocation, he devoted much of his time to the \$4,800.00 post of Elections Board Chairman. It was not uncommon on Election Day to find him visiting polling places throughout the county to make sure they were operating correctly. An avid jogger, he often showed up at the polls in running shoes, shorts, and a tee shirt.

On Election nights, he could be found in the Courthouse Annex, working with other election board members and the office full-time staff tallying votes. His professionalism was evident throughout his life.

Dick loved the GDLA. He was Membership and Meeting Chairman in perpetuity, along with being President in perpetuity. This association was Dick's life and he set a standard for every member to follow.

Dick was married to Elizabeth Head. They had two sons, one is Willis J. Richardson, III, of Oakley, Utah, and South Carolina State Senator Scott H. Richardson of Hilton Head, South Carolina.

In Dick's honor, the GDLA funded a Student Award Fund at the University of Georgia School of Law known as the "Willis J. 'Dick' Richardson, Jr. Award given to the Student Chair of the Mock Trial Board.

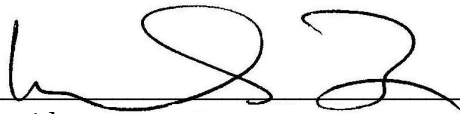
With the passing of Willis J. "Dick" Richardson, Jr., this Association and the Bar in general have suffered a great loss, but the Association can and does take pride in his accomplishments and his record of service.

GEORGIA DEFENSE LAWYERS ASSOCIATION

President

A handwritten signature in black ink, appearing to be "J. B. ...", written over a horizontal line.

Vice President

A handwritten signature in black ink, appearing to be "W. S. ...", written over a horizontal line.

ACKNOWLEDGMENT

We owe a great deal of gratitude to many individuals in connection with this year's Journal. The advice from Jimmy Singer, who was a co-editor of last year's Journal, was invaluable with respect to the many technical issues that had not even occurred to us, particularly now that the Journal appears on our website and is distributed in booklet form to judges and on disk to the membership.

Johnny Foster was also a great help with respect to consideration and enlistment of potential authors and topics.

We all owe a great deal of appreciation and thanks to Senior Judge William C. O'Kelley of the Northern District of Georgia for allowing us to use the paper on *Daubert* issues he presented at the 2005 Annual Meeting, as it is extremely well-done, instructive, and obviously timely.

The hard work and dedication of David Smith, Mel Haas, William Clifton, Jon Martin, Lane Young, David Nelson, Erin Raley, Rusty Watts, and Tim Callaway is also very much appreciated. We believe their efforts have resulted in a compilation of excellent legal authorities that will hopefully be useful to all who review it and retain it for future reference.

Steve Milano, our Executive Director, was, as always, helpful on the many practical issues involving distribution of the Journal, coordinating with the printer, and similar matters.

Finally, we want to express our thanks to Brenda Bracken, Legal Assistant at Callaway, Braun, Riddle & Hughes, who spent many hours assisting in editing, proofreading, formatting, and related activities without which the Journal could not have been published.

We hope that the Journal will be helpful to all of you.

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DEFENSE LAWYERS
ASSOCIATION**

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THE GATEKEEPER: DAUBERT TODAY

Presented To
The Georgia Defense Lawyers Association
Annual Meeting
June 16-19, 2005
Ponte Vedra, Florida

By William C. O'Kelley, Senior Judge

United States District Court
Northern District of Georgia
JoAnn E. Johnston, Law Clerk

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INTRODUCTION

“An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness.”¹

The use of expert witnesses is widespread in both criminal and civil trials. Every day, courts are asked to consider the admissibility of testimony from a variety of professionals, including laboratory technicians, economists, nutritionists, mechanics, human factors analysts, pollsters, psychologists, linguists, statisticians, and anthropologists.² Because such “experts” have specialized knowledge and experience in their specific fields, judges and juries rely upon them to clarify and explain the complex scientific and technical matters that arise during trial.³ The increasing dependence on expert testimony, however, has led to the rise of “hired guns”—paid witnesses willing to testify regarding issues beyond their area of expertise, render opinions that are unreliable, speculative, or outside what other experts would be willing to say about their own disciplines, and misrepresent the data and certainty of the principles and methodology upon which they rely to reach their conclusions.⁴

At the same time, controversy has arisen as judges and jurists seek the best method for ensuring that juries hear only relevant and reliable expert testimony. The United States Supreme Court, in Daubert v. Merrell Dow Pharmaceuticals, Inc.,⁵ attempted to simplify and clarify the appropriate admissibility standard for the federal courts by creating guidelines in step with the Federal Rules of Evidence. As a result, federal district courts became “gatekeepers” charged with preventing speculative, unreliable, and irrelevant expert testimony from reaching a jury.⁶ The Daubert court, however, left

open significant questions about the nature and scope of the courts' gatekeeping responsibilities.⁷ This paper reviews the trial courts' developing roles as gatekeepers of expert testimony under Daubert as well as the various attempts that have been made to develop a sound, yet universal, rule of admissibility for such courts to apply.

I. ADMISSIBILITY OF EXPERT TESTIMONY PRIOR TO THE DAUBERT GATEKEEPING CONCEPT

To understand the impact of judicial gatekeeping on expert testimony, it is important to examine the factors that led the Supreme Court to address this particular issue in Daubert. Traditionally, courts across the country have viewed expert testimony with skepticism.⁸ At common law, this skepticism stemmed from the belief that any witness willing to come forward and testify was biased against one of the parties.⁹ With the advent of institutional safeguards, such as cross-examination, impeachment, and competency requirements, the courts' skepticism toward testimonial evidence soon abated, and gradually the need for expert evidence in trials was accepted.¹⁰

From the middle of the Nineteenth Century until the beginning of the Twentieth Century, courts admitted expert testimony based on a witness's qualifications and success in his or her profession.¹¹ In 1923, despite a lack of perceived problems with this standard, Frye v. United States¹² announced a new test for determining the admissibility of scientific evidence at trial.

A. Frye v. United States

In Frye, the Court of Appeals for the District of Columbia examined whether the results of a "deception test," a precursor to the modern lie detector measuring changes in systolic blood pressure, were admissible in a criminal trial.¹³ The court found that such evidence was inadmissible because it lacked the required "standing

and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony.”¹⁴ The Frye test was born. Under this “general acceptance” standard, novel scientific evidence would be admissible only if it had been sufficiently established to gain general acceptance within the relevant scientific community.¹⁵

In the decades thereafter, Frye became the majority rule with regard to determining the admissibility of expert testimony in federal and state courts.¹⁶ Courts faced with a proffer of expert testimony applied Frye by differentiating among “scientific principles that had attained sufficient recognition and scientific principles that had not achieved [that] status.”¹⁷ These courts considered: (1) the status of the scientific principle underlying the proffered evidence in the appropriate scientific community; (2) the technique applying the scientific principle; and (3) the application of the technique relevant to the proffered testimony.¹⁸ The Frye standard thus relieved trial courts of the “duty to make an independent determination of the reliability of scientific evidence . . . and reduced the need for spending . . . time and attention on these rulings through hearings.”¹⁹ As might be expected, courts were content to leave such decisions to the scientific community, which they argued was a better forum for evaluating such evidence.²⁰

Over time, courts applied Frye’s general acceptance rule to a variety of scientific theories and techniques, including voiceprints, neutron activation analysis, tool mark identification, DNA fingerprinting, battered wife syndrome, bite mark comparison, psychiatric testimony, psycholinguistics, microscopic hair analysis, and numerous other forensic techniques.²¹ The general acceptance standard, however, was not universally hailed. Critics challenged the Frye rule for its difficulty of application, which they attributed to:

[T]he inherent vagueness of the concept of ‘general acceptance,’ its susceptibility to manipulation, the

inconsistent results it generates, its overly conservative exclusion of relevant evidence, the tendency of courts to rely on previous judicial assessments of scientific theories and techniques rather than their own evaluations, and the documented admission of evidence satisfying Frye but subsequently deemed unreliable.²²

As a consequence, many argued, the Frye standard arbitrarily ignored the considerable, yet natural, delay between scientific discovery and general acceptance.²³ Critics further maintained that the rule excluded scientific evidence and testimony that was completely reliable in both its conclusions and methodologies solely because it is novel.²⁴ While this inability to address new scientific principles eventually contributed to the downfall of the Frye general acceptance standard, more importantly, it “demonstrated the difficulties in devising the proper test for determining the admissibility of expert testimony.”²⁵

B. Federal Rule of Evidence 702

In 1975, in an attempt to create a universal set of rules for judges and attorneys to apply to evidentiary matters, the federal courts and Congress, through the rule making process, enacted the Federal Rules of Evidence.²⁶ The enactment of Rule 702, which dealt directly with the admissibility of expert evidence, did little to reduce the confusion surrounding the proper standard that should be applied to determinations of admissibility of expert evidence in federal courts.

Rule 702, as adopted in 1975, provided: “[I]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.”²⁷ The drafters of the rule had several goals in mind: (1)

to promote the search for truth by helping the trier of fact understand other evidence or determine the facts in dispute; (2) to safeguard the trier of fact's power to decide the meaning of evidence as well as the credibility of witnesses; and (3) to preserve the role of the trial judge in deciding the law applicable to the case.²⁸ Because both the admission and exclusion of expert testimony can interfere with these goals, however, creating a rule of admissibility of expert testimony to promote them continued to prove difficult.²⁹

Taken together with Federal Rules of Evidence 104,³⁰ 401,³¹ 402,³² 403,³³ and 703,³⁴ Rule 702 announced an admissibility standard of its own--expert testimony must "assist the trier of fact."³⁵

Rule 702, on its face, mandated that a witness be qualified as an expert and possess the appropriate specialized education, knowledge, training, or experience that the fact finder otherwise would not.³⁶ Moreover, a witness's testimony had to be based on "a body of known facts or [on] any body of ideas inferred from such facts or accepted as truths on good grounds."³⁷ An expert could apply his or her knowledge and experience to the particular opinion he or she gives but could not opine on facts foreign, irrelevant, or misleading to those at issue in the case.³⁸ As a result, the codification of Rule 702 increased the scope of admissible expert evidence and testimony in federal courts, allowing an expert to testify on any subject without limitation, eliminating the high standard of proof for the admitting party, and recognizing other methods of obtaining expertise besides formal education.³⁹

When Rule 702 was enacted, however, its drafters failed to incorporate the language of Frye's general acceptance test or make any mention of the standard in the advisory committee notes or floor debates, despite the fact that Frye was well-known and widely adopted at the time.⁴⁰ "Because it failed to mention the 'general acceptance test when it enacted the Federal Rules of Evidence, Congress left the courts in a quandary.'" ⁴¹ The debate among federal courts and jurists therefore turned from the efficacy of Frye's general

acceptance test to the question of whether that test was superceded entirely by Federal Rule 702.

C. Interpreting Federal Rule 702 under Frye

The conflict that arose among the federal circuit courts over application of Frye after the enactment of the Federal Rules of Evidence illustrated the general confusion and growing disapproval of the general acceptance standard.⁴² After the adoption of Rule 702, many courts concluded that there was no conflict between the standards. Rather, these courts interpret the Federal Rules of Evidence, when read alongside Frye, to “create[] a framework for trial judges struggling with proffered expert testimony.”⁴³ The Fifth Circuit Court of Appeals, in Christophersen v. Allied-Signal Corporation,⁴⁴ followed this path in affirming the exclusion of expert testimony because the methodology and reasoning that the expert had used to connect the facts of the case to his conclusion had not been generally accepted within the relevant scientific community.⁴⁵ In doing so, the court reviewed the proffered evidence under the standards set forth in both Frye and the Federal Rules of Evidence, developing a four-part framework for ascertaining admissibility:

(1) Whether the witness is qualified to express an expert opinion, Fed. R. Evid. 702; (2) whether the facts upon which the expert relies are the same type as are relied upon by other experts in the field, Fed. R. Evid. 703; (3) whether in reaching his conclusion the expert used a well-founded methodology, Frye; and (4) assuming the expert's testimony has passed Rules 702 and 703, and the Frye test, whether under Fed. R. Evid. 403 the testimony's potential for unfair prejudice substantially outweighs its probative value.⁴⁶

The general acceptance standard therefore became a consideration that, along with the Federal Rules of Evidence, the Christophersen court applied to determine the admissibility of expert testimony.

While a majority of courts still followed some form of the general acceptance standard, a number of courts rejected the rule in Frye altogether. In United States v. Williams,⁴⁷ for example, the Second Circuit Court of Appeals declined to follow the general acceptance standard and devised a more liberal approach to the examination of the reliability of scientific expert testimony. The court observed: "[a] determination of reliability cannot rest solely on a process of 'counting [scientific] noses.'"⁴⁸ Instead, the court opined, the admissibility of scientific evidence was based on factors that indicate its reliability, such as the potential rate of error, the existence and maintenance of standards, the care taken with the methodology, and similarity with other scientific techniques.⁴⁹ Similarly, the Third Circuit, in United States v. Downing,⁵⁰ rejected Frye and applied a reliability standard formulated from Federal Rule 702. Observing that the Frye standard was conservative in its approach and "at odds with the spirit, if not the precise language, of the Federal Rules of Evidence," the Downing court announced a new test, under which expert testimony was admissible as long as "it had the potential to aid the jury in reaching an accurate resolution of the matter and if it was unlikely that the testimony would overwhelm or mislead the jury."⁵¹ This split among jurisdictions, however, continued for almost two decades until the United States Supreme Court finally broke its silence in Daubert.⁵²

II. DEVELOPMENT OF THE DAUBERT GATE-KEEPING CONCEPT BY THE UNITED STATES SUPREME COURT

A. Daubert v. Merrell Dow Pharmaceuticals, Inc.

The United States Supreme Court did not address the coexistence of the Frye general acceptance standard and Federal Rule 702 until 1993. That year, in Daubert v. Merrell Dow Pharmaceuticals, Inc.,⁵³ the Court held that the enactment of the Federal Rules of Evidence, which liberalized the admission of expert evidence, superceded the seventy-year-old Frye test.⁵⁴ Accordingly, the Court reversed the Ninth Circuit, which had applied Frye to exclude the opinions of plaintiff's experts after finding that their conclusions were not generally accepted in the scientific community.⁵⁵ The Court then announced a new standard of admissibility of expert evidence, derived in part from Rule 702, that mandated scientific testimony be admitted only if it was reliable and relevant:

Faced with a proffer of expert scientific testimony . . . the trial judge must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology properly can be applied to the facts in issue.⁵⁶

To help the lower courts' examination under this new approach, the Court articulated a nonexclusive list of factors that indicated the reliability of scientific expert testimony, such as whether the theory or technique: (1) can be or has been tested; (2) has been subjected to peer review and publication; (3) has a known or potential rate of error; and (4) has been generally accepted within the scientific

community.⁵⁷ The Daubert court emphasized, however, that these factors were not “a definitive checklist or test” and that additional considerations were possible.⁵⁸ Furthermore, the Court delegated a “gatekeeping role” to federal district courts, mandating that they act to ensure both the reliability and relevancy of expert evidence.⁵⁹

Daubert thus requires that trial courts screen scientific testimony to ensure its reliability at the outset, usually in a pretrial hearing.⁶⁰ Before an expert’s testimony may be admitted to a jury, district courts must assess proffered testimony to determine “whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology can be applied to the facts in issue.”⁶¹ The Daubert court believed that the trial courts could effectively and competently apply the new standard to determine the reliability of scientific evidence.⁶² Such a gatekeeping role is important, the Court averred, because when presented to a jury, expert testimony can be both “powerful and quite misleading.”⁶³ Only in the aftermath of Daubert, however, has the magnitude of the gatekeeping requirement become clear:

To say that the Court merely expanded the ‘gatekeeper’ function would oversimplify the role that the Supreme Court has bestowed upon trial judges. Judges must ensure the integrity of the judicial system by providing the trier of fact with reliable and relevant evidence in every facet of expert testimony. Judges must perform this role with vigor to prevent another twist or turn in an already crooked path of admitting expert testimony.⁶⁴

Daubert finally provided federal courts with a method for determining the admissibility of scientific evidence, but the decision left several issues unresolved. These issues include: (1) whether the Daubert factors apply to all expert evidence or only to scientific evidence; (2) whether application of the Daubert factors was a

requirement or a suggestion; and (3) whether the application of the Daubert factors was subject to an abuse of discretion standard or de novo review.⁶⁵ Moreover, while it established that all scientific evidence must be reliable, the Court left its definition of “reliability” unclear.⁶⁶ Consequently, “[t]he ambiguous nature of the Daubert decision requires federal courts to wrestle with the probable answers of these questions,” often with inconsistent or controversial results.⁶⁷

B. General Electric Company v. Joiner

In 1997, in General Electric Company v. Joiner,⁶⁸ the Supreme Court clarified the standard for admissibility of expert evidence first announced in Daubert. Reaffirming its prior holdings, the Court stated that a trial court’s determination of the admissibility of an expert’s testimony should not be disturbed on appeal absent an “abuse of discretion.”⁶⁹ An abuse of discretion occurs when the appellate court finds that the trial judge has made a “clearly erroneous conclusion and judgment—one that is clearly against logic and effect of such facts as are presented in support of the application or against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing.”⁷⁰ The application of this standard of review, the Joiner court noted, was especially important because a trial court’s decision to exclude expert testimony may heavily influence the outcome of a trial, especially when the expert was key to showing liability, and can lead to summary judgment against the proffering party.⁷¹

Additionally, the Joiner court addressed the tension raised in Daubert between the importance placed on an expert’s principles and methodology as applied to the case at hand and the proposed expert’s conclusions generated therefrom.⁷² The Court opined that conclusions and methodology are not entirely distinct from one another so that the Daubert gatekeeping was applicable to the proposed expert’s conclusions as well as his or her principles and methodology.⁷³ The Joiner court further cautioned the courts against

admitting expert testimony at face value on the experts' credentials alone:

Trained experts commonly extrapolate from existing data. But nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.⁷⁴

C. *Kumho Tire Company, Ltd. v. Carmichael*

Finally, in Kumho Tire Company, Ltd. v. Carmichael,⁷⁵ the Supreme Court addressed the issue of whether the gatekeeping obligation imposed upon trial courts in Daubert applied only to scientific testimony or to all expert testimony. The Court concluded that a trial judge must apply the Daubert gatekeeping requirements to all expert testimony, whether based on scientific, technical, or otherwise specialized knowledge.⁷⁶ The Court opined:

[A] trial court may consider one or more of the specific factors that Daubert mentioned when doing so will help determine that testimony's reliability. But as the Court stated in Daubert, the test of reliability is "'flexible," and Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination.⁷⁷

The Kumho Tire court provided three reasons to support its extension of the Daubert gatekeeping function to nonscientific evidence.⁷⁸ The Court noted that Rule 702 does not make a "relative distinction"

between scientific and nonscientific knowledge and therefore requires only that all expert testimony be reliable.⁷⁹ The Kumho Tire court also observed that the rationale behind Daubert's gatekeeping function was that Federal Rules of Evidence 702 and 703 "grant expert witnesses testimonial latitude unavailable to other witnesses on the 'assumption that the expert's opinion will have a reliable basis in the knowledge and expert of his discipline,'" supporting the requirement that all expert testimony be reliable.⁸⁰ Finally, the Court averred, drawing a distinction between scientific and nonscientific experts would be a difficult and unnecessary task.⁸¹

Kumho Tire also elaborated on the gatekeeping concept developed in Daubert, remarking that Daubert's analysis was meant to enable trial courts to employ the practical tools available to them and ensure that an expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."⁸² To guarantee that trial judges would continue to have broad latitude to make such admissibility determinations, the Court reiterated, the abuse of discretion standard was the proper test for reviewing a trial court's admission or exclusion of expert testimony.⁸³

D. The 2000 Amendment to Federal Rule 702

Because of the imprecise standards and definitions set forth by the Supreme Court in Daubert, Joiner, and Kumho Tire, the federal courts, through the rule making process, amended Federal Rule 702 in 2000.⁸⁴ Rule 702 now reads:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based

upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.⁸⁵

The Advisory Committee, however specifically stated that the amended rule was not a codification of Daubert.⁸⁶ “Notably absent from either the amended rule or the notes are any procedural requirements for the exercise of the trial court’s gatekeeping function. Indeed, the note explains the absence is intentional to allow trial courts flexibility and discretion in considering evidentiary challenges.”⁸⁷ As a result, under amended Rule 702, federal district courts must continue to fulfill their Daubert gatekeeping responsibilities by screening expert testimony to ensure that it arises out of a reliable methodology, has a sufficient factual basis, and reliably applies the methodology to the facts.⁸⁸

Nevertheless, the exact meaning of “reliability” of expert evidence still remains unclear. Amended Rule 702, like Daubert, failed to provide federal courts with express guidance as to the definition of scientific reliability.⁸⁹ “Instead, the rule creates three reliability requirements: ‘reliable data, reliable methodology, and reliable application of the methodology,’ that require ‘trial judges conducting the gatekeeping function . . . to undertake a three-part reliability inquiry in connection with all expert testimony.’”⁹⁰ Federal Rule 702, as amended, leaves trial courts with the discretion to determine not only whether the methods used by a proposed expert are reliable but also the means by which reliability is to be determined. As a consequence, the weight that courts place on the Daubert factors in determining reliability varies greatly, depending on the nature of the case before the trial court and the type of expert testimony proffered.⁹¹ Variances in judicial interpretation regarding the admissibility of reliable expert testimony continue to arise, therefore, in spite of the federal courts’ and Congress’ attempts to formulate a uniform test.

III. INTERPRETATION OF THE DAUBERT GATEKEEPING CONCEPT IN THE ELEVENTH CIRCUIT

In the Eleventh Circuit, federal district courts must fulfill their Daubert gatekeeping responsibilities by making a preliminary evaluation of expert evidence to ensure that the proffered testimony is the product of reliable methods that have been reliably applied to the facts at hand before it is presented to the jury. As the circuit court emphasized last year in United States v. Frazier:⁹²

Rule 702 compels the district courts to perform the critical “gatekeeping” function concerning the admissibility of expert scientific [and technical] evidence This function “inherently requires the trial court to conduct an exacting analysis” of the foundations of expert opinions to ensure that they meet the standards for admissibility under Rule 702.⁹³

District courts faced with a proffer of scientific evidence thus consider whether:

(1) [T]he expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine the fact in issue.⁹⁴

These courts must do more than simply “take the expert’s word for it.”⁹⁵ Instead, the burden of establishing the admissibility of scientific or technical expert testimony under Daubert rests on the proponent of

the opinion.⁹⁶ Courts generally structure their specific considerations of expert evidence around the key elements of admissibility outlined below.

A. Expert Qualifications

An expert witness is generally called to the stand at trial because he or she has specialized knowledge in a particular area that will assist the proponent in proving the case.⁹⁷ As a gatekeeper, the district court has broad discretion to verify that a proposed witness's testimony rests on a reliable foundation by ensuring that he or she is qualified to offer his or her expert opinion.⁹⁸ "[T]he court is to examine 'not the qualifications of the witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question.'"⁹⁹ District courts analyze an expert's qualifications using evidence of his or her knowledge, skill, experience, training, or education.¹⁰⁰ The trial court's gatekeeping function requires more than simply accepting the expert's asserted qualifications as sufficient.¹⁰¹ "While an expert's overwhelming qualifications may bear on the reliability of his proffered testimony, they are by no means a guarantor of reliability."¹⁰² In McLendon v. Georgia Kaolin Company,¹⁰³ for example, an economic geologist offered to provide expert testimony about the value of kaolin on a tract of land. Despite the geologist's academic credentials, the district court excluded the witness's testimony because he had minimal experience in evaluating kaolin for commercial use, the processes used to make kaolin commercially viable, or the market value of kaolin during the relevant time period.¹⁰⁴

An expert can also be qualified because he or she has experience in the matter about which he or she plans to testify.¹⁰⁵ The Eleventh Circuit has noted, however, "if the witness is relying solely or primarily upon experience, then the witness must explain how that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts."¹⁰⁶ For example, in

Mullins v. Crowell,¹⁰⁷ the Eleventh Circuit found that a witness was qualified to give expert testimony regarding the many jobs available in his field because he had been a general foreman supervising workers of all types for eleven years.¹⁰⁸ The Eleventh Circuit, in United States v. Bennett,¹⁰⁹ similarly ruled that the trial court had not abused its discretion in admitting expert testimony of an employee of a forensics department on the subject of methamphetamines even though he had less than two years of experience working for the department. Instead, the court noted, the witness was qualified because he had a bachelor's degree in microbiology and seven months of training by the forensics department.¹¹⁰

B. Expert Reliability

Because Rule 702 and Daubert fail to define “reliability,” the districts courts have been given “considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. Exactly how reliability is evaluated may vary from case to case, but what remains constant is the requirement that the trial judge evaluate the reliability of the testimony before allowing its admission at trial.”¹¹¹ As gatekeepers, district courts must look for independent evidence showing that the expert relied upon sufficient facts and data, used reliably applied methods, and reliably applied those methods to the facts.¹¹² The Eleventh Circuit has noted that the courts “must make certain, whether basing testimony upon professional studies or personal experience, [the expert] employs in the courtroom the same level of intellectual rigor that characterized the practice of an expert in the relevant field.”¹¹³

In ruling that the methodology employed by an expert in arriving at his or her opinions must be reliable, the Daubert court suggested several factors that trial courts could apply: (1) whether the theory or method has been and can be tested; (2) whether the theory or method has been subjected to publication and peer-review; (3) whether the theory or method has an acceptable rate of error, and

whether mechanisms exist to ensure the error rate is accurate; and (4) whether the theory or method has been met with general acceptance within the relevant scientific community.¹¹⁴ The factors articulated in Daubert, however, are not exhaustive, and any one or several of these factors may or may not be applicable to the reliability inquiry in a given case.¹¹⁵ In addition, there are numerous other factors beyond those set forth in Daubert that could support the reliability of an expert's opinion.¹¹⁶ Such factors include whether an analytical gap exists between data relied on by the expert and the conclusion drawn by him or her; whether the expert's conclusion is supported by sufficient data; whether the expert has employed the same intellectual rigor in the courtroom as employed by other experts in the field; whether the expert has eliminated other possible explanations; whether the expert has relied too heavily on anecdotal evidence; whether the studies and research relied upon are in their infancy; whether the expert appears to have shaped or prepared the conclusion solely for litigation; and to what extent the expert relied on agency rules.¹¹⁷

In applying the above Daubert factors, moreover, district courts look to see whether expert testimony "fits" within the facts of the case.¹¹⁸ Fitness requires that the expert testify only within the scope of his or her designated expertise and that his or her testimony be related the pertinent facts of the case.¹¹⁹ The Eleventh Circuit has placed the burden of persuasion on the proponent of the evidence to explain how the expert's methodology or experience provides a sufficient basis for each of his opinions and how those methodologies or experiences can be reliably applied to the facts in the case.¹²⁰ Although an expert can offer scientifically valid evidence for one purpose, if it is not scientifically valid for the purposes of the case, then the testimony lacks "fit" and cannot be considered reliable.¹²¹

C. Expert Assists the Trier of Fact

Finally, district courts consider whether the proffered expert opinions would assist the trier of fact. “By this requirement, expert testimony is admissible if it concerns matters that are beyond the understanding of the average lay person.”¹²² As gatekeepers, district courts will limit an expert’s testimony to matters beyond the knowledge or general experiences of the jury.¹²³ Courts generally allow testimony that would be helpful to the jury’s understanding of complex or confusing subject matters.¹²⁴ Nonetheless, the testimony must be presented in such a way that it allows jurors to draw their own conclusions.¹²⁵ “[The fact finding] power is given to the jury because the jury generally is presumed capable of making such determinations.”¹²⁶ If a jury could arrive at the same opinion or conclusion using common sense, common experience, or simple logic, then the expert has usurped the jury’s power and the district court must exercise its gatekeeping role to exclude the testimony.

District courts also remain mindful of the fact that when an expert testifies, the jury often perceives his or her testimony as infallible.¹²⁷ The Eleventh Circuit has noted: “[E]xpert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead and confuse.”¹²⁸ As gatekeepers, the courts prevent the proponent of expert testimony from taking advantage of an expert’s increased likelihood to persuade jurors by proffering the expert merely to bolster his or her case. Pursuant to Federal Rule 403, therefore, district courts may exclude otherwise admissible expert testimony if it would be prejudicial when put before the jury.¹²⁹ Rule 403 provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”¹³⁰ District courts often use Rule 403 to keep out opinions that provide unspecific

and imprecise information. In Frazier, for example, the Eleventh Circuit affirmed the exclusion of a proposed forensics expert who was willing to testify that foreign hairs were expected in samples taken from a rape victim.¹³¹ The court agreed with the district court that the opinion was vague and imprecise, requiring the jury to determine whether “expectation” meant the presence of hairs was a virtual certainty, a strong possibility, or merely more likely than not.¹³²

In addition, expert testimony that undermines the judge’s power to decide the facts or the jury’s power to decide the meaning of evidence and the credibility of witnesses will usually be excluded because it usurps the functions of the judge and jury.¹³³ Courts will also prevent legal conclusions masked as expert testimony from being admitted because “[s]uch opinions merely function like jury instructions and, thus, infringe upon the trial judge’s role.”¹³⁴ Finally, expert testimony that merely tells the jury what verdict to reach is usually inadmissible because these statements amount to a closing argument.¹³⁵

IV. ADOPTION OF THE DAUBERT GATEKEEPING CONCEPT IN GEORGIA

Although Daubert and its progeny were not binding upon state courts, in a period of four years after the decision, at least twenty-eight states either adopted the Daubert standard, assimilated it as similar to a test already in place, or maintained a Daubert-like test without mentioning the decision.¹³⁶ Georgia, however, rejected these approaches and declined to adopt the admissibility standards presented in both Frye¹³⁷ and Daubert.¹³⁸

A. *Admissibility of Expert Testimony in Georgia State Courts Prior to the Georgia Tort Reform Act of 2005*

Section 24-6-67 of the Official Code of Georgia and Georgia courts required only that (1) the expert be qualified, (2) the procedure used to arrive at the conclusion have reached a stage of verifiable certainty, and (3) the expert’s testimony be relevant and helpful to the jury.¹³⁹ “In practice, the requirements for expert qualification were minimal and required little more than a showing that the expert had gained special knowledge through his education, training, or experience.”¹⁴⁰

While § 24-6-67 did not require a reliability determination, in Harper v. State,¹⁴¹ the Supreme Court of Georgia adopted a “verifiable certainty test,” under which trial courts determined whether the technique or procedure used by an expert witness in reaching his or her opinion was “at a stage of verifiable certainty—that is, whether the expert’s procedure ‘rests on the laws of nature.’”¹⁴² Instead of determining whether the expert’s theory or methodology was generally accepted in the scientific community, the trial court considered evidence presented by the parties, as well as outside sources such as exhibits, treatises, and laws of other jurisdictions, in determining admissibility.¹⁴³

B. *Implementing Daubert Gatekeeping in Georgia State Courts under the Georgia Tort Reform Act of 2005*

In its 2005 legislative session, the Georgia General Assembly adopted sweeping changes to the statutory requirements for the admissibility of expert testimony in the state’s courts.¹⁴⁴ The act, signed into law in February, adopted Rules 702 and 703 of the Federal Rules of Evidence as the new standards for admissibility in all civil cases.¹⁴⁵ The act also places additional restrictions on the

admissibility of expert testimony in professional negligence and malpractice cases.¹⁴⁶ As one commentator has noted:

The new statute incorporates the language of Federal Rules 702 and 703 in O.C.G.A. §§ 24-9-67.1(a) and (b). Additionally, in a unique form of statutory drafting, the new law specifically references and allows Georgia courts to draw from the opinions of Daubert v. Merrell Dow Pharmaceuticals, Inc., General Electric v. Joiner, Kumho Tire Co., Ltd. v. Carmichael, and other decisions [by] federal courts in applying the standards enumerated in the statute.¹⁴⁷

The standards for admissibility of expert testimony in criminal cases, however, remain unchanged.¹⁴⁸

Section 24-9-67.1 is notably different from Federal Rule of Evidence 702 in several ways. First, § 24-9-67.1(b)(1) provides that an expert's testimony must be based upon sufficient facts and data "which are or will be admitted into evidence at the hearing or trial."¹⁴⁹ As a result, Georgia courts must ensure that experts substantially rely upon admissible evidence in reaching their proffered opinions.¹⁵⁰ Experts are still permitted to rely on inadmissible evidence to some extent, however, because § 24-9-67.1 specifically provides that the facts relied upon by an expert need not have been admitted.¹⁵¹

The Georgia Tort Reform Act also provides special qualification requirements for experts testifying in professional malpractice actions. Section 24-9-67.1 requires that at the time the act or omission is alleged to have occurred, the expert must have been licensed in the profession involved by an appropriate regulatory agency in the state where he or she was either practicing or teaching.¹⁵² In medical malpractice cases, moreover, expert testimony is admissible only if the expert had actual professional

knowledge and experience in the area of practice or specialty in which the opinion is to be given because he or she regularly engaged in:

1. The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or
2. The teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; and
3. Except as provided in subparagraph (D) of this paragraph:
 - a. Is a member of the same profession;
 - b. Is a medical doctor testifying as to the standard of care of a defendant who is a doctor of osteopathy; or
 - c. Is a doctor of osteopathy testifying as to the standard of care of a defendant who is a medical doctor; and
4. Notwithstanding any other provision of this Code section, an expert who is a physician and, as a result of having, during at least three of the last five years immediately

preceding the time the act or omission is alleged to have occurred, supervised, taught, or instructed nurses, nurse practitioners, certified registered nurse anesthetists, nurse midwives, physician's assistants, physical therapists, occupational therapists, or medical support staff, has knowledge of the standard of care of that health care provider under the circumstances at issue shall be competent to testify as to the standard of that health care provider. However, a nurse, nurse practitioner, certified registered nurse anesthetist, nurse midwife, physician's assistant, physical therapist, occupational therapist, or medical support staff shall not be competent to testify as to the standard of care of a physician.¹⁵³

In addition, § 24-9-67.1 imposes the same requirements upon experts who testify in malpractice actions via affidavit pursuant to O.C.G.A. § 9-11-9.1.¹⁵⁴

Under the terms of § 24-9-67.1, moreover, the Georgia Tort Reform Act became effective immediately upon its approval by the governor of Georgia in February 2005. Some commentators have read the act to require that experts in pending cases who do not meet the new requirements of § 24-9-67.1 be replaced even if these experts have been disclosed and have testified in depositions. Several Georgia courts, however, have refused to apply § 24-9-67.1 in pending cases that “were near the time of trial or otherwise procedurally advanced.”¹⁵⁵

Finally, § 24-9-67.1(d) provides that, upon the motion of either party, the trial court may hold a pretrial hearing to determine

whether a proposed witness qualifies as an expert and whether his or her proffered testimony meets the act's new requirements for admissibility.¹⁵⁶ If the trial court holds a pretrial hearing, moreover, the hearing and any rulings as to admissibility must be completed no later than the final pretrial conference as provided for in O.C.G.A. § 9-11-16.¹⁵⁷ Nonetheless, Georgia law does not mandate that parties disclose the existence of experts or the scope of their proposed testimony prior to trial.¹⁵⁸ Such information must instead be disclosed only if the opposing party requests it during discovery.¹⁵⁹

APPENDIX A

FEDERAL RULE OF EVIDENCE 702

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

APPENDIX B

NOTES OF ADVISORY COMMITTEE ON RULE 702

An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it.

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference. The use of opinions is not abolished by the rule, however. It will continue to be permissible for the experts to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts. See Rules 703 to 705.

Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952). When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time. 7 WIGMORE § 1918.

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education." Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values.

APPENDIX C

NOTES OF ADVISORY COMMITTEE ON 2000 AMENDMENTS TO RULE 702

Rule 702 has been amended in response to Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), and to the many cases applying Daubert, including Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167 (1999). In Daubert the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in Kumho Tire clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. See also Kumho Tire, 119 S.Ct. at 1178 (citing the Committee Note to the proposed amendment to Rule 702, which had been released for public comment before the date of the Kumho Tire decision). The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. Consistently with Kumho Tire, the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. See Bourjaily v. United States, 483 U.S. 171 (1987).

Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the Daubert Court are (1) whether the expert's technique or theory can be or has been tested--that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known

or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. The Court in Kumho Tire held that these factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending upon "the particular circumstances of the particular case at issue." 119 S.Ct. at 1175.

No attempt has been made to "codify" these specific factors. Daubert itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific Daubert factors can apply to every type of expert testimony. In addition to Kumho Tire, 119 S.Ct. at 1175, see Tyus v. Urban Search Mgmt., 102 F.3d 256 (7th Cir. 1996) (noting that the factors mentioned by the Court in Daubert do not neatly apply to expert testimony from a sociologist). See also Kannankeril v. Terminix Int'l, Inc., 128 F.3d 802, 809 (3d Cir. 1997) (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge"). The standards set forth in the amendment are broad enough to require consideration of any or all of the specific Daubert factors where appropriate.

Courts both before and after Daubert have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include:

1. Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1317 (9th Cir. 1995).

2. Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. See General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered").
3. Whether the expert has adequately accounted for obvious alternative explanations. See Claar v. Burlington N.R.R., 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiffs condition). Compare Ambrosini v. Labarraque, 101 F.3d 129 (D.C. Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).
4. Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." Sheehan v. Daily Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997). See Kumho Tire, 119 S.Ct. at 1176 ("Daubert requires the trial court to assure itself that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field").
5. Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. See Kumho Tire, 119 S.Ct. at 1175 ("Daubert's general acceptance factor does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy."); Moore v. Ashland Chem., Inc., 151 F.3d 269 (5th Cir. 1998) (en banc) (clinical doctor was properly

precluded from testifying to the toxicological cause of the plaintiffs respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on "clinical ecology" as unfounded and unreliable).

All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended. Other factors may also be relevant. See Kumho Tire, 119 S.Ct. at 1176 ("[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."). Yet no single factor is necessarily dispositive of the reliability of a particular expert's testimony. See, e.g., Heller v. Shaw Indus., Inc., 167 F.3d 146, 155 (3d Cir. 1999) ("not only must each stage of the expert's testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules."); Daubert, 43 F.3d at 1317 n.5 (noting that some expert disciplines "have the courtroom as a principal theatre of operations" and as to these disciplines "the fact that the expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration.").

A review of the case law after Daubert shows that the rejection of expert testimony is the exception rather than the rule. Daubert did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." United States v. 14.38 Acres of Land, 80 F.3d 1074, 1078 (5th Cir. 1996). As the Court in Daubert stated: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 595. Likewise, the amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert.

See Kumho Tire, 119 S.Ct. at 1176 (noting that the judge has discretion "both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.").

When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. See, e.g., Heller, 167 F.3d at 160 (expert testimony cannot be excluded simply because the expert uses one test rather than another, when both tests are accepted in the field and both reach reliable results). As the court stated in In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 744 (3d Cir. 1994), proponents "do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable. . . . The evidentiary requirement of reliability is lower than the merits standard of correctness." See also Daubert, 43 F.3d at 1318 (scientific experts might be permitted to testify if they could show that the methods they used were also employed by "a recognized minority of scientists in their field."); Ruiz-Troche v. Pepsi Cola, 161 F.3d 77, 85 (1st Cir. 1998) ("Daubert neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance.").

The Court in Daubert declared that the "focus, of course, must be solely on principles and methodology, not on the conclusions they generate." 509 U.S. at 595. Yet as the Court later recognized, "conclusions and methodology are not entirely distinct from one another." General Elec., 522 U.S. at 146. Under the amendment, as under Daubert, when an expert purports to apply principles and

methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. See Lust v. Merrell Dow Pharm., Inc., 89 F.3d 594, 598 (9th Cir. 1996). The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case. As the court noted in In re Paoli R.R. Yard PCB Litigation, 35 F.3d at 745, "any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology."

If the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably. Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or blood clotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles. For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony "fit" the facts of the case.

As stated earlier, the amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeping function applies to testimony by any expert. See Kumho Tire, 119 S.Ct. at 1171 ("We conclude that Daubert's general holding--setting forth the trial judge's general 'gatekeeping' obligation--applies not only to testimony based on 'scientific'

knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge."). While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist. See Watkins v. Telsmith, Inc., 121 F.3d 984, 991 (5th Cir. 1997) ("[I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique."). Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded. See, e.g., American College of Trial Lawyers, Standards and Procedures for Determining the Admissibility of Expert Testimony after Daubert, 157 F.R.D. 571, 579 (1994) ("[W]hether the testimony concerns economic principles, accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the 'knowledge and experience' of that particular field.").

The amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case. While the terms "principles" and "methods" may convey a certain impression when applied to scientific knowledge, they remain relevant when applied to testimony based on technical or other

specialized knowledge. For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted.

Nothing in this amendment is intended to suggest that experience alone--or experience in conjunction with other knowledge, skill, training or education--may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. See, e.g., United States v. Jones, 107 F.3d 1147 (6th Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail); Tassin v. Sears Roebuck, 946 F. Supp. 1241, 1248 (M.D. La. 1996) (design engineer's testimony can be admissible when the expert's opinions "are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches"). See also Kumho Tire, 119 S.Ct. at 1178 (stating that "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.").

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it." See Daubert, 43 F.3d at 1319 ("We've been presented

with only the experts' qualifications, their conclusions and their assurances of reliability. Under Daubert, that's not enough."). The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable. See O'Conner v. Commonwealth Edison Co., 13 F.3d 1090 (7th Cir. 1994) (expert testimony based on a completely subjective methodology held properly excluded). See also Kumho Tire, 119 S.Ct. at 1176 ("[I] will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.").

Subpart (1) of Rule 702 calls for a quantitative rather than qualitative analysis. The amendment requires that expert testimony be based on sufficient underlying "facts or data." The term "data" is intended to encompass the reliable opinions of other experts. See Advisory Committee Note to Rule 703. The language "facts or data" is broad enough to allow an expert to rely on hypothetical facts that are supported by the evidence. Id.

When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on "sufficient facts or data" is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.

There has been some confusion over the relationship between Rules 702 and 703. The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the sufficiency of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion. In contrast, the "reasonable reliance" requirement of Rule 703 is a relatively narrow inquiry. When an expert relies on inadmissible information, Rule 703 requires the trial court to determine whether that information is of a

type reasonably relied on by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question whether the expert is relying on a sufficient basis of information--whether admissible information or not--is governed by the requirements of Rule 702.

The amendment makes no attempt to set forth procedural requirements for exercising the trial court's gatekeeping function over expert testimony. See Daniel J. Capra, The Daubert Puzzle, 38 GA. L. REV. 699, 766 (1998) ("Trial courts should be allowed substantial discretion in dealing with Daubert questions; any attempt to codify procedures will likely give rise to unnecessary changes in practice and create difficult questions for appellate review."). Courts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under Daubert, and it is contemplated that this will continue under the amended Rule. See, e.g., Cortes-Irizarry v. Corporacion Insular, 111 F.3d 184 (1st Cir. 1997) (discussing the application of Daubert in ruling on a motion for summary judgment); Paoli R.R. Yard PCB Litig., 35 F.3d at 736, 739 (discussing the use of in limine hearings); Claar, 29 F.3d at 502-05 (discussing the trial court's technique of ordering experts to submit serial affidavits explaining the reasoning and methods underlying their conclusions).

The amendment continues the practice of the original Rule in referring to a qualified witness as an "expert." This was done to provide continuity and to minimize change. The use of the term "expert" in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an "expert." Indeed, there is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial. Such a practice "ensures that trial courts do not inadvertently put their stamp of authority" on a witness's opinion, and protects against the jury's being "overwhelmed by the so-called 'experts'." Hon. Charles Richey, Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and

Civil Jury Trials, 154 F.R.D. 537, 559 (1994) (setting forth limiting instructions and a standing order employed to prohibit the use of the term "expert" in jury trials).

APPENDIX D

GEORGIA TORT REFORM ACT OF 2005

SECTION 1. The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act.

....

SECTION 7. Title 24 of the Official Code of Georgia Annotated, relating to evidence, is amended by striking Code Section 24-9-67, relating to expert opinion evidence, and inserting in its place new Code Sections 24-9-67 and 24-9-67.1 to read as follows:

§ 24-9-67

In criminal cases, the opinions of experts on any question of science, skill, trade, or like questions shall always be admissible; and such opinions may be given on the facts as proved by other witnesses.

§ 24-9-67.1

- B. The provisions of this Code section shall apply in all civil actions. The opinion of a witness qualified as an expert under this Code section may be given on the facts as proved by other witnesses. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing or trial. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.
- C. If scientific, technical, or other specialized knowledge will assist the trier of fact in any cause of action to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:
1. The testimony is based upon sufficient facts or data which are or will be admitted into evidence at the hearing or trial;
 2. The testimony is the product of reliable principles and methods; and
 3. The witness has applied the principles and methods reliably to the facts of the case.
- D. Notwithstanding the provisions of subsection (b) of this Code section and any other provision of law which might be construed to the contrary, in professional malpractice

actions, the opinions of an expert, who is otherwise qualified as to the acceptable standard of conduct of the professional whose conduct is at issue, shall be admissible only if, at the time the act or omission is alleged to have occurred, such expert:

1. Was licensed by an appropriate regulatory agency to practice his or her profession in the state in which such expert was practicing or teaching in the profession at such time; and
2. In the case of a medical malpractice action, had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:
 - i. The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or
 - ii. The teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others how to perform the procedure, diagnose the condition, or render the

- treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; and
- iii. Except as provided in subparagraph (D) of this paragraph:
 - 1. Is a member of the same profession;
 - 2. Is a medical doctor testifying as to the standard of care of a defendant who is a doctor of osteopathy; or
 - 3. Is a doctor of osteopathy testifying as to the standard of care of a defendant who is a medical doctor; and
 - iv. Notwithstanding any other provision of this Code section, an expert who is a physician and, as a result of having, during at least three of the last five years immediately preceding the time the act or omission is alleged to have occurred, supervised, taught, or instructed nurses, nurse practitioners, certified registered nurse anesthetists, nurse midwives, physician's assistants, physical therapists, occupational therapists, or medical support staff, has knowledge of the standard of care of that health care provider under the circumstances at issue shall be competent to testify as to the standard of that health care provider. However, a nurse, nurse practitioner, certified registered nurse anesthetist, nurse midwife, physician's assistant, physical therapist, occupational therapist, or medical support staff shall not be

competent to testify as to the standard of care of a physician.

- E. Upon motion of a party, the court may hold a pretrial hearing to determine whether the witness qualifies as an expert and whether the expert's testimony satisfies the requirements of subsections (a) and (b) of this Code section. Such hearing and ruling shall be completed no later than the final pretrial conference contemplated under Code Section 9-11-16.
- F. An affiant must meet the requirements of this Code section in order to be deemed qualified to testify as an expert by means of the affidavit required under Code Section 9-11-9.1.
- G. It is the intent of the legislature that, in all civil cases, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); General Electric Co. v. Joiner, 522 U.S. 136 (1997); Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.

....

SECTION 15.

- A. This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval.

- B. Code Sections 51-12-31 and 51-12-33, as amended by this Act, and Code Sections 51-1-29.5, 51-2-5.1, and 51-13-1, as enacted by this Act, shall apply only with respect to causes of action arising on or after the effective date of this Act, and any prior causes of action shall continue to be governed by prior law. It is the intention of the General Assembly that all other provisions of this Act shall apply to causes of action pending on its effective date, unless such application would be unconstitutional.

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- ¹ FED. R. EVID. 702 advisory committee's note.
- ² See Rochelle Cooper Dreyfuss, Is Science a Special Case? The Admissibility of Scientific Evidence After *Daubert v. Merrell Dow*, 73 TEX. L. REV. 1779, 1782 (1995).
- ³ See Krista L. Needham, Comment, Questioning the Admissibility of Nonscientific Evidence After *Daubert*: The Need for Increased Judicial Gatekeeping to Ensure the Reliability of All Expert Testimony, 25 FORDHAM URB. L.J. 541-42 (1998).
- ⁴ See L. Timothy Perrin, Expert Witness Testimony: Back to the Future, 29 U. RICH. L. REV. 1389, 1389-90 (1995).
- ⁵ 509 U.S. 579 (1993).
- ⁶ Id. at 585.
- ⁷ See infra Part II.A.
- ⁸ See Kimberly M. Hrabosky, *Kumho Tire v. Carmichael*: Stretching *Daubert* Beyond Recognition, 8 GEO. MASON L. REV. 203, 229 (1999).
- ⁹ See Jeffrey S. Parker, *Daubert's* Debut: The Supreme Court, the Economics of Scientific Evidence, and the Adversarial System, 4 SUP. CT. ECON. REV. 1, 9 (1995).
- ¹⁰ Id. at 10-11.

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- 11 See Leslie Morsek, *Get on Board for the Ride of Your Life! The Ups, the Downs, the Twists, and the Turns of the Applicability of the “Gatekeeper” Function to Scientific and Non-Scientific Expert Evidence: Kumho’s Expansion of Daubert*, 31 AKRON L. REV. 689, 695 (2001).
- 12 293 F. 1013 (D.C. Cir. 1923).
- 13 Id. at 1014.
- 14 Id.
- 15 Id.
- 16 See Paul C. Giannelli & Edward J. Imwinkelried, SCIENTIFIC EVIDENCE § 1-5, at 10-14 (2d ed. 1986 & Supp. 1998) (cataloging post-Frye decisions and interpretations).
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- 20 See id.; Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1207 (1980).
- 21 See Richard Nahas, Comment, *Daubert v. Merrell Dow Pharmaceuticals, Inc.* Requiem for *Frye*: The Supreme Court Lays to Rest the Common Law Standard for Admitting Scientific Evidence in the Federal Courts, 29 New Eng. L. Rev. 93, 98-99 (1994).

22 Id. at 101-102.

23 See id.

24 See e.g., Giannelli, supra note 20, at 1223-25.

25 Morsek, supra note 11, at 700.

26 See Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 to
be effective July 1, 1975 (codified at 28 U.S.C. app. (1976)).

27 FED. R. EVID. 702. Rule 702 was subsequently amended in
2000 to conform to the Supreme Court's decisions in Daubert,
General Electric Co. v. Joiner, 522 U.S. 136 (1997), and
Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137(1999).
FED. R. EVID. 702 (amended Dec. 1, 2000).

28 See Wright & Gold, supra note 19, at § 6262.

29 See id.

30 Rule 104 provides in pertinent part:

Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

FED. R. EVID. 104(A).

31 Rule 401 provides:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence.

FED. R. EVID. 401.

³² Rule 402 provides:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

FED. R. EVID. 402.

³³ Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FED. R. EVID. 403.

³⁴ Rule 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to

evaluate the expert's opinion substantially outweighs their prejudicial effect.

FED. R. EVID. 703 (amended Dec. 1, 2000).

35 FED. R. EVID. 702.

36 See id.

37 Wright & Gold, supra note 19, at § 6261 (citing Daubert, 509
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38 See FED. R. EVID. 702.

39 See Morsek, supra note 11, at 700 n.49 (citing Major Victor
Hansen, Rule of Evidence 702: The Supreme Court Provides
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41 Morsek, supra note 11, at 703.

42 See Giannelli, supra note 20, at 1128-31.

43 Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1110
(5th Cir. 1991).

44 939 F.2d 1106 (5th Cir. 1991) (en banc), cert. denied, 503
U.S. 912 (1992).

45 Id. at 1114.

46 Id.

47 583 F.2d 1194 (2d Cir. 1978), cert. denied, 439 U.S. 1117

 (1979).

48 Id. at 1197.

49 Id. at 1198-99.

50 753 F.2d 1224 (3d Cir. 1985).

51 Id. at 1237-41.

52 See Montz, supra note 40, at 94.

53 509 U.S. 579 (1993).

54 See id. at 587.

55 See id. at 597-98.

56 Id. at 592-93 (internal citations omitted).

57 Id. On remand, the Ninth Circuit applied these factors and

 still concluded that the plaintiff's expert testimony was

 inadmissible. See Daubert v. Merrell Dow Pharm., Inc., 43

 F.3d 1311, 1316 (9th Cir. 1995).

58 509 U.S. at 593. See also Mark McCormick, Scientific

Evidence: Defining a New Approach to Admissibility, 67

 IOWA L. REV. 879, 911-12 (1982) (identifying other factors

 that affecting admissibility of scientific evidence).

59 Id. at 589-92.

60 See id. at 592.

61 Id. at 593-95.

62 See Montz, supra note 40, at 106 (citing Kumho Tire, 526
U.S. at 152; United States v. Hines, 55 F. Supp. 2d 62, 66 (D.
Mass. 1999)).

63 Daubert, 509 U.S. at 595 (quoting Jack B. Weinstein, Rule
702 of the Federal Rules of Evidence Is Sound: It Should Not
Be Amended, 138 F.R.D. 631, 632 (1991)).

64 Morsek, supra note 11, at 739.

65 Id. at 710-11.

66 See id.

67 Id. at 711-12 (citing K. Issac de Vyver, Comment, Opening
the Door But Keeping the Lights Off: Kumho Tire Co. v.
Carmichael and the Applicability of the Daubert Test to
Nonscientific Evidence, 50 CASE W. RES. L. REV. 177, 186-
89 (1999)).

68 522 U.S. 136 (1997).

69 Id. at 146.

70 Morsek, supra note 11, at 715 & n.81 (citing BLACK'S LAW
DICTIONARY 5-6 (6th ed. 1991)).

71 See id.

72 See 522 U.S. at 146.

73 Id.

74 Id.

75 526 U.S. 137 (1999).

76 Id. at 149-50.

77 Id. at 141-42.

78 See id. at 141.

79 Id. at 142.

80 Id. at 142.

81 See Morsek, supra note 11, at 717 n.89 (quoting Kumho Tire,
526 U.S. at 152); Hrabosky, supra note 8, at 219 (outlining
the reasons for the Supreme Court’s decision in Kumho Tire).

82 Kumho Tire, 526 U.S. at 152.

83 Id. at 152.

84 See Montz, supra note 40, at 99-100.

85 FED. R. EVID. 702 (amended Dec. 1, 2000).

86 See FED. R. EVID. 702 advisory committee notes to 2000
amendment.

87 Montz, supra note 40, at 100-02 (quoting Conning the IADC
Newsletters, 68 DEF. COUNS. J. 245, 250 (2001)).

88 See id. at 102 n.63 (citing Allstate Ins. Co. v. Hugh Cole
Builder, Inc., 137 F. Supp. 2d 1283, 1285 (M.D. Ala. 2001)).

89 Id. at 103.

90 Id. (quoting Erickson v. Baxter Healthcare, Inc., 131 F. Supp.
2d 995, 998 (N.D. Ill. 2001); Allapath v. Exxon Corp., 61 F.
Supp. 2d 1335, 1339 n.8 (S.D. Fla. 1999)).

91 Id. (quoting Phillip L. Gordon, Amendments to the Federal
Rules of Civil Procedure and the Federal Rules of Evidence,
30 Colo. Law 35, 38 (2001)).

92 387 F.3d 1244.

93 Id. at 1266 (quoting McCorvey v. Baxter Healthcare Corp.,
298 F.3d 1253, 1257(11th Cir. 2002)).

94 City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548,
562 (11th Cir. 1998) (citing Daubert, 509 U.S. at 589).

95 United States v. Frazier, 387 F.3d 1244, 1265 (11th Cir.
2004) (quoting FED. R. EVID. 702 advisory committee notes to
2000 amendment).

96 See McCorvey, 298 F.3d at 1257; Allison, 184 F.3d at 1306.

97 See Wright & Gold, supra note 19, at § 6266.

98 See Frazier, 387 F.3d at 1260.

99 Smith v. Ortho Pharm. Corp., 770 F. Supp. 1561, 1566 (N.D.
Ga. 1991) (quoting Semsler v. Norfolk S. Ry. Co., 105 F.3d
299, 303 (6th Cir. 1997)).

100 See Allison, 137 F.3d at 1316 (citing FED. R. EVID. 702).

101 Id.

102 Frazier, 387 F.3d at 1261 (quoting Quiet Tech. DC-8, Inc. v.
103 Hurel-Dubois UK Ltd., 326 F.3d 1333, 1341 (11th Cir.
2003)).

104 841 F. Supp. 415 (M.D. Ga. 1994).

105 See id. at 418. See also Everett v. Georgia-Pacific Corp., 949
106 F. Supp. 856, 857 (S.D. Ga. 1996) (holding that a physician
107 practicing family medicine was incompetent to testify about
108 the effect of the inhalation of toxic chemicals); Will v.
109 Richardson-Merrell, Inc., 647 F. Supp. 544, 548-49 (S.D. Ga.
110 1986) (holding that a plastic surgeon was incompetent to
111 testify about whether drug caused birth defects).

112 Frazier, 387 F.3d at 1261 (citing FED. R. EVID. 702 advisory
113 committee note).

114 Id.

115 228 F.3d 1305 (11th Cir. 2000).

116 Id. at 1317 n.20.

117 368 F.3d 1343 (11th Cir. 2000).

118 Id. at 1355-56.

119 Frazier, 387 F.3d at 1263.

120 See id.

121 Id. (citing Kumho Tire, 526 U.S. at 152).

122 Quiet Tech., 326 F.3d at 1341 (citing Daubert 509 U.S. at
123 593-94; McCorvey, 298 F.3d at 1256).

115 See Frazier, 387 F.3d at 1262 (citing Kumho Tire, 526 U.S. at
150-52).

116 See id.

117 McClain, 401 F.3d at 1233; McCorvey, 298 F.3d at 1253;
Allison, 184 F.3d at 1316.

118 See Allison, 184 F.3d at 1312 (citing Daubert, 509 U.S. at
591).

119 See id.

120 Id.

121 Allison, 184 F.3d at 1317 (citing Daubert, 509 U.S. at 591).

122 Frazier, 387 F.3d at 1262-63 (quoting United States v. Rouco,
765 F.2d 983, 995 (11th Cir. 1985)).

123 Id.

124 Id. at 1263.

125 See id.

126 Id.

127 See id. at 1244.

128 Id.

129 See id. at 1263 (citing Rouco, 765 F.2d at 995; Hull v. Merck
& Co, Inc., 758 F.2d 1474, 1477 (11th Cir. 1985)).

130 Id. (citing FED. R. EVID. 403).

131 387 F.3d at 1264.

132 Id.

133 Id.

134 Wright & Gold, supra note 19, at § 6264.

135 See Frazier, 387 F.3d at 1262-63 (citing 4 WEINSTEIN’S
FEDERAL EVIDENCE § 702.03[2][a]).

136 See Montz, supra note 38, at 96 (citing Heather G. Hamilton,
The Movement from Frye to Daubert: Where Do the States
Stand, 38 JURIMETRICS J. 201, 208 (1998)).

137 See, e.g., Harper v. State, 249 Ga. 519, 525 (1982).

138 See Orkin Exterminating Co. v. Carder, 258 Ga. App. 796
(2003) (refusing to apply the reliability analysis enunciated in
Daubert).

139 See Mary Donne Peters & James W. Standard, The New
Rules Regarding Admissibility of Expert Testimony in
Georgia, in THE NEW RULES REGARDING ADMISSIBILITY OF
EXPERT TESTIMONY IN GEORGIA (Institute of Continuing
Legal Education in Georgia 2005) and THE ADMISSIBILITY OF
EXPERT TESTIMONY IN GEORGIA (forthcoming 2005).

140 Id. (citing Manesh v. Baker Equip. Eng’g Co., 247 Ga. App.
407 (2000)).

141 249 Ga. 519 (1982).

142 Id. at 525. See also Peters & Standard, supra note 140.

143 See 249 Ga. at 525; Peters & Standard, supra note 140.

144 Georgia Tort Reform Act of 2005 (enacted Feb. 15, 2005).

145 See Peters & Standard, supra note 140.

146 See id.

147 Id.

148 See id. Section 24-9-67 (2005), which previously governed the admissibility of expert testimony in all cases, was merely amended to read: “In criminal cases, the opinions of experts on any question of science, skill, trade, or like questions shall always be admissible; and such opinions may be given on the facts as proved by other witnesses.” O.C.G.A. § 24-9-67 (2005). The General Assembly then added a new section to the statute, § 24-9-67, which specifically addressed the new standard for admission of such evidence in civil cases. See O.C.G.A. § 24-9-67.1 (2005).

149 O.C.G.A. § 24-9-67.1 (2005) (emphasis added). See also Peters & Standard, supra note 140.

150 See Peters & Standard, supra note 140 (comparing O.C.G.A. § 24-9-67.1 with Federal Rule 702).

151 See id. (citing O.C.G.A. § 24-9-67.1(a)).

152 See O.C.G.A. § 24-9-67.1.

153 O.C.G.A. § 24-9-67.1(c).

154 O.C.G.A. § 9-11-9.1 provides in pertinent part:

In any action for damages alleging professional malpractice against a professional licensed by the State of Georgia . . . or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional

licensed by the State of Georgia . . . the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim

155 Peters & Standard, supra note 140 (citing Ga. Sen. Bill 3, § 15(a); Order of Hon. Melodie H. Clayton, Mason v. Home Depot U.S.A., No. 97-A-5105-1, State Court of Cobb County, Georgia, Feb. 21, 2005).

156 See O.C.G.A. § 24-9-67.1(d); Peters & Standard, supra note 140.

157 See O.C.G.A. § 24-9-67.1(d); Peters & Standard, supra note 140.

158 See Peters & Standard, supra note 140 (citing Ga. R. Civ. P. § 26(a)(2)(b) (setting forth the requirements for the designation of experts and the pretrial disclosure of any anticipated testimony)).

159 See Peters & Standard, supra note 140 (citing O.C.G.A. § 9-11-26(b)(4)(A)(i) (permitting parties to discover the identity of any expert witnesses that the opposing party expects to call at trial, the subject matter of the expert's proposed testimony, and a summary of the grounds for the expert's opinions)).

WHEN DOES A LAWSUIT TRIGGER A DUTY TO DEFEND IN GEORGIA?

*By David R. Smith**

This article will review the Georgia case law on when a liability insurance carrier has a duty to defend an insured who has been sued. Whether or not a duty to defend has been triggered depends on the language in the insurance contract, the allegations in the complaint, and any other information submitted to the insurance company about the claims.

1. Carefully review the language in the insurance policy.

An insurance policy is a contract and is governed by the rules of construction applicable to contracts.¹ “The true rule is that the duty to defend is determined by the contract”.² Before reviewing the complaint or case law, a carrier must have a clear understanding of the language in its policy. Whether or not a duty to defend is triggered depends on what the carrier agreed to do in its policy.

The first step is to confirm that the insurance policy is a liability policy that includes a “duty to defend” and not an indemnity policy, which merely indemnifies the insured after it has paid its defense costs and may include a “right” to defend. Next, the insurer needs to determine exactly what it has agreed to defend. Standard policies typically provide that the insurer will have the right and duty to defend the insured against any lawsuits seeking damages covered under the policy. The insurer, therefore, must determine exactly what is covered by the policy, what is excluded from coverage, and the conditions to coverage under the policy.

Finally, the carrier should determine whether its policy provides that the carrier will defend “groundless, false, or fraudulent” lawsuits. As discussed below, this provision was important in a series of cases, which held that insurance carriers had to defend complaints alleging covered claims, even when the facts showed that the alleged covered claims were invalid. Many modern-day policies do not include this provision. If the duty-to-defend issue turns on whether or not the carrier has a duty to defend groundless claims, the absence of this provision in the policy could be important.

2. The complaint should be read closely to identify all claims being asserted against the insured.

Determining the nature of the claims and damages alleged in a complaint can be difficult. Sometimes the claims (causes of action) are plainly stated and neatly organized into counts. Other times the allegations are vague; the precise claims are not identified; and determining the types of damages being sought is difficult. If a complaint is ambiguous or incomplete with respect to coverage, the carrier must defend it.³

Whether or not the carrier is ultimately liable for any judgments in the case is irrelevant. “An insurer’s duty to defend and its duty to indemnify are separate and independent obligations.”⁴ The duty to defend issue does not turn on whether the insured is actually liable to the plaintiff, but whether the plaintiff has asserted a least one claim that falls within the policy’s coverage.⁵ A lawsuit may allege numerous claims that are not covered under the policy, but still trigger a duty to defend, if it alleges at least one claim that is potentially covered under the policy.⁶

In *Penn-America Ins. Co. v. Disabled American Veterans, Inc. et al.*, the Georgia Supreme Court held that a liability carrier had a duty to defend a lawsuit filed by an employee against his employers,

despite the fact that the employer's liability policy excluded claims by employees. This was because the complaint did not allege that the plaintiff was an employee of the defendants. The plaintiff in the underlying suit had brought a tort action against the insureds seeking damages for a fall that occurred on the insured's premises. The insurance carrier refused to defend the suit, apparently because its investigation showed the plaintiff was the insured defendants' employee. In the tort case, the insureds moved for a summary judgment on alternative grounds, one of which was the exclusive remedy provision in workers' compensation law. The trial court granted the summary judgment in favor of the insureds without specifying its reasons.⁷

The insureds then brought suit against their carrier, alleging that the refusal to defend was a breach of the insurance contract. The trial court granted a summary judgment in favor of the insureds and the court of appeals affirmed. The supreme court granted certiorari to determine whether the allegations of the complaint obligated the carrier to defend the lawsuit, even though the plaintiff was injured in the course of her employment.⁸

The court noted that the insurance contract at issue included the standard provision requiring the insurer to defend groundless, false or fraudulent suits. This provision meant that "the insurer has a duty to defend even where the complaint against the insurer sets forth false factual allegations which would bring the claim within the coverage of the policy."⁹ Moreover, when the allegations of the complaint are ambiguous or incomplete with respect to the issue of insurance coverage, the insurer has a duty to defend.¹⁰

To excuse the duty to defend the petition must unambiguously exclude coverage under the policy..., and thus the duty to defend exists if the claim potentially comes within the policy. When the claim is one of potential coverage, doubt as to liability and

the insurer's duty to defend should be resolved in favor of the insured.¹¹

The court said, “[i]t is only where the complaint sets forth true factual allegations showing no coverage that the suit is one for which liability insurance coverage is not afforded and for which the insurer need not provide a defense.”¹² The court noted that if the plaintiff's tort action had been successful, it clearly would have been covered. The fact that the insured had a valid workers' compensation defense, which coincidentally triggered the employers' liability exclusion in the policy, was irrelevant on the duty to defend issue. The carrier was obligated to hire an attorney to present the defense on behalf of the insureds.¹³ This demonstrates how an insurer may be obligated to defend a complaint even though it is not ultimately liable for any judgment.¹⁴

An interesting question is whether the court in *Penn-America* would have required the carrier to defend the obviously groundless tort suit, if the carrier's policy did not have a provision requiring it to defend “groundless, false or fraudulent” suits. The fact that the policy included such a provision seems critical to the court's decision in *Penn-America* and many other cases.¹⁵

In the recent case of *Yeomans & Assoc. Agency v. Bowen Tree Surgeons*,¹⁶ the Georgia Court of Appeals said that an insurer had a duty to defend groundless, false or fraudulent claims without referring to language in the policy. The court's authority for this proposition of law was *Southern Guaranty Ins. Co. v. Dowse*,¹⁷ where the Georgia Supreme Court stated, in dicta, that an insurer had a duty to defend its insured against groundless claims without referring to language in the policy. The court's authority for this proposition was an ALR article discussing the consequences of a liability carrier's refusal to assume the defense of an insured.¹⁸ This article, however, notes that some policies require insurers to defend groundless claims while other policies do not.¹⁹ With regard to the policies that do not, the article

discusses several older decisions from other jurisdictions which held that insurance companies do not have a duty to defend, if it can be proven that the plaintiff's claims are groundless.²⁰ Based on *Southern Guaranty v. Dowse*, however, the notion that liability carriers always have a duty to defend groundless covered claims may now be part of the Georgia common law. But in an appropriate case, this issue might be raised if the policy in question did not require the insurer to defend groundless suits, and the only covered claim asserted against the insured is indisputably groundless.

Where it is clear that the complaint does not assert any claims that are covered under the policy, an insurer is justified in refusing to defend the lawsuit. In *City of Atlanta v. St. Paul Fire & Marine Ins. Co.*, the complaint asserted claims of trespass and conversion and alleged that the insured intentionally entered upon and damaged the plaintiff's property.²¹ Negligence was not alleged in the complaint. If the plaintiff had recovered damages for trespass and conversion, the insurer would not have been obligated to pay the claims. Based on these facts, the court ruled that the carrier had no duty to defend the lawsuit.²²

3. Factual contentions by an insured can create a duty to defend, even if the complaint does not allege any covered claims.

In some states, a carrier's duty to defend is based solely on the allegations contained within the "four corners of the complaint."²³ Facts outside the complaint are irrelevant on the duty-to-defend issue. Georgia, however, has rejected the "four corners" approach.²⁴ Georgia courts look beyond the "four corners" of the complaint to the "true facts," known or ascertainable to the insurer, and if these "true facts" place the claim within coverage, the insurer is obligated to defend the suit.²⁵

Because facts outside the complaint can trigger a duty to defend, insurers used to wonder how far they had to investigate a claim to determine if it could be covered, especially when it was clear that the complaint, on its face, did not trigger a duty to defend. The Georgia Supreme Court answered this question in *Colonial Oil*.²⁶ The Eleventh Circuit Court of Appeals had certified questions to the supreme court regarding the scope of an insurer's duty to investigate prior to determining whether to defend a claim brought against its insured. The supreme court concluded that an insurer has no duty to investigate until the insured apprises the insurer of facts that would bring the claim within the policy's coverage.²⁷ This means that a carrier can base its decision on whether to defend a suit on the four corners of the complaint, if the insured does not provide it with any facts outside the complaint.

In *Colonial Oil*, the complaint against the insured alleged that it had dumped hazardous material on property owned by the plaintiff. The insured notified its carrier of the dispute and also informed it that the dumped material was not hazardous. The carrier ultimately denied coverage, because the complaint alleged that the dumped material contained "waste" and "pollution." The policy excluded coverage for damage caused by waste and pollution. Nevertheless, the court ruled that the carrier had a duty to defend the complaint, because the insured had notified the carrier of its position that the dumped material did not contain waste or pollution.²⁸

Initially, the carrier had no duty to independently investigate the claim, but when the insured notified the carrier of factual contentions, which would have placed the claim within coverage if true, the court said the carrier had to give due consideration to its insured's version of the facts and base its decision on the "true facts."²⁹ Under the circumstances, the carrier had a duty to conduct a reasonable investigation into the insured's contentions. If an insurer fails to investigate its insured's contentions and refuses to defend the insured, it will be liable for a breach of the duty to defend when a

reasonable investigation at the time would have established the potential for coverage. Because the district court had found that a reasonable investigation would have revealed the “possible existence of coverage,” the court said the carrier had breached its duty to defend.³⁰

In *Penn America*, the Georgia Supreme Court commented that cases in which the complaint indicates there is no coverage, but the insured’s factual contentions trigger a duty to defend, are rare.³¹ There are a number of Georgia appellate decisions where this has happened, however. One of the most interesting examples is *Anderson v. Southern Guaranty Ins. Co. of Ga.*³² In a decision written by Judge Gary P. Andrews, the court held that a complaint alleging assault and battery, false imprisonment, and intentional infliction of emotional distress triggered a duty to defend under an accident-based liability policy. The lawsuit resulted from a physical altercation that occurred when the insured entered a school bus driven by the plaintiff and began shouting obscenities at her. The plaintiff alleged that the insured had struck her repeatedly with a cane, and then grabbed her by the foot and dragged her off the bus onto the ground, where she resumed attacking the plaintiff. The complaint clearly did not allege accidental conduct.³³

The attack was so severe that criminal charges were filed against the insured. She was convicted of aggravated assault and simple battery. During the criminal trial, however, the insured had testified that she did not strike or kick the plaintiff, and that she grabbed the plaintiff’s foot only to protect herself from being kicked by the plaintiff, and that the plaintiff tripped or fell out of the bus. According to the insured, the plaintiff’s damages were caused by an accident.³⁴

Even though of the complaint’s allegations were excluded from coverage, the *Anderson* court said this did not, as a matter of law, relieve the insurer of its duty to defend the suit. Considered in

light of the insured's claim that the true facts would place the claim within the policy's coverage, the court concluded that the insurance contract was ambiguous as to the insurer's duty to defend. Under these circumstances, the insurer was not entitled to a summary judgment.³⁵

There are limits on when evidence outside the complaint can trigger a duty to defend. For instance, if the insured does not notify the insurance company of facts indicating that the lawsuit includes a covered claim, the insurer will have no duty to defend.³⁶ Moreover, merely demanding that an insurer investigate and defend a case, and arguing the law applicable to the facts already available to the insurer, is not enough. The insured must present an alternative factual scenario in order to give rise to a duty to investigate.³⁷ Finally, facts developed after a liability carrier has rightfully denied a duty to defend, based on the complaint and the other information it had at the time of the denial, cannot trigger a duty to defend, unless this information is communicated to the insurer.³⁸ The correctness of an insurer's decision to defend or not cannot be based on later-revealed facts, of which the insurer had no knowledge or notice.³⁹

4. Can unstated claims trigger a duty to defend?

One area of the law that can be confusing, and on which there is little Georgia case law, concerns the situation where certain facts alleged in a complaint could form the basis of a covered claim, but this covered claim is not expressly alleged. The claim is "unstated," but arguably could be stated under the facts alleged in the case. Can such facts, by themselves, trigger a duty to defend?

One possible answer to this question is found in *Penn-America*, where the court held that a duty to defend was triggered when the allegations of the complaint were ambiguous or incomplete with respect to the issue of insurance coverage. Another answer to this question, however, is found in *O'Dell v. St. Paul Fire & Marine*

Ins. Co., et al., where the court raised an issue about whether an insurer was obligated to defend an as yet “unstated cause of action.”⁴⁰

The complaint in *O’Dell* alleged sexual harassment and several other claims, which clearly were not covered and did not trigger a duty to defend under the insurance policy. Factually, the complaint alleged that the insured had made derogatory remarks about the plaintiff in public. The insured argued that this allegation could form the basis of a slander claim, which was covered under the policy. Slander was not specifically alleged as a cause of action, however.⁴¹

After raising the issue of whether unstated claims could trigger a duty to defend, the court decided against resolving the issue. Instead, *assuming* that the complaint somehow provided notice that the plaintiff was suing the insured for slander, the court said the slander action would be barred by the one-year statute of limitation governing slander claims. The court then used the statute of limitation as the reason the insurer was not required to defend the lawsuit. The insured’s claim against the insurer was not barred by the statute of limitation. But because the underlying plaintiff’s hypothetical slander claim against the insured was barred by the statute, the court held that a duty to defend was not triggered.⁴²

The *O’Dell* court seems to confuse coverage law with tort and procedural law. According to *Penn-America Ins. Co.*, whether or not the plaintiff’s hypothetical slander claim was defensible should be irrelevant to the duty-to-defend issue. If the claim was made, the carrier should have hired a lawyer to defend the claim and get it dismissed on the statute of limitations defense. The fact that the insured would have a valid statute of limitations defense to the claim should not have any bearing on whether or not it triggered a duty to defend.

Reconciling *O'Dell* with *Penn-America* is difficult. One distinction between the two cases, however, is that the plaintiff in *Penn-America* had clearly alleged a covered, though invalid, tort claim against the insured. In *O'Dell*, the plaintiff had not clearly alleged a covered claim against the insured. It had merely alleged facts, which the insured argued could form the basis of a covered claim—an “unstated cause of action.”

One way to reconcile *O'Dell* and *Penn-America* is to say that clearly-stated-groundless claims trigger a duty to defend, but unstated-groundless claims do not. This is not the rationale of *O'Dell*; but it may make more sense than holding that the carrier had a statute of limitation defense, because the underlying claim was barred by the statute of limitation.

The idea that groundless-unstated claims do not trigger a duty to defend is supported by an old district court decision called *Tennessee Corp. v. Hartford Accident & Indemnity Co.*⁴³ In this case, the insured was sued for intentionally dumping waste into a sewer. This claim was clearly not covered. In order to get the suit defended, the insured argued that, the facts showed that the sewer could have been damaged by negligent construction, which was covered. Negligent construction was not alleged, but it could have been alleged, according to the insured. The court rejected this argument, because the facts showed that the sewer was not built by the insured; therefore, the plaintiff did not have a valid negligent construction claim against the insured. The plaintiff could have falsely alleged that the insured had negligently constructed the sewer, which might have triggered a duty to defend; but the plaintiff did not do this. The insurer did not have to defend a complaint, based on the possibility that the plaintiff could have alleged a groundless claim.

5. Conclusion

In deciding whether a particular complaint triggers a duty to defend under an insurance policy, the insurance carrier needs to carefully review its policy and the complaint. Generally speaking, if the complaint potentially or arguably alleges at least one claim that is covered under the policy, the carrier should defend the suit. Complaints that are ambiguous or incomplete with respect to coverage should be defended. If the complaint clearly does not allege a covered claim, the suit does not need to be defended, unless the insured provides the carrier with factual contentions or other information that show the plaintiff may have a valid-covered claim against the insured, even though it is not alleged in the complaint. An invalid-unstated claim, however, probably does not trigger a duty to defend. Georgia courts have been liberal in defining the situations in which liability carriers must defend their insureds, but there are limits to when this duty is triggered.

¹ *Collier v. State Farm Mut. Automobile Ins. Co.*, 249 Ga.App. 865, 866, 549 S.E.2d 810, 811 (2001).

² *Great Am. Ins. Co. v. McKemie*, 244 Ga. 84, 84, 259 S.E.2d 39, 39 (1979).

³ *Penn-American Ins. Co. v. Disabled American Veterans*, 268 Ga. 564, 565, 490 S.E.2d 374, 376 (1997).

⁴ *Nationwide Mut. Fire Ins. Co. v. Somers*, 264 Ga.App. 421, 424, 591 S.E.2d 430, 433 (2003).

⁵ *Id.*

⁶ *See Utica Mut. Ins. Co. v. Kelly & Cohen, Inc.*, 233 Ga.App. 555, 504 S.E.2d 510 (1998)(Plaintiff's complaint alleged liability that was clearly excluded from coverage under the policy, but because one claim was potentially covered, a duty to defend was triggered.)

⁷ 268 Ga. at 564, 490 S.E.2d at 375.

⁸ *Id.*

⁹ *Id.* at 565, 490 S.E.2d at 376.

¹⁰ *Id.*

¹¹ *Id.* (quoting 7C Applemen § 4684.01 at 98-100).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 565, 490 S.E.2d at 377; see also *Continental Casualty Co. v. Synalloy Corp.*, 667 F.Supp. 1523, 1545 (S.D.Ga. 1983)(Judge Edenfield held that because one of the plaintiffs' claims was for mental anguish and the carrier had agreed to cover mental anguish claims, the carrier had a duty to defend the complaint, even though the plaintiffs would probably not be able to recover on their mental anguish claims).

¹⁵ See generally *Great Am. Ins. Co. v. McKemie*, 244 Ga. at 85, 259 S.E.2d at 39 ("The true rule is that the duty to defend is determined by the contract; and **since** the contract obligates the insurer to defend claims asserting liability under the policy; even if groundless, the allegations of the complaint are looked to, to determine whether a liability covered by the policy is asserted.") (emphasis supplied); *Colonial Oil Indus. Subscribing to Policy Nos. TO31504670 and TO31504671*, 268 Ga., 561, 491 S.E.2d 338 ("The policy provided coverage for defense of even 'groundless, false or fraudulent' suits.").

¹⁶ 274 Ga.App. 738, 742, 618 S.E.2d 673, 677 (2005)

¹⁷ 278 Ga. 674, 676, 605 S.E.2d 27 (2004).

¹⁸ See *Id.* at n. 4 ("See Consequences Of Liability Insurer's Refusal To Assume Defense Of Action Against Insured Upon Ground That Claim Upon Which Action Is Based Is Not Within Coverage Of Policy, 49 ALR 2d 694.")

¹⁹ 49 ALR 2d 694, § 1[a].

²⁰ *Id.* at § 6.

²¹ 231 Ga.App. 206, 207, 498 S.E.2d 782, 784 (1998).

²² *Id.* at 208, 498 S.E.2d at 785.

²³ Ostrager and Newman, HANDBOOK ON INSURANCE COVERAGE DISPUTES, §5.02[a][1] (11th Ed., 2001).

²⁴ *Loftin v. U.S. Fire Ins. Co.*, 106 Ga.App. 287, 294, 127 S.E.2d 53, 58 (1962).

²⁵ *Id.* at 296, 127 S.E.2d. at 59.

²⁶ 268 Ga. 561, 491 S.E.2d 337 (1997).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 562, 491 S.E.2d at 338-339.

³⁰ *Id.* at 563, 491 S.E.2d at 339.

³¹ 268 Ga. at 565, 490 S.E.2d at 376.

³² 235 Ga.App. 306, 508 S.E.2d 726 (1998).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 311, 508 S.E.2d at 732. *See also West Am. Ins. Co. v. Merritt*, 216 Ga.App. 822, 456 S.E.2d 225 (1995)(insured could have been sued for negligent use of a BB gun); *Southern Guaranty Ins. Co. of Ga. v. Saxon*, 190 Ga.App. 652, 379 S.E.2d 577 (1989)(true facts showed insured could have been sued for “negligent driving”).

³⁶ *City of Atlanta v. St. Paul Fire & Marine Ins. Co.*, 231 Ga.App. 206, 208, 498 S.E.2d 782, 785 (1998)(insured never brought any facts to insurer’s attention that indicated the plaintiff’s claims could be covered).

³⁷ *JLM Enterprises v. Houston General Ins. Co.*, 196 F.Supp.2d 1299, 1313 (2002).

³⁸ *Great American v. McKemie*, 244 Ga. 84, 86, 259 S.E.2d 39, 41 (1979).

³⁹ *Id.* at 85, 259 S.E.2d at 40.

⁴⁰ 223 Ga.App. 578, 581, 478 S.E.2d 418, 421 (1996).

⁴¹ *Id.*

⁴² *Id.*

⁴³ 326 F.Supp. 520 (N.D.Ga. 1971).

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GEORGIA LABOR AND EMPLOYMENT LAW

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I. Introduction

This article surveys recent developments in state statutory and common law that affect labor and employment relations of Georgia employers. Accordingly, it surveys published decisions from the Georgia Court of Appeals and Georgia Supreme Court from June 1, 2004 to May 31, 2005. This article also highlights specific revisions to the Official Code of Georgia Annotated (“O.C.G.A.”).

II. Recent Legislation

Without regard to the General Assembly’s changes to the “Workers’ Compensation” section¹ of the Georgia Labor and Industrial Relations Code (“Labor Code”),² the General Assembly passed three noteworthy amendments to Georgia’s Labor Code during the survey period.

The General Assembly addressed the “Living Wage,”³ when it amended O.C.G.A. § 34-4-3.1⁴ by adding a subsection prohibiting local government attempts to establish local wage or employment benefits through purchasing or contracting procedures. This subsection was passed in an attempt to further eliminate wage and benefit disparities that the General Assembly perceived to be “creating an anticompetitive marketplace and fostering job and business relocation.”⁵ Apparently, after last year’s passage of O.C.G.A. § 34-4-3.1⁶ which preempted all local governments from setting a wage or employment benefit mandate, local governments

continued to establish such local minimums through use of evaluation factors and qualifications of bidders for contractors and vendors.⁷ While this is a further pronouncement on the General Assembly's goal of eliminating local minimum wages, the amended language is not very different from the preexisting language of O.C.G.A. § 34-4-3.1(b)(2)⁸ and the practical effect may take years to see as local governments battle with their desires to provide a "living wage" and comply with state law.

The General Assembly also made several amendments to Georgia's Employment Security Act,⁹ which dictates the circumstances under which the Georgia Department of Labor is required to pay unemployment benefits. It amended O.C.G.A. § 34-8-194¹⁰ to allow the payment of benefits to an employee who loses his or her job to accompany a spouse who is reassigned from one military post to another.¹¹ The General Assembly also increased the unemployment insurance benefit amount.¹² The rate change will take effect over a two-year period.¹³ In addition, the bill extends the ceiling on employer surcharge payments through December 31, 2006, and provides a "reduced adjustment in contribution rates" through December 31, 2006.¹⁴

Finally, in order to comply with the Federal SUTA-Dumping Prevention Act of 2004,¹⁵ the General Assembly amended O.C.G.A. § 34-8-153.¹⁶ SUTA-dumping occurs (1) when commonly controlled employers transfer business amongst themselves in order to apply the low or minimum unemployment tax rate of the transferee entity to a larger amount of employees; or (2) when a new employer takes over an entity to merely acquire its low or minimum unemployment tax rate instead of the new employer rate.¹⁷ In the past, such actions had resulted in losses to the State Unemployment Insurance Trust Fund and unfairly shifted the costs to other employers across the State.¹⁸

The "SUTA-Dumping" amendments to O.C.G.A. § 34-8-153 consisted of the addition of two new subsections.¹⁹ Subsection (g)(1)

eliminates the first type of SUTA-dumping by providing that if at the time of transfer the former employer and the transferee employer are under common control or management, the transferred entity's rate of contribution shall be transferred to the transferee entity.²⁰ The rate of contribution for the combined entity is immediately recalculated and is effective as of the date of transfer.²¹ Subsection (g)(2) attempts to eliminate the second type of SUTA-dumping. That is, if the Commissioner of Labor determines, based on statutory factors, that the new employer acquired the business solely or primarily for the purpose of obtaining a lower rate of contribution, then the new employer shall be assigned the statutory new employer rate under O.C.G.A. § 34-8-151.²² Subsection (h) provides for civil penalties, rate adjustments, and felony prosecution for those who knowingly violate O.C.G.A. § 34-8-153 or attempt to do so.²³

III. Wrongful Termination

A. *Employment-at-Will*

The employment-at-will contract has at least two notable characteristics: first, either the employee or employer may terminate the employment relationship at any time, with or without cause. Second, upon the termination of the employment-at-will contract, the employee may not successfully maintain a wrongful termination claim.²⁴

While the doctrine is gradually eroding in other jurisdictions,²⁵ O.C.G.A. § 34-7-1 provides that employment contracts in Georgia are at-will unless the parties implicitly or explicitly contract otherwise.²⁶ Generally, this means that in the absence of a specified length of employment, the relationship is employment-at-will.²⁷ Contract provisions specifying "permanent employment, employment for life, or employment until retirement" are indefinite and therefore are employment-at-will contracts.²⁸

In *Balmer v. Elan Corp.*,²⁹ the State Supreme Court reaffirmed this long held guiding principle, and further held that oral promises can neither modify the at-will status nor create an enforceable contract.³⁰ Elan, a pharmaceutical company which had previously been cited by the FDA, had a pending inspection scheduled for May of 2000.³¹ The plaintiff employees, lab analysts, alleged they were told by Elan that they would not be penalized if they cooperated with the FDA and, based on this promise, they did cooperate.³² The FDA cited Elan for violations of quality control standards.³³ In August of 2000, the cooperating employees were fired because they allegedly lied to FDA Inspectors.³⁴ The employees sued Elan for breach of contract based upon the company's alleged oral promises.³⁵ The trial court granted Elan's motion for summary judgment and the court of appeals affirmed.³⁶

In reaching its decision, the Supreme Court noted that "numerous Georgia cases have held that oral promises are not enforceable by at-will employee."³⁷ The employees argued that because O.C.G.A. § 34-7-1 was merely a codification of the Supreme Court's decision in *Margarahan v. Wright & Lamkin*,³⁸ the Supreme Court was *required* to look to foreign law for guidance.³⁹ While the court acknowledged that it *may* look to foreign authority when interpreting statutes created as a codification of common-law principles, the Georgia Supreme Court reaffirmed the rule that courts of this State will refuse to acknowledge any exceptions to the employment-at-will doctrine not encompassed by statute.⁴⁰ The Supreme Court of Georgia affirmed the granting of summary judgment and held that an oral promise was neither an enforceable modification to the contract of an at-will employee nor a new, enforceable contract.⁴¹

B. Breach of Employment Contracts

To form a valid employment contract, the basic rules of contracts apply: offer, acceptance, and consideration. Further, an

employment contract must contain a designation of the employee's place of employment, period of employment (if not specified, then at-will⁴²), the nature of services to be rendered, and the amount or type of compensation. The terms of an employment contract must be sufficiently definite to be enforceable and whether they are is a question of law for the judge.⁴³

When interpreting employment contracts, courts are guided by three general principles. If there is no ambiguity the court will enforce the contract according to its terms and dismiss all technical or arbitrary rules of construction.⁴⁴ However, if the contract is ambiguous, then interpreting the terms is a question of law for the court. If after applying the statutory rules of construction the court cannot negate the ambiguity, then the ambiguity will be resolved by a jury.⁴⁵

In *Key v. Naylor, Inc.*,⁴⁶ the court of appeals was called upon to determine whether an employment contract was too indefinite to be enforceable.⁴⁷ In that case, the plaintiff, a senior executive, alleged that the company chairman had made promises regarding promotions and stock ownership that extended beyond the terms of her contract for employment executed in 2000.⁴⁸ Upon the chairman's death, his wife became the majority stockholder and appointed herself chairwoman of the board.⁴⁹ As chairwoman, she demoted and later terminated the plaintiff,⁵⁰ who sued for breach of employment contract and fulfillment of the now-deceased chairman's promise of company stock.⁵¹

Resolving the matter, the court of appeals held that an enforceable employment contract must contain language that is "sufficient to plainly and explicitly convey [sic] the agreement between the parties."⁵² Georgia courts have held that the party relying on the contract has the burden of proving the contract's existence and its terms. The court of appeals found that the employee's 2000 employment contract included indefinite statements

regarding 1) her salary, 2) her duties, 3) and the terms of her employment that went to essential elements of the contract.⁵³ The contract also lacked severability clauses that may have rehabilitated the otherwise deficient contract.⁵⁴ The court further held that the promise of stock in the company was not enforceable because it was indefinite and in return for past consideration.⁵⁵ Thus, the court found the contract unenforceable, meaning the plaintiff's employment was effectively "at will."⁵⁶

In *Botterbusch v. Preussag International*,⁵⁷ the court of appeals decided what effect, if any, a procedural flaw in termination proceedings would have on the validity of a contract calling for automatic extensions.⁵⁸ In that case, an executive of a German company had an employment contract which provided for a five year term. The contract also provided that if the five year term was not terminated, his employment "would be extended thereafter automatically for an additional period to expire at such time as [the employee] reaches 65 years of age, . . . at which time [the employee's] employment shall be terminated."⁵⁹ The employee's contract also provided it could be terminated "without cause 'upon written notice given not less than two hundred seventy (270) days prior to such termination.'"⁶⁰ The employer did not honor the notice period, instead firing the employee without cause and indicating that the termination was effective immediately.⁶¹ Nevertheless, the employer continued regular pay during the 270-day notice period causing the employee no financial losses during that period of time.⁶² The employee sued for breach of contract and claimed that (1) the termination was invalid due to the lack of notice, meaning that his employment contract automatically renewed, and (2) based upon various conversations the executive had had with corporate officials, the employer breached a promise to provide additional retirement benefits.⁶³ The trial court granted the employer's motion for summary judgment as to both issues and the employee appealed.⁶⁴

In regard to the employee's argument that his employment contract was invalidated due to the employer's failure to follow the notice of termination proceedings set forth in the contract, the court held that "failure to comply with the notice requirement constituted a procedural, rather than substantive, flaw in the termination."⁶⁵ In so holding, the court of appeals relied upon the Supreme Court of Georgia, as follows:

[i]f the employer were justified in terminating the employee under the contract, then the termination would have occurred even if the employer had followed the proper procedures. Thus, procedural flaws in the manner in which the termination was carried out will not warrant damages to compensate for losses that naturally result from a justified termination.⁶⁶

Finding that the procedural breach had not caused the employee to suffer actual contractual loss but did entitle him to recover the nominal cost of bringing the suit, the court remanded the case.⁶⁷ Finally, the court found that a contract for retirement benefits did not exist.⁶⁸ Although the court recognized that the employee had multiple conversations regarding a supplemental retirement package, it held that there was no "meeting of the minds." The lack of mutuality could be inferred from the absence of a final agreement as to the financial amount of such benefits and the employee's awareness that any promise would have been contingent upon approval by the employer's board of directors.⁶⁹

Finally, in *Milhollin et al. v. Salomon Smith Barney, Inc.*,⁷⁰ the court of appeals determined to what extent an employee could recover damages for stock not received from a restricted stock benefits plan.⁷¹ Milhollin was an employee of Salomon Smith Barney. In 1996, he executed a stock benefit plan agreement that gave him the option to elect between zero and twenty-five percent of his salary to be paid in

stock.⁷² Participants would receive stock at a twenty-five percent discount from the fair market value.⁷³ The plan provided, however, if the employee was terminated for cause or left voluntarily within two years of executing the plan, then he would forfeit his stock and the amount of salary he had agreed to divert to such stock.⁷⁴ Milhollin voluntarily left the company before the end of the two year window and then sued for the forfeited shares.⁷⁵

Among his many arguments, two are particularly instructive for labor and employment practitioners. First, he argued that the forfeiture violated O.C.G.A. § 34-7-2, which provides that an employer must pay the “full net amount of wages or earnings due the [employee] for the period for which the payment is made.”⁷⁶ The court of appeals did not decide that issue as it found that Milhollin’s claim was untimely. Specifically, the court relied upon O.C.G.A. § 9-3-22 which requires:

all actions for the recovery of wages, overtime, or damages and penalties accruing under laws respecting the payment of wages and overtime shall be brought within two years after the right of action has accrued.⁷⁷

Milhollin argued that because his cause of action arose from written agreements he was entitled to the six year statute of limitations applying to “an action under a written contract,”⁷⁸ but the court of appeals dismissed this argument. The court observed that because his claims “were premised solely upon the provisions of O.C.G.A. § 34-7-2, the statutory wage law,” his cause of action was governed by the shorter statute of limitations applicable to that section.⁷⁹

The court of appeals similarly dismissed Milhollin’s forfeiture argument. Although the court observed that forfeiture provisions are not favored in Georgia, it noted that that forfeitures will not be

relieved in the absence of a contractual ambiguity or infirmity.⁸⁰ The court found the forfeiture provision at issue to be clear and free from any legal infirmity, thereby upholding its enforcement.⁸¹ The court further held that forfeiture provisions are not covenants not to compete and therefore unlawful restraints on trade subject to strict scrutiny.⁸² Finding that the forfeiture provision did not restrict Milhollin's ability to work elsewhere or impose a penalty for doing so, the court held that such a provision was merely a lawful condition precedent to receipt of certain stock benefits.⁸³

IV. Miscellaneous Employment Torts

A. *Negligent Hiring or Retention*

Increasingly, employers are finding themselves the subjects of negligent employment practices claims. For example, in *Govea v. City of Norcross*,⁸⁴ the court affirmed the denial of the City of Chamblee's motion for summary judgment as to Govea's claims for negligent hiring and negligent retention.⁸⁵ In that case, a police officer for the City of Chamblee served as a soccer coach for teen boys in his off-duty capacity.⁸⁶ While in uniform at a player's home, he allowed a thirteen-year-old boy to inspect his dismantled and unloaded sidearm.⁸⁷ When the officer became distracted in conversation, the boy loaded the firearm and accidentally discharged it, resulting in his death.⁸⁸

The officer had previously been an officer in the City of Norcross and had been voluntarily terminated. However, his POST file⁸⁹ contained numerous incidents when the officer had been inattentive or careless and had disregarded safety procedures (including leaving his sidearm on the front seat of an unlocked patrol car).⁹⁰ In fact, the officer's decision to "voluntarily resign" was the result of an administrative investigation in which his supervisors were concerned about "negligent retention."⁹¹ Thus, although his POST file contained the notation "voluntarily resigned," the city of Lilburn

declined to extend him a job upon reviewing his disciplinary history. Instead, he was hired by the City of Chamblee.⁹² Thereafter, the pattern of poor judgment continued while in the employ of Chamblee, culminating in the incident that led to the litigation.⁹³

The parents brought suit against both the City of Norcross and the City of Chamblee⁹⁴ for negligent hiring and retention.⁹⁵ Although the City of Chamblee argued that the officer's off-duty coaching activities were not related to his employment, the court rejected this argument and found the officer had acted within the "color of employment."⁹⁶ "Color of employment" is a lower standard than the "scope of employment" standard which is required to establish vicarious liability under a respondeat superior theory.⁹⁷ The court found that the jury could conclude that the officer was acting within the "color of his employment" as he used his status as a police officer to recruit members of the soccer team, was encouraged by the police chief to use the team members to gain intelligence, introduced himself as a police officer to team members parents, and was in uniform at the time of the shooting.⁹⁸

The court of appeals found sufficient evidence from which a jury could find negligent retention. In a case for negligent retention or hiring, if the employer by exercise of reasonable care might have foreseen some injury resulting from hiring or retaining an employee, then the employer is liable even if it could not have anticipated the particular consequence.⁹⁹ Based upon the documentation in the officer's POST file, the court held that a jury could find it was foreseeable that he would again inflict injury to someone while on the job:

The evidence concerning whether Chamblee negligently retained [the officer] is not plain and indisputable. And even assuming that Chamblee negligently retained [the officer], the record does not mandate a finding that Norcross could not have

anticipated that a subsequent employer would have retained him even after having observed dissatisfactory performance. Norcross documented years of instances of misconduct by [the officer]. But before resorting to proposing termination, it exhausted other alternatives, including suspensions, reprimands, counseling, and a psychological evaluation. During that time, Norcross permitted [the officer] to continue working as a uniformed police officer. Thus, whether Chamblee committed negligent retention and whether Norcross might have foreseen that [the officer's] subsequent employer would do so are questions for the jury.¹⁰⁰

While a city may be liable for the torts of negligent retention or negligent hiring, the court of appeals held that a state agency is not. Specifically, in *Georgia State Board of Pardons and Paroles v. Finch*, the court of appeals held that employment decisions, including the retention of an employee, are discretionary functions as they “require the consideration of numerous factors and the exercise of deliberation and judgment.”¹⁰¹ The court held that because the State of Georgia has not waived its sovereign immunity for acts or omissions relating to the exercise of a discretionary function, the State of Georgia cannot be liable for negligent retention or negligent hiring.¹⁰² The plaintiff, a parolee, also sought to hold the Board liable for various torts allegedly committed by his parole officer. The court held that all of the parolee’s alleged “‘losses’” were the result of intentional acts of the parole officer for which the State also could not be held liable. Therefore, the court ruled that the Board was entitled to summary judgment on claims it had negligently retained the parole officer.¹⁰³

B. *Tortious Interference with an Employment Relationship*

For a plaintiff to recover under a theory of tortious interference with an employment relationship, the plaintiff must establish that the defendant: (1) acted improperly and without privilege, (2) acted purposely and with malice with the intent to injure, (3) induced a third party or parties not to enter into or continue a business relationship with the plaintiff, and (4) caused the plaintiff financial injury.”¹⁰⁴ To be liable for tortious interference with an employment relationship, a defendant must also be a stranger to the relationship giving rise to the cause of action.¹⁰⁵ During the survey period there were only two significant cases involving tortious interference with an employment relationship.

In *Tidikis v. Network for Medical Communications & Research LLC*,¹⁰⁶ the court of appeals decided whether a corporation who had a financial interest in an employer could be held liable when it encouraged the employer to terminate an executive with whom it disagreed.

In that case, Frank Tidikis was the former CEO of Network for Medical Communications & Research, LLC (“NMCR”). In 2002, NMCR was recapitalized by American Capital Strategies Inc. (“ACS”), and ACS became a 50 percent owner in the corporation.¹⁰⁷ Thereafter, NCMR began negotiating with a third corporation for the purchase of NCMR. Tidikis would have received approximately \$1.7 as a result of the transaction.¹⁰⁸ In March 2003, the plaintiff, in his capacity as a member of the board of managers, registered the lone vote against a proposal for a “special distribution” from NMCR to ACS. Months later, the plaintiff was placed on administrative leave pending an investigation into alleged misconduct as CEO of NMCR.¹⁰⁹ The plaintiff filed suit against NMCR and ACS among others.¹¹⁰ The trial court granted a motion to dismiss as to the claims against ACS, and plaintiff appealed.

On appeal, the court decided whether ACS was a “stranger” to Tidikis’s employment contract so as to allow him to sustain a cause of action for intentional interference with contractual relations based upon his allegation that ACS induced NMCR to fire him and interfered with his prospective employment at the third corporation.¹¹¹ Affirming the trial court, the court of appeals observed:

The exercise of an absolute legal right is not and cannot be considered an interference with a contractual or potential contractual relationship,” because privilege includes legitimate economic interests of the defendant or a legitimate relationship of the alleged interloper or meddler to the contract.¹¹²

Thus, it held that where a “defendant has a financial interest in one of the parties to the contract or in the contract, the defendant is not a stranger to the contract or business relationship, even though it is not a signatory to the contract.”¹¹³ As ACS was the majority stockholder in NMCR and Tidikis’ prospective employment was contingent on his termination by ACS, ACS was not a stranger, meaning ACS could be held liable neither for tortious interference with employment nor tortious interference with prospective employment.¹¹⁴

The court of appeals found no malice existed when a company forbade a former employee from working on its property in *Batayias v. Kerr-McGee Corp.*¹¹⁵ In that case, Kerr-McGee employed Consolidated Mechanical as an on-site welding contractor.¹¹⁶ One of Consolidated Mechanical’s employees, Batayias, had formerly been an employee of Kerr-McGee.¹¹⁷ Batayias had previously entered into a settlement agreement of a lawsuit he initiated at the termination of his employment with Kerr-McGee.¹¹⁸ After discovering Batayias was once again working in its plant, Kerr-McGee informed Consolidated Mechanical that it did not want Batayias on its property.¹¹⁹ Kerr-McGee did not ask for Batayias to be fired or laid off; the employer

claimed to only want him off its property “to protect the corporation from possible exposure to any kind of liability.”¹²⁰ Consolidated Mechanical complied with Kerr-McGee’s request but eventually laid Batayias off when he refused reassignment seventy miles away.¹²¹ Batayias brought suit alleging, *inter alia*, tortious interference by Kerr-McGee in his employment relationship with Consolidated Mechanical.¹²² The trial court granted summary judgment to Kerr-McGee, and the court of appeals affirmed.¹²³

The court of appeals held that Kerr-McGee could not be liable for tortious interference with Batayias and Consolidated Mechanical’s employment relationship because the interference was not malicious or wrongful.¹²⁴ The court found no evidence of malice in Kerr-McGee’s conduct when it “was not comfortable with Batayias on the property and acted in what it believed was the best interests of the company.”¹²⁵

V. *Respondeat Superior*

To hold an employer liable for a tort committed by an employee, the plaintiff must show that at the time of the incident the employee was engaged in the employer’s business and not on some personal matter of his or her own.¹²⁶ Understandably, the “scope of employment” prong is the subject of frequent litigation when an employee injures a third party. Several cases during the survey period illustrate the considerations important to Georgia’s courts of appeals.

In *Betsill et al. v. Scale Systems, Inc.*,¹²⁷ the court of appeals held that, even though an employee might have been taking action that would have benefited the employer, an employer will not be held liable for an employee’s conduct during his time off unless the employer gave a direct charge to undertake the action at issue.¹²⁸ In that case, Mr. Betsill was employed by Scale Systems as a parts and distribution manager. He worked regular business hours during the week, though he was on-call 24 hours a day at the time of the collision.¹²⁹ On occasion, Mr. Betsill was required to deliver items to

customers or field technicians.¹³⁰ He was provided with a company truck for such purposes and was also free to use it for personal reasons.¹³¹ Mr. Betsill's father-in-law was a technician for Scale Systems who worked from home, and Mr. Betsill would make trips to drop off or pick up equipment in order to save his father-in-law the trip.¹³² Betsill was paid hourly for the trips to his father-in-law's house.¹³³ In late January 2002, Scale Systems became worried about the possibility of theft from its parts room.¹³⁴ A plan was devised by upper management, Mr. Betsill, and his co-workers to place a piece of tape over the door and then wait to see whether it was disturbed over the weekend.¹³⁵ Although it was mentioned that Mr. Betsill would come in over the weekend to check the status of the tape, Scale Systems never explicitly approved of this plan or required him to do so.¹³⁶

On Saturday February 2, 2002, Betsill was on-call and loaded his children into his company truck.¹³⁷ He then drove to his father-in-law's house to pick up a computer that did not need to be returned for a couple of weeks and continued on to Scale Systems to check the tape over the parts room door.¹³⁸ While driving from his father-in-law's house to Scale Systems, Mr. Betsill was involved in an accident which injured him and his children.¹³⁹ Mrs. Betsill brought suit on behalf of the children against Scale Systems, based on the doctrine of respondeat superior.¹⁴⁰ The trial court granted summary judgment to Scale Systems, and the court of appeals affirmed.¹⁴¹

Georgia law places the burden on the employer to show that a person involved in an accident while operating a company owned vehicle was not acting within the scope of employment. The court of appeals found Scale Systems overcame this burden by showing that Mr. Betsill was not on a "special mission" at the time of the accident.¹⁴² An employee who is commuting to work is deemed to be acting for his own purposes and outside the scope of his employment unless performing a "special mission" for the employer.¹⁴³ A "special mission" is defined as an errand or mission made "*at the direction of*

the employer.”¹⁴⁴ The court found that Mr. Betsill was not requested to pick up the computer from his father-in-law as the announcement regarding their return was not directed to him. Neither was he requested to pick it up or to deliver it on Saturday two weeks before it was needed.¹⁴⁵ Further, the court found that, although he had discussed checking the tape on the parts room door with upper management, he was never requested or expected to do so.¹⁴⁶ As Betsill was not on duty and not performing a “special mission,” the court of appeals found his actions were not within the scope of his employment; therefore, Scale Systems was not vicariously liable for his actions.¹⁴⁷

In *Allen v. Atlas Cold Storage, Inc.*,¹⁴⁸ the court of appeals decided that there may be circumstances when an employer may be held liable for an employee’s sexual misconduct when there is no evidence that the employee’s actions were solely for his own sexual gratification. Specifically, after reports of drug use and sales on its premises, Atlas Cold Storage, Inc. (“Atlas”), installed a surveillance camera system throughout its warehouse.¹⁴⁹ The surveillance system was under the sole control of the manager of operations. Eventually, the system fell into disuse.¹⁵⁰ He boasted to the employees that he could see everything they were doing, even stating, “There’s camera places where y’all don’t know about.”¹⁵¹ When the manager received complaints from female employees that there appeared to be a camera above one of the stalls in the women’s restroom, he responded in a joking though not dismissive manner.¹⁵² Additionally, when the maintenance man mentioned that he had the manager that there was a video monitor in the ceiling above the manager’s private restroom.¹⁵³

The manager eventually left the employer. When Atlas later reactivated the security system with post-9/11 security concerns, a camera connected to a monitor, VCR, and modem was discovered above the women’s restroom.¹⁵⁴ Current and former employees, as well as customers, alleged invasion of privacy, intentional infliction

of emotional distress, premises liability, fraud against Atlas.¹⁵⁵ Plaintiffs also brought claims against the manager individually.¹⁵⁶

On appeal, Atlas argued that the trial court erred when it denied Atlas' motion for summary judgment regarding its liability for invasion of privacy, premises liability and fraud. The court of appeals held that summary judgment was, in fact, appropriate and reversed the trial court in part.¹⁵⁷

But, the court of appeals affirmed the trial court's denial of Atlas' motion for summary judgment based upon its liability for intentional infliction of emotional distress under a respondeat superior theory.¹⁵⁸ Although employers are not normally held responsible for their agents' sexual misconduct, the court of appeals noted, "there is no evidence that [the manger] acted solely for his personal sexual gratification in this case, as opposed to conducting an investigation of suspected criminal conduct for his employer. At best, his motivation remains an open question of fact for the jury."¹⁵⁹

VI. Restrictive Covenants

A. *Non-compete Agreements*

Agreements that place general restraints on trade with the effect of lessening competition and encouraging monopolies are void as against public policy.¹⁶⁰ Generally, non-competition agreements are disfavored in contractual relations because they place restrictions on trade, thereby thwarting competition.¹⁶¹ Nonetheless, courts will uphold a non-compete agreement when the agreement merely places a partial restraint upon trade.¹⁶² A non-competition agreement is valid as a partial restraint on trade if the agreement is (1) written and specifies (2) time, (3) territorial limitation, and (4) activity restriction.¹⁶³ Additionally, the agreement must be reasonable. Whether it is reasonable is a question of law for the court to decide. The court will apply varying levels of scrutiny to determine whether the contract is reasonable, depending upon the type of contract it is.¹⁶⁴

When the agreement is ancillary to an employment agreement, then a strict standard applies, meaning the entire agreement is invalid if any provision therein is considered overbroad or unreasonable.¹⁶⁵ But when the agreement is made pursuant to a contract for the sale of a business, a less stringent standard applies, meaning the agreement will survive despite the presence of broad provisions. In applying this less stringent standard, the court may “blue pencil,” i.e. rewrite or sever, provisions deemed overly-broad or unreasonable.¹⁶⁶

In *Dent Wizard Int’l Corp. v. Brown*,¹⁶⁷ the court of appeals refused to enforce an employment contract’s non-competition covenant because it was facially overly-broad.¹⁶⁸ In that case, an employee entered into an employment contract with Dent Wizard, a painless dent removal company.¹⁶⁹ The contract contained restrictive covenants, including a covenant not to compete and not to solicit business as well as a non-solicitation of employees clause.¹⁷⁰ The covenant not to compete prohibited the employee from working in a defined “Trade Area” that consisted of four counties for two years following the termination of his employment with Dent Wizard.¹⁷¹ Upon his resignation from Dent Wizard, the employee filed suit seeking a declaratory judgment on the issue of whether the restrictive covenants were invalid restrictions on trade.¹⁷² The trial court entered an interlocutory injunction in the employee’s favor.¹⁷³

On appeal, the court observed that whether a restraint on trade imposed by an employment contract is reasonable is a question of law.¹⁷⁴ Upholding the trial court’s grant of an interlocutory injunction, court found that the defined “Trade Area” was overly broad geographically as the employee had only worked for Dent Wizard in “two to three” of the four counties.¹⁷⁵ In so holding, the court of appeals stated the following:

Under such circumstances, the restriction will be considered overly broad on its face unless the record

contains evidence demonstrating a strong justification for such a restriction. While this Court will accept as prima facie valid a territory where the employee worked and the employer does business, a territory that is only where the employer does business but the employee did not work is overly broad on its face, absent strong justification for such protection, other than the desire not to compete with the former employee.¹⁷⁶

Although Dent Wizard justified the territorial restriction on the basis that the employee's training had been a substantial investment, both the trial court and the court of appeals were not persuaded by this argument, noting the employee no longer used the techniques learned on the job and the absence of evidence demonstrating that the techniques were unique.¹⁷⁷ Dent Wizard also claimed that the restriction was justified because it protected customer relationships, but the court found this justification was similarly inadequate as the activity restrictions were not limited solely to customers served by the employee.¹⁷⁸ The court noted that the "blue pencil" doctrine is not followed in Georgia when construing employment contracts.¹⁷⁹ Therefore, because the court found that one restrictive covenant was unenforceable, the court was bound to find that all the restrictive covenants contained in the contract were unenforceable¹⁸⁰ but had no need to decide whether the accompanying non-solicitation clause would have been valid otherwise.¹⁸¹

B. Non-solicitation Agreements

In *Fellows v. All Star, Inc.*,¹⁸² the court of appeals found that a non-solicitation of customers clause was unreasonable in its territorial coverage. In that case, former employees of All Star were prohibited from "contacting or soliciting any customer" for the purposes of providing them with any product or service obtainable from All

Star.¹⁸³ A restrictive covenant contained in an employment agreement is considered a partial restraint on trade.¹⁸⁴ The court applied a three element test of duration, territorial coverage, and scope of activity to determine whether the noncompete agreement was reasonable.¹⁸⁵ Striking down the clause at issue, the court of appeals noted that the agreement lacked specific territorial limits and did not limit restrictions to customers with which the former employee had had contact.¹⁸⁶ This serves the public policy of “protect[ing] an employer’s interest in preventing the employee from exploiting the personal relationship the employee has enjoyed with the employer’s customers.”¹⁸⁷ The court refused to enforce the restrictive covenant and remanded the case for a directed verdict on the breach of the noncompete agreement claims.¹⁸⁸

Likewise, in *Palmer & Cay of Georgia, Inc. v. Lockton Companies, Inc.*,¹⁸⁹ the court of appeals refused to enforce or modify a non-solicitation of customers agreement which barred two former employees from soliciting “any of the customers of the Company which were served by the employee during the term of his employment.”¹⁹⁰ Affirming the decision of the trial court, the court of appeals found that the covenant was overbroad in scope and unenforceable as it would have prevented the former employees from conducting business with former customers of the Palmer & Cay who may not have been active customers for a number of years.¹⁹¹

In striking down the non-solicitation agreement, the court of appeals noted that its enforcement of non-solicitation agreements relating to customers have usually been limited to “employment agreements which limit the time of customer contact to a certain period before the termination of employment.”¹⁹²

VII. Conclusion

Although labor and employment issues arising under Georgia law often are not as complex as their federal counterparts, the issues

which arise under state law become more challenging with each passing year. Adding to this challenge is the increasing overlap of state and federal issues. Regardless of whether a practitioner professes to specialize in state, federal, administrative, trial, or other matters pertaining to labor and employment law, it is important to recognize that the laws and legal proceedings in one area of law can and do impact relations between employer and employee in others.

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¹ Recent developments in workers' compensation law are discussed in the Survey of Workers' Compensation Law, AUTHOR, 2005 *Annual Survey of Georgia Law*, 57 MERCER L. REV ____ (2005).

² O.C.G.A. §§ 34-1-1 to 421 (1998 & Supp. 2005).

³ The Fair Labor Standard Act, the federal minimum wage statute, allows state and local governments to enact minimum wages higher than the federal standard, though, until recently, few states and municipalities have taken this opportunity. 29 U.S.C. § 218(a) (2000). Based upon the premise that the federal minimum wage has failed to keep pace with inflation, the Association of Community Organizations for Reform Now (ACORN) began a "Living Wage" Campaign in the mid-1990s in an effort to pressure municipalities into raising minimum wages at the local level around the country. See *ACORN Living Wage Res. Ctr. Web Site*, at <http://www.livingwagecampaign.org> (last visited Aug. 2, 2004). Indeed, ACORN's website declares that it had "Living Wage Campaigns Underway" in both Atlanta and Athens, Georgia, as well as the campuses of Agnes Scott College and Valdosta State University. *Id.* So far, ACORN counts among its victories 130 cities and counties that allegedly have passed living wage ordinances. *Id.*

⁴ 2005 Ga. Laws 59 (amending O.C.G.A. §34-4-3.1 (2004)).

⁵ For further discussion see W. Melvin Haas, III, et, al., *Labor and Employment, Annual Survey of Georgia Law*, 56 MERCER L. REV 291, 292 (2004).

⁶ *Id.*

⁷ *Id.* O.C.G.A. §34-4-3.1(c) provides:

(c) No local government entity may through its purchasing or contracting procedures seek to control or affect the wages or employment benefits provided by its vendors, contractors, service providers, or other parties doing business with the local government entity. A local government entity shall not through the use of evaluation factors, qualification of bidders, or otherwise award preferences on the basis of wages or employment benefits provided by its vendors, contractors, service providers, or other parties doing business with the local government entity.

O.C.G.A. § 34-4-3.1.

⁸ In relevant part O.C.G.A. § 34-4-3.1(b) provides:

(b)(2) No local government entity may adopt, maintain, or enforce by charter, ordinance, purchase agreement, contract, regulation, rule, or resolution, either directly or indirectly, a wage or employment benefit mandate.

O.C.G.A. § 34-4-3.1.

⁹ O.C.G.A. §§ 34-8-1 et. seq.

¹⁰ 2005 Ga. Laws 404 (amending O.C.G.A. § 34-8-194 (1991)).

¹¹ *Id.* In relevant part O.C.G.A. § 34-8-194 provides:

(1) For the week or fraction thereof in which the individual has filed an otherwise valid claim for benefits after such individual has left the most recent employer voluntarily without good cause in connection with the individual's most recent work. Good cause shall be determined by the Commissioner according to the circumstances in the case; provided, however, that leaving an employer to accompany a spouse who has been reassigned from one military assignment to another shall be deemed to be for good cause; provided, however, that the employer's account shall not be charged for any benefits paid out to the person who leaves to accompany a spouse reassigned from one military assignment to another. O.C.G.A. § 34-4-194 (?).

¹² 2005 Ga. Laws 520 § 9 (amending O.C.G.A. §34-8-193 (1991)).

¹³ *Id.*

¹⁴ 2005 Ga. Laws 520 § 5 (amending O.C.G.A. §34-8-156 (1991)).

¹⁵ 42 U.S.C.A. § 1305 (2004).

¹⁶ 2005 Ga. Laws 520 § 3 (amending O.C.G.A. § 34-8-153 (1991)).

¹⁷ *SUTA Dumping Prevention Act of 2004: Subcommittee on Human Resources*

of the House Committee on Ways and Means (June 14, 2005) (statement of The Honorable Mason Bishop, Deputy Assistant Secretary, Employment and Training Administration, U.S. Department of Labor).

¹⁸ *Id.* (“We also estimate that the proposals would produce indirect tax reductions of \$2.856 billion over 10 years.”)

¹⁹ 2005 Ga. Laws 520 § 3 (amending O.C.G.A. § 34-8-153 (1991)).

²⁰ 2005 Ga. Laws 520 § 3 (amending O.C.G.A. § 34-8-153 (1991)). O.C.G.A. § 34-8-153(g)(1) provides:

(1) If an employer transfers its trade or business, or any portion thereof, to another employer and, at the time of the transfer, there is substantially common ownership, management, or control of the two employers then the rate of contributions attributable to the predecessor shall be transferred to the successor employer to whom such business is so transferred. The rates of contributions of both employers shall be recalculated and made effective immediately upon the date of the transfer of the trade or business.

O.C.G.A. § 34-8-153.

²¹ *Id.*

²² 2005 Ga. Laws 520 § 3 (amending O.C.G.A. § 34-8-153 (1991)). O.C.G.A. § 34-8-153(g)(2) provides:

(2) Whenever the successor is not already an employer at the time of the acquisition, the unemployment experience of the acquired business shall not be transferred to the successor if the Commissioner determines that the successor acquired the business solely or primarily for the purpose of obtaining a lower rate of contribution. Instead, the successor shall be assigned the new employer rate under Code Section 34-8-151. In determining whether the trade or business was acquired solely or primarily for the purpose of obtaining a lower rate of contributions, the Commissioner shall use objective factors which may include the following:

(A) The cost of acquiring the trade or business;

(B) Whether the successor actually continued the business enterprise of the acquired trade or business;

(C) How long the acquired trade or business was continued; and

(D) Whether or not a substantial number of new employees were hired for the performance of duties unrelated to the business activity conducted by the predecessor prior to acquisition.

O.C.G.A. § 34-8-153.

²³ 2005 Ga. Laws 520 § 3 (amending O.C.G.A. § 34-8-153 (1991)).

²⁴ See generally, JAMES W. WIMBERLY, JR., *GEORGIA EMPLOYMENT LAW* 20-21 (3d Ed. & Supp 2005).

²⁵ See Amy Carlson, *States are Eroding At-Will Employment Doctrines: Will Pennsylvania Join the Crowd?*, 42 DUQ. L. REV. 511 (2004); Melanie Robin Galberry, *Employers Beware: South Carolina's Public Policy Exception to the At-Will Employment Doctrine is Likely to Keep Expanding*, 51 S.C. L. REV. 406 (2000); Cortlan H. Maddux, *Employers Beware! The Emerging Use of Promissory Estoppel as an Exception to Employment-At-Will*, 49 BAYLOR L. REV. 197 (1997); Mark A. Fahleson, *The Public Policy Exception to Employment-At-Will—When Should Courts Defer to the Legislature?* 72 NEB. L. REV. 956 (1993); Kimberly Anne Huffman, *Salt v. Applied Analytical, Inc.: Clarifying the Confusion in North Carolina's Employment-at-Will Doctrine*, 70 N.C. L. REV. 2087 (1992); Richard J. Pratt, *Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment-at-Will Doctrine*, 139 U. PA. L. REV. 197 (1990).

²⁶ O.C.G.A. §34-7-1 (1998).

²⁷ See generally WIMBERLY, *supra* note 24, at 20-21.

²⁸ WIMBERLY, *supra* note 24, at 20.

²⁹ 278 Ga. 227, 599 S.E.2d 158 (2004).

³⁰ *Id.* at 230, 599 S.E.2d at 162.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*, 599 S.E.2d at 161.

³⁶ *Id.*, 599 S.E.2d at 160.

³⁷ *Id.* at 228-29, 599 S.E.2d at 161 (citing *Ford Clinic v. Potter*, 246 Ga. App. 320, 540 S.E.2d 275 (2000) (oral promise as to an employment contract for an indefinite period of time is not enforceable); *Moore v. BellSouth Mobility*, 243 Ga. App. 674(1), 534 S.E.2d 133 (2000) (oral promises as to future events are not enforceable by at-will employees and cannot provide grounds for a breach of contract claim); *Alston v. Brown Transport Corp.*, 182 Ga. App. 632(2), 356 S.E.2d 517 (1987) (oral promise of promotion unenforceable where the employment contract is terminable at will)).

³⁸ 83 Ga. 773, 10 S.E. 584 (1889).

³⁹ *Id.* at 229, 599 S.E.2d at 161 (The Georgia rules of statutory construction concerning “statutes of non-statutory origin” provide “that when the Code section is a mere codification of the general law, and is not of original legislative enactment, decisions of other courts . . . may be looked to.”) (citing *Sinclair v. Friedlander*, 197 Ga 797, 800, 30 S.E.2d 398 (1944)).

⁴⁰ *Id.* at 230, 599 S.E.2d at 161-162.

⁴¹ *Id.*, 599 S.E.2d at 162.

⁴² *See supra* III(A).

⁴³ WIMBERLY, *supra* note 10, at 6-7.

⁴⁴ *Homer v. Board of Regents of the University System of Georgia* No. A05A0312, 2005 Ga. App. Lexis 364 (Ga. App. 2005); *Mon Ami Int’l, Inc. v. Gale*, 264 Ga. App. 739, 741, 592 S.E.2d 83, 86 (2003) (citing *Atlanta Development v. Emerald Capital Investments*, 258 Ga. App. 472, 477(1), 574 S.E.2d 585 (2002)).

⁴⁵ *Id.*

⁴⁶ 268 Ga.App. 419, 602 S.E.2d 192 (2004).

⁴⁷ *Id.* at 422-423, 602 S.E.2d at 195.

⁴⁸ *Id.* at 420, 602 S.E.2d at 194.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 421, 602 S.E.2d at 195.

⁵³ *Id.* (citing *Jackson v. Easters*, 190 Ga.App. 713, 414(1), 379 S.E.2d 610 (1989)).

⁵⁴ *Id.* at 421, 602 S.E. at 195-96.

⁵⁵ *Id.* at 425-6, 602 S.E.2d at 197-8.

⁵⁶ *Id.*, 423, 602 S.E.2d at 196. (The court of appeals was also called upon to decide whether the trial court erred in finding that a subsequent written employment agreement was unenforceable. The court of appeals decided it did not need to reach that issue since the subsequent written agreement allowed the employer to terminate the employee “with just cause”).

⁵⁷ 271 Ga. App. 190, 609 S.E.2d 141 (2004).

⁵⁸ *Id.* at 194, 609 S.E.2d at 146.

⁵⁹ *Id.* at 190, 609 S.E.2d at 143-44.

⁶⁰ *Id.* at 191, 609 S.E.2d at 144.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 191-192, 609 S.E.2d 144.

⁶⁵ *Id.* at 194 (citing *Savannah College of Art & Design v. Nulph*, 265 Ga. 662, 663 (1995)).

⁶⁶ *Id.* (quoting *Savannah College of Art & Design v. Nulph*, 265 Ga. 662, 663, 460 S.E.2d 792 (1995)).

⁶⁷ *Id.* at 195, 609 S.E.2d at 146.

⁶⁸ *Id.* at 198, 609 S.E.2d at 148.

⁶⁹ *Id.* at 197, 609 S.E.2d at 148.

⁷⁰ 272 Ga. App. 267, 612 S.E.2d 72 (2005).

⁷¹ *Id.* at 272, 612 S.E.2d at 77.

⁷² *Id.* at 268-269, 612 S.E.2d at 74-75.

⁷³ *Id.*

⁷⁴ *Id.* at 269, 612 S.E.2d at 75.

⁷⁵ *Id.* at 269-279, 612 S.E.2d at 75.

⁷⁶ *Id.* at 270, 612 S.E.2d at 75.

⁷⁷ *Id.* at 270, 612 S.E.2d at 76 (citing O.C.G.A. § 9-3-22).

⁷⁸ *Id.* (citing O.C.G.A. § 9-3-24).

⁷⁹ *Id.*

⁸⁰ *Id.* at 270, 612 S.E.2d at 75.

⁸¹ *Id.* at 272, 612 S.E.2d at 77.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ 271 Ga. App. 36, 608 S.E.2d 677 (2004).

⁸⁵ *Id.* at 48, 608 S.E.2d at 687.

⁸⁶ *Id.* at 38, 608 S.E.2d at 681.

⁸⁷ *Id.* at 39, 608 S.E.2d at 681.

⁸⁸ *Id.*

⁸⁹ O.C.G.A. § 35-8-1, *et seq.*, is known as the Peace Officer Standards and Training (POST) Act. The POST Act regulates record keeping and reporting by law enforcement agencies, requiring the submission of duplicate personnel records of police officers. These records are then released to any law enforcement agency considering the officer for employment. *Id.* at 40, 608 S.E.2d at 682.

⁹⁰ *Id.* at 37, 47-48, 608 S.E.2d at 680, 687.

⁹¹ *Id.*.

⁹² *Id.*.

⁹³ *Id.* at 38, 608 S.E.2d at 681.

⁹⁴ *Id.* at 39, 608 S.E.2d at 682.

⁹⁵ *Id.* at 49, 608 S.E.2d at 688.

⁹⁶ *Id.*

⁹⁷ In *Georgia Interlocal Risk Management Agency v. Godfrey*, 273 Ga. App. 77, 614 S.E.2d 20 at 206 (2005), in distinguishing the case from *Govea*, the court held that while a police trainee was allowed to take a patrol car home at night to use for transportation, the trainee acted outside of the scope of his employment when he used a patrol car to commit a robbery and murder. Thus, the police department could not be held vicariously liable under the doctrine of respondeat superior, and the court noted “liability based upon respondeat superior is not equivalent to liability based upon negligent

hiring and retention.”

⁹⁸ *Id.*

⁹⁹ *Id.* at 48, 608 S.E.2d at 687 (*citing* *Munroe v. Universal Health Svcs.*, 277 Ga. 861 at 863, 596 S.E.2d 604(2004)).

¹⁰⁰ *Id.* at 45, 608 S.E.2d 685.

¹⁰¹ *Georgia State Board of Pardons and Paroles v. Finch*, 269 Ga. App. 791 at 794, 605 S.E.2d 414 at 416 (2004).

¹⁰² *Id.* at 794, 605 S.E.2d at 416.

¹⁰³ *Id.*, 605 S.E.2d at 417.

¹⁰⁴ *Wilson v. Sardis*, 264 Ga. App. 178, 179-80, 590 S.E.2d 383, 385 (2003) (*quoting* *Renden, Inc. v. Liberty Real Estate*, 213 Ga. App. 333, 334(2), 444 S.E.2d 814 (1994)).

¹⁰⁵ *Cox v. City of Atlanta*, 266 Ga. App. 329; 596 S.E.2d 785, 788 (2004).

¹⁰⁶ 2005 WL 1054964 (Ga. App. May 6, 2005).

¹⁰⁷ *Id.* at *1.

¹⁰⁸ *Id.* at *2.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at *4.

¹¹² *Id.* (*quoting* *Disaster Svcs., Inc. v. ERC Partnership*, 228 Ga.App. 739, 741-742, 492 S.E.2d 526 (1997)).

¹¹³ *Id.* (*citing* *Cox v. City of Atlanta*, 266 Ga. App. 329, 333, 596 S.E.2d 785 (2004)).

¹¹⁴ *Id.* at **4-5.

¹¹⁵ 267 Ga. App. 848, 601 S.E.2d 174.

¹¹⁶ *Id.*, 601 S.E.2d at 175.

¹¹⁷ *Id.*

¹¹⁸ *Id.*, 601 S.E.2d at 176.

¹¹⁹ *Id.*, 601 S.E.2d at 175-6.

¹²⁰ *Id.* at 849, 601 S.E.2d at 176.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 850, 601 S.E.2d at 177.

¹²⁵ *Id.*, 601 S.E.2d at 176.

¹²⁶ *CLO White Co. v. Lattimore*, 263 Ga. App. 839 at 840, 590 S.E.2d, 381at 382 (2003).

¹²⁷ 269 Ga. App. 393, 604 S.E.2d 265 (2004).

¹²⁸ *Id.* at 396, 604 S.E.2d at 268.

¹²⁹ *Id.* at 394, 604 S.E.2d at 267.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 395, 604 S.E.2d at 267.

¹³⁵ *Id.*

¹³⁶ *Id.* at 395-6, 604 S.E.2d at 267-268.

¹³⁷ *Id.* at 395, 604 S.E.2d at 267.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 394, 604 S.E.2d at 267 & n.1 (2004) (*citing* Stapleton v. Stapleton, 85 Ga. App. 728, 731-732, 70 S.E.2d at 156 (1952)). Georgia's Family Immunity Doctrine barred any recovery on the children's behalf from the father, however, claims against a parent's employer under a theory of respondeat superior are not barred. *Id.*

¹⁴¹ *Id.*, 604 S.E.2d at 267.

¹⁴² *Id.* at 397, 604 S.E.2d at 269.

¹⁴³ *Id.* "On-call" status does not constitute evidence that an employee was working within the scope of his employment. *Id.*

¹⁴⁴ *Id.* at 395, 604 S.E.2d at 267.

¹⁴⁵ *Id.* at 396, 604 S.E.2d at 268.

¹⁴⁶ *Id.* at 396-397, 604 S.E.2d at 268.

¹⁴⁷ *Id.* at 397, 604 S.E.2d at 268.

¹⁴⁸ 272 Ga. App. 861, 613 S.E.2d 657 (2005).

¹⁴⁹ *Id.* at 862, 613 S.E.2d 659.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 863, 613 S.E.2d 659.
¹⁵³ *Id.*, 613 S.E.2d 660.
¹⁵⁴ *Id.*
¹⁵⁵ *Id.* at 862, 613 S.E.2d 659 & n.2.
¹⁵⁶ *Id.*
¹⁵⁷ *Id.* at 866, 613 S.E.2d 662.
¹⁵⁸ *Id.* at 868, 613 S.E.2d at 663.
¹⁵⁹ *Id.*
¹⁶⁰ *See* O.C.G.A. § 13-8-2 (1982 & Supp. 2003).
¹⁶¹ WIMBERLY, *supra* note 10, § 2-11.
¹⁶² *Id.*
¹⁶³ *Id.*
¹⁶⁴ *Id.*
¹⁶⁵ *Id.*
¹⁶⁶ *Id.*
¹⁶⁷ 272 Ga. App. at 553, 612 S.E.2d 873 (2005).
¹⁶⁸ *Id.* at 554, 612 S.E.2d 875.
¹⁶⁹ *Id.* at 555, 612 S.E.2d 876.
¹⁷⁰ *Id.* at 554, 612 S.E.2d 875.
¹⁷¹ *Id.* at 553, 612 S.E.2d 874.
¹⁷² *Id.*
¹⁷³ *Id.* at 555, 612 S.E.2d 874.
¹⁷⁴ *Id.*, 612 S.E.2d 875-6.
¹⁷⁵ *Id.* at 555, 612 S.E.2d 876.
¹⁷⁶ *Id.* (*citing* Hulcher Svcs. v. R.J. Corman R. Co., 247 Ga. App. 486 at 491(4), 543 S.E.2d 461 (2000).)
¹⁷⁷ *Id.*, 612 S.E.2d 876.
¹⁷⁸ *Id.* at 556, 612 S.E.2d 876.
¹⁷⁹ *Id.* at 557, 612 S.E.2d 877.
¹⁸⁰ *Id.* at 557, 612 S.E.2d 877.
¹⁸¹ *Id.*
¹⁸² 272 Ga. App. 262, 612 S.E.2d 86 (2005).
¹⁸³ *Id.* at 264, 612 S.E.2d 88.
¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 266. 612 S.E.2d 89..

¹⁸⁷ *Id.* at 265, 612 S.E.2d 89.

¹⁸⁸ *Id.* at 267, 612 S.E.2d 89-90.

¹⁸⁹ 2005 WL 976994 (Ga. App.).

¹⁹⁰ *Id.* at *2.

¹⁹¹ *Id.*

¹⁹² *Id.*

**LEGAL MALPRACTICE:
AUTHORITY ESTABLISHED BY GEORGIA
COURTS,
2003-PRESENT**

*By H. Lane Young, II**

This article examines case law established from January 1, 2003 to present by various Courts in the State of Georgia, including the U.S. District Court for the Northern District, the Supreme Court of Georgia, and various Georgia Courts of Appeals, specific to a cause of action for legal malpractice and relevant issues and holdings related thereto. The cases are arranged in reverse chronological order by Court, with the most recent cases listed first.

I.

**U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT
OF GEORGIA**

A. *Viasys Servs. v. Mc Curdy & Stone*, 2006 U.S. Dist. LEXIS 18513 (N.D. Ga. 2006).

To support a negligence cause of action, a plaintiff must show that defendant owed some kind of duty to the plaintiff. A legal malpractice claim is essentially a professional negligence action, and a plaintiff must establish that the defendant owed a legal duty to conform to a standard of conduct raised by the law for the protection of others against unreasonable risks of harm. In a legal malpractice claim, a plaintiff must show that he actually employed the defendant

attorney. Without this evidence, there can be no attorney-client relationship, and there exists no duty to form the basis of plaintiff's negligence claim. Georgia courts do not recognize aider and abettor liability to breaches of fiduciary duty.

B. *Atl. Rim Equities, LLC v. Slutzky, Wolfe, & Bailey*, 2005 U.S. Dist. LEXIS 38262 (N.D. Ga. 2005).

In order to state a claim for legal malpractice under Georgia law, a plaintiff must establish: (1) employment of an attorney; (2) failure of the attorney to exercise ordinary care, skill and diligence; and (3) damages proximately caused by that failure. With respect to the “ordinary care, skill and diligence” element, the law imposes upon persons performing professional services the duty to exercise a reasonable degree of skill and care, as determined by the degree of skill and care ordinarily employed by their respective professions under similar conditions and like surrounding circumstances. A plaintiff bringing a legal malpractice action must file with his Complaint an affidavit of an expert which sets forth at least one negligent act committed by the defendant which would constitute an alleged breach of duty, as well as a factual basis for each claim of negligence.

Mere allegations that an attorney's conduct violates the Code of Professional Responsibility or Standards of Conduct, standing alone, cannot serve as the basis for a legal malpractice action. However, pertinent Bar Rules are relevant to the standard of care in a legal malpractice action if they are intended to protect a person in the plaintiff's position or are addressed to the particular harm suffered by the plaintiff.

In addition to the element of liability, damages are an essential element of a claim for legal malpractice. A defendant attorney is liable only for actual injury sustained by his client; an act of negligence alone does not create a cause of action in tort without

damages. The alleged negligence of the defendant attorney must be the proximate cause of the plaintiff's damages. The relevant inquiries are whether a reasonable jury could find that a defendant's alleged legal malpractice caused the plaintiff's injuries, and whether the defendant could have reasonably foreseen those injuries.

In this case, the evidence of the plaintiff's damages was affidavit and deposition testimony which the Court determined to be conclusory and based only on the allegations set forth in the Complaint, and which were, in fact, even more ambiguous than the claims set forth therein. As such, the Court determined that there were numerous issues of fact for a jury to resolve, and therefore summary judgment for plaintiff on the issue of defendant's legal malpractice was not appropriate.

II.

SUPREME COURT OF GEORGIA

A. *Barnes v. Turner*, 278 Ga. 788 (2004).

An attorney has the duty to act with ordinary care, skill, and diligence in representing his client. In the sale of business transactions where the purchase price is to be paid over time and collateralized, the seller's attorney shall prepare and file the financing statements to perfect his client's security interest. The Court held that if the financing statements require renewal before full payment is made to the seller, then the attorney has a duty to renew. Safeguarding a security interest is not an "unexpected duty" of the attorney; but "goes to the very heart" of the reason the defendant attorney is retained. The attorney is not required to ascertain the full extent of his client's objectives, but must take reasonable, legal steps to fulfill the client's main, known objective, which, in this case, the Court determined to be receipt of payment.

III.

GEORGIA COURTS OF APPEALS

A. *Villani v. Hughes*, 2006 Ga. App. LEXIS 331 (2006).

The statute of limitation for legal malpractice actions is four years, runs from the date of the alleged incident of malpractice, and is triggered immediately upon the commission of the wrongful act by the defendant attorney.

B. *Studio X, Inc. v. Weener, Mason & Nathan, LLP*, 276 Ga. App. 652 (2005).

In a legal malpractice action, the client has the burden of establishing three elements: (1) that it employed the attorney; (2) that the attorney failed to exercise ordinary care, skill and diligence; and (3) that such negligence was the proximate cause of damage to the plaintiff. The plaintiff must prove that the attorney's alleged negligence proximately caused his harm. Proximate cause in a malpractice action requires the plaintiff to demonstrate that but for the attorney's error, the outcome would have been different. The Court held in this case that the defendant attorneys were entitled to summary judgment upon showing that the plaintiff failed to prove that defendants' acts and/or omissions were the proximate cause of his damages.

C. *Clough v. Richelo*, 274 Ga. App. 129 (2005).

The State Bar of Georgia's Rules of Professional Conduct applicable to attorneys may be used in a legal malpractice case as evidence of the standard of care for attorneys.

D. *Gingold v. Allen*, 272 Ga. App. 653 (2005).

When a defendant's bankruptcy petition is filed, an estate is created which, pursuant to federal law, includes any and all legal or equitable interests in property at the commencement of the estate. This broad definition of property includes any legal malpractice cause of action which accrued prior to the commencement of the bankruptcy case. Accordingly, if a legal malpractice cause of action accrued prior to the commencement of the bankruptcy case, then it is property of the bankruptcy estate and the trustee is the real party in interest.

Although federal law determines when a debtor's interest in property is property of the bankruptcy estate, the property interests at issue are created and defined by state law, so state law controls the issue of when the legal malpractice cause of action accrued. In order to determine whether a cause of action belongs to the bankruptcy trustee, one must determine whether, under state law, the action accrued prior to the commencement of the bankruptcy case. A legal malpractice action accrues on, and the applicable statute of limitation commences to run from, the date that defendant attorney allegedly breached the original attorney-client relationship. Since damages arise upon the commission of the breach such damages are sufficient as a triggering device for the statute of limitations.

E. *Rhone v. Bolden*, 270 Ga. App. 712 (2004).

A plaintiff must demonstrate the existence of an attorney-client relationship, establishing the duty that is necessary to support a claim of negligence, before he may recover in a legal malpractice suit. In order to do so, a plaintiff must provide evidence that legal advice or assistance was both sought and received from the defendant attorney.

In some situations, a defendant attorney may owe a duty to a third party other than the plaintiff, or direct client. A lawyer representing the guardian ad litem of a minor owes a duty to the minor as well, who is the real party with the legal interest warranting representation and the intended beneficiary of the relationship between her guardian and the guardian's attorney. Additionally, a real property buyer who relies on an attorney's title certification of the property purchased has a cause of action against the attorney if the seller had no interest in the property. Finally, in a wrongful death case, the surviving spouse acts as the children's representative and owes them the duty to act prudently in asserting, prosecuting and settling the claim and to act in the utmost good faith.

F. *Landau v. Davis Law Group, P.C.*, 269 Ga. App. 904 (2004).

Pursuant to O.C.G.A. §9-11-9.1 (a), a plaintiff in any professional malpractice action is required to file with his Complaint an affidavit of an expert which shall set forth at least one negligent act or omission committed by the defendant and the factual basis for each such claim. O.C.G.A. §9-11-9.1 (b) contains the only exception to this contemporaneous filing requirement in professional malpractice cases, and establishes that subsection (a) shall not apply in a case in which the period of limitation will expire, or where there is a good faith basis to believe it will expire, on any claim stated in the Complaint within ten days of the date of filing and, because of such time constraints, an affidavit of an expert could not be prepared. In such cases, the plaintiff shall have 45 days after the filing of the Complaint to supplement the pleadings with the affidavit.

Landau argued in this case that she faced a 30 day period of limitation because her counterclaim was compulsory and had to be filed within 30 days of service. Since she did not file her counterclaim until the last day of the 30 day period, she argued that she was entitled to the 45 day extension for supplementing her Complaint with the required expert affidavit. The Court held that the

45 day extension does not apply to such a counterclaim. Landau maintained that the phrase "period of limitation" referenced in O.C.G.A. §9-11-9.1(b) means the 30 days within which a defendant must file responsive pleadings to a complaint. Landau, however, cited no case so interpreting the phrase, and the Court held that the phrase has no such meaning, and refers only to the statute of limitation that applies to a particular action.

Furthermore, in applying O.C.G.A. §9-11-9.1, the Court found that the period of limitation applicable to a legal malpractice claim to be four years, that the four-year statute of limitation was not going to expire within ten days of the filing of the counterclaim, and that Landau therefore was not entitled to invoke the 45 day extension for filing the required expert affidavit. The Court held that O.C.G.A. §9-11-9.1 does apply to the assertion of a counterclaim, and held that where a party asserting a counterclaim fails to comply with the requirements of the Code, a court may dismiss the defective claim.

Landau argued that O.C.G.A. §9-11-9.1(b) violates both the federal and state constitutional guarantees of equal protection under the law because it treats those parties filing a compulsory counterclaim differently from other parties filing similar claims. The Court held that no equal protection violation exists unless legislation treats similarly-situated individuals differently, and held that O.C.G.A. §9-11-9.1 (b) does not treat similarly situated individuals differently. On the contrary, a plaintiff asserting a legal malpractice claim and a defendant asserting a similar compulsory counterclaim are treated the same way, in that if a plaintiff filed a legal malpractice claim more than ten days before the expiration of the statute of limitation, then he would be treated just as Landau was treated in this case; and would be required to file an expert's affidavit contemporaneously with his claim. Conversely, if a plaintiff filed his legal malpractice claim within ten days of the expiration of the statute of limitations, then he would not have to file an affidavit with his

Complaint, and would be entitled to the extra forty-five days provided by O.C.G.A. §9-11-9.1 (b).

G. *Cornwell v. Kirwan*, 270 Ga. App. 147 (2004).

In a legal malpractice action, the plaintiff must establish three elements: (1) employment of the defendant attorney, (2) failure of the attorney to exercise ordinary care, skill and diligence, and (3) that such negligence was the proximate cause of damage to the plaintiff, e.g., the loss of a meritorious case. With respect to the "ordinary care, skill and diligence" element, the law imposes upon persons performing professional services the duty to exercise a reasonable degree of skill and care, as determined by the degree of skill and care ordinarily employed by their respective professions under similar conditions and like surrounding circumstances.

In a criminal case, an attorney's failure to advise a defendant of collateral consequences is not a factor in determining whether or not a plea was intelligently entered. If a defendant's actual knowledge of such collateral consequences is not a prerequisite to his entry of a knowing and voluntary guilty plea, his lack of knowledge of those collateral consequences cannot affect the voluntariness of the plea. Accordingly, counsel's failure to advise the defendant of the collateral consequences of a guilty plea cannot rise to the level of constitutionally ineffective assistance.

There can be no liability for acts and omissions by an attorney which are based on an honest exercise of professional judgment, and Courts will not hold an attorney liable for malpractice based merely on the attorney's choice of trial tactics or strategy or the good faith exercise of professional judgment.

H. *McKenna Long & Aldridge, LLP v. Keller*, 267 Ga. App. 171 (2004).

An attorney-client relationship must be demonstrated before a plaintiff may recover, as a plaintiff must establish the element of duty that is necessary to every lawsuit based upon a theory of negligence, including legal malpractice lawsuits. In order to support a claim of legal malpractice, the evidence must show a legal duty from the attorney to the plaintiff. In order to protect free access to the courts and the existence of a legal duty by the attorney only to his own client, the Court held that an attorney does not owe any legal duty to an adverse party which would give rise to a negligence cause of action. As such, a defendant attorney has no duty to an adverse party to fully investigate his client's claims prior to filing suit, nor does he owe any duty to an adverse party to avoid filing a suit which the attorney knew, or should have known, was frivolous. If an attorney owes no legal duty sounding to an adverse party to investigate his client's claims prior to filing suit or to avoid filing a potentially frivolous suit, then similarly the attorney does not owe an adverse party any duty to investigate before sending a demand letter on behalf of a client.

I. *Paul v. Smith, Gambrell & Russell*, 267 Ga. App. 107 (2004).

Legal malpractice requires that the plaintiff client prove: (1) employment of the defendant attorney, (2) failure of the attorney to exercise ordinary care, skill and diligence, and (3) that such negligence was the proximate cause of damage to the plaintiff. Where professional judgment is involved, a Court will not hold an attorney liable for malpractice based merely on the attorney's choice of trial tactics or strategy or the good faith exercise of professional judgment. There can be no liability for acts and omissions by an attorney in the conduct of litigation which are based on an honest exercise of professional judgment; "otherwise every losing litigant

would be able to sue his attorney if he could find another attorney who was willing to second guess the decisions of the first attorney with the advantage of hindsight.” The tactical decisions made during the course of litigation require that the attorney be given a great deal of discretion. The honest exercise of professional judgment is dependent upon the reasonable exercise of discretion free from outside influence. This exercise of discretion must be free of any conflict of interest to be truly an independent exercise of discretionary judgment.

In the area of criminal law involving ineffective assistance of counsel, the decision to call or not call a witness is a matter of trial tactics and strategy, thereby amounting to professional judgment.

A lawyer is disqualified from representing a party against a former client in a matter that is substantially related to the lawyer's prior representation. The representation of a former client during the time that the subsequent client's cause of action arose is a conflict of interest which requires the attorney to recuse himself. A lawyer should act in a manner consistent with the best interests of his client. An attorney owes undivided loyalty to his client, undiluted by conflicting or contrary obligations. A conflict of interest may be waived knowingly by the client after receiving full disclosure of all facts. If a client's written consent, or a lawyer's written notice to the client, does not include the required full disclosure, it must contain some recognition that the client's consent was made with knowledge of the potential conflict of interest. The required writing must at least acknowledge the disclosure essential to an informed decision and consent.

There is no rule of law or of ethics which prevents an attorney from taking employment in a case merely because he has previously represented, or even at the same time represents, an opposite party to the case, provided the cases are not related to each other in some substantial respect. If two cases are substantially related, the attorney

may not allege that he had no confidential information from the prior client. If an attorney has been employed in a matter and has appeared in court in that matter, he can not thereafter accept employment and appear in a case against his former client when, under the latter employment he assumes a position contrary to his prior client. The mere potential for a conflict of interest should be addressed by these same rules.

J. *Blackwell v. Potts*, 266 Ga. App. 702 (2004).

To prevail in a legal malpractice action, a plaintiff must show that the attorney he employed was negligent and that this negligence was the proximate cause of plaintiff's harm. The plaintiff must show that, but for the attorney's negligence in the underlying case, the plaintiff would have prevailed. It is conceivable that under this rule, any attorney could avoid legal malpractice liability by intentionally or negligently failing to develop a record of his improper representation.

In this Court's opinion in the case of *Ross v. Edwards*, *Ross v. Edwards*, 253 Ga. App. 773 (2002), however, the Court implicitly sanctioned the use of evidence found outside the record of the underlying action.

In *Ross*, the plaintiff client in a legal malpractice action presented expert testimony from another attorney that the defendant attorney was negligent in failing to present expert testimony in support of his nuisance claim, and that the outcome of the trial would have been different if he had done so. However, the plaintiff client failed to present evidence that an expert could have given testimony that would have changed the result of the trial. In the absence of expert testimony that would have changed the outcome of the case, the plaintiff client failed to show that, but for the failure of the defendant attorney to present this testimony, the jury's verdict would have favored his nuisance claim. The Court held that proper expert testimony would have made a difference, and stated that an attorney testifying as an expert on behalf of the plaintiff client in the legal

malpractice case could consider the expert opinion testimony and give an expert legal opinion that, if this testimony had been presented in the underlying nuisance trial, it would have provided the evidence necessary for the jury to render a different verdict. But without the expert testimony necessary to provide evidence in the nuisance trial, an attorney's legal opinion that the hypothetical expert testimony would have produced a different verdict is pure conjecture and establishes nothing.

In this case the plaintiff client identified two experts who could provide testimony on the crucial issue of whether they could have prevailed in the underlying action. Defendant attorney argued that, because these experts were not identified in the underlying trial, their testimony cannot be considered in this legal malpractice action. *Ross*, however, does not hold that the only experts who may testify in a legal malpractice claim are those who were directly identified or retained in the underlying case and, in fact, is silent regarding that question.

K. *Traub v. Washington*, 264 Ga. App. 541 (2003).

Although the violation of a professional ethical standard, standing alone, cannot serve as a basis for a legal malpractice action, State Bar Rules are relevant to the standard of care in a legal malpractice action.

L. *Kidd v. Ga. Ass'n of Educators, Inc.*, 263 Ga. App. 171 (2003).

To establish a legal malpractice claim, a plaintiff must prove that: (1) he employed the defendant attorney, (2) the attorney failed to exercise ordinary care, skill, and diligence, and (3) this failure was the proximate cause of damages to the plaintiff. To establish proximate cause, the client must show that but for the attorney's error the outcome would have been different. The defendant attorney is

entitled to summary judgment if he shows that there is an absence of proof adduced by the client on the issue of proximate cause. A plaintiff's case fails if he cannot show a causal link between his attorney's failure to raise the defense and any injury suffered.

In the context of a legal malpractice case in which the negligence alleged is the failure of an attorney to file an appeal, proximate cause may be established by showing that the appellate court would have reversed and that, upon remand to the lower court, the client would have obtained a more favorable result. A determination of whether an appeal would have been successful is a question of law, and hence, proper for summary judgment.

M. *Shores v. Troglin*, 260 Ga. App. 696 (2003).

The statute of limitation for legal malpractice actions is four years and runs from the date of the alleged incident of malpractice. The statute of limitations is tolled in malpractice actions when a defendant intentionally conceals an act of professional negligence from a plaintiff, causing the plaintiff to be deterred from bringing a claim.

If a defendant is guilty of a fraud, by which the plaintiff has been deterred from bringing an action, the period of limitation shall run only from the time of the plaintiff's discovery of the fraud. Such an action requires proof of: (1) actual fraud involving moral turpitude, or (2) a fraudulent breach of a duty to disclose that exists because of a relationship of trust and confidence.

In cases where the underlying action is not a claim of fraud, but rather of malpractice, the statute of limitations is tolled only upon a showing of a separate independent actual fraud involving moral turpitude which deters a plaintiff from filing suit. In such cases, before the running of the limitation period will toll, it must be shown that the defendant concealed information by an intentional act,

something more than a mere failure, with fraudulent intent to disclose such conduct, unless there is on the party committing such wrong a duty to make a disclosure thereof by reason of facts and circumstances, or the existence between the parties of a confidential relationship.

N. *Griffin v. Fowler*, 260 Ga. App. 443 (2003).

It is well settled that a claim for breach of fiduciary duty requires proof of three elements: (1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach. In this case, a plaintiff's breach of fiduciary duty claim, as well as claims of breach of contract and breach of implied duty of good faith and fair dealing, merely duplicated the malpractice claim and could not survive summary judgment. The Court affirmed the trial court's ruling that the claims were mere duplications of the legal malpractice claim, which itself is based on the establishment of a fiduciary, attorney-client relationship that is breached. Furthermore, even if the plaintiff's allegations were not duplicative, they would not have survived summary judgment where plaintiff's allegation that he was charged excessive legal fees cannot provide the sole basis for a legal malpractice claim. The Supreme Court recognized that prohibitions of clearly excessive legal fees are contained in the Georgia Code of Professional Conduct and the State Bar Rules, and held that a plaintiff cannot base a claim for civil damages solely on duties imposed by the Code of Professional Conduct.

The plaintiff cited the cases of *Watkins & Watkins, P.C. v. Williams* and *Allen v. Lefkoff, Duncan, Grimes, & Dermer, P.C.* in support of his argument, but the Court disagreed, and distinguished the cases from plaintiff's case, holding that in *Watkins*, a client sued her former attorney for professional negligence, fraud, and breach of fiduciary duty. Evidence was presented that the lawyer charged extremely high fees, solicited loans from his client, and kept money that he should have forwarded to her. The Court held that the trial

court did not err in allowing evidence of the Code of Professional Responsibility, holding that the Rules of the State Bar may be considered along with other facts and circumstances to determine whether an attorney treated his client with the requisite degree of skill and care. The Court reasoned that each of the plaintiff's claims in *Watkins* was part of a single legal malpractice claim. There was no indication in *Watkins* that the defendant moved for summary judgment on the ground that the excessive fee allegation was improper or that the plaintiff attempted to base a claim for breach of fiduciary duty solely on that allegation. At most, the Court held that *Watkins* provides that evidence of excessive fees can be considered as part of a legal malpractice claim. In this case, the Court held that the trial court determined plaintiff's claims to be duplicative rather than part of a single malpractice claim. The Court held that, pursuant to the trial court's ruling, the plaintiff retains his legal malpractice claim, and the trial court may determine that evidence of certain Bar Rules may be presented in connection with that claim, but plaintiff's allegation that he was charged excessive fees cannot form the basis for his breach of fiduciary duty claim.

At issue in the *Allen* case was the trial court's disallowance of any evidence that the defendants violated the Code of Professional Responsibility. The Supreme Court recognized that the duties imposed by the Bar Rules cannot provide the sole basis for the standard of care applied in a legal malpractice action. In regard to the "ordinary care, skill and diligence" element of a legal malpractice action, ethical standards are admissible as some evidence of this standard of care. *Allen* does not hold that a claim for civil damages can be premised solely on allegations of excessive fees.

The Court also held that defendant charging plaintiff for the purchase of software did not support a claim for breach of fiduciary duty. The record shows that in the course of his representation, defendant purchased estate planning software that was necessary to make certain necessary calculations on plaintiff's behalf. He charged

plaintiff for the software and then retained it for use in his practice, but testified that he had not needed the software until he began his representation of plaintiff. Plaintiff argues that defendant's fiduciary duty prevented him from charging for "office supplies". The retainer agreement, however, expressly provides that plaintiff may be charged for out-of-pocket costs required to implement the estate plan, including "software acquisition." The Court held that plaintiff's argument essentially amounts to an allegation of excessive fees, which cannot solely form the basis of a breach of fiduciary duty claim.

Furthermore, where there is nothing in the record to support the plaintiff's argument that defendant somehow should have foreseen that the assigned trustee, whom he did not know or personally recommend, was unfit, the Court held that defendant cannot be liable for the trustee's intervening act of making an unauthorized withdrawal from the plaintiff's trust.

Finally, contrary to plaintiff's allegation that the defendant lacked the necessary legal knowledge to competently handle the estate planning matters at issue in his case, it is undisputed that the defendant had practiced law in the area of estate planning for over ten years, that he was a founding member of the National Network of Estate Planning Attorneys, and that, at the time of his deposition, he served as the Estate Planning Director for the southeast division of Solomon Smith Barney. Given this background, the Court held that there was no evidence to support plaintiff's claim that defendant defrauded him when he represented that he had the expertise and experience to handle plaintiff's estate planning matters. In the absence of false or grossly misleading statements which demonstrate an intent to create a false impression of expertise or experience, it is not fraud for an attorney to convey to a potential client a healthy self-estimation of ability.

O. *Smith v. Morris, Manning & Martin, LLP*, 264 Ga. App. 24 (2003).

Under O.C.G.A. §9-11-15 (a), a plaintiff in a professional negligence case may amend his pleading as a matter of course and without leave of court at any time before the entry of a pretrial order. A claimant who files a defective affidavit may cure the alleged defect by amendment, and may add to the complaint language required by O.C.G.A. §9-11-9.1 (b). The statute prohibits the amendment to a complaint to add an affidavit of an expert, except under certain limited circumstances. The statute does not prohibit other amendments of the body of the pleadings in the complaint and, therefore, should be liberally construed with regard to any other amendments to the pleadings. Although the legislature revised the statute in 1997, the current version still does not prohibit amendments to the pleadings in the Complaint.

A claimant's failure to comply with O.C.G.A. §9-11-9.1 renders the action void, precluding renewal under O.C.G.A. §9-2-61. O.C.G.A. §9-11-9.1 specifically permits renewal if the trial court determines that the claimant obtained the requisite expert affidavit within the necessary time, but mistakenly failed to file it. Noncompliance with the affidavit requirement does not result in an automatic dismissal of the complaint; the complaint is simply subject to dismissal for failure to state a claim. Therefore, professional negligence actions that fail to comply with O.C.G.A. §9-11-9.1 at their inception are not voided at that time.

Under Georgia law, the affidavit requirement in O.C.G.A. §9-11-9.1 is applicable only to those professional malpractice actions alleging professional negligence. Claims based on a professional's alleged intentional conduct do not require an expert affidavit. Although a plaintiff need not file an expert affidavit, he must prove that the defendant acted intentionally, rather than negligently.

In this case, the Court held that the plaintiff's breach of contract, breach of fiduciary duty, and fraud claims were grounded in intentional conduct and were not claims of legal malpractice, and held that the trial court erred in concluding that those claims must be accompanied by an expert affidavit.

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A PRACTITIONER'S GUIDE TO THE RELEASE OF PROTECTED HEALTH INFORMATION

*By David N. Nelson**

I. Brief Overview of HIPAA.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936, was enacted by the United States Congress to ensure increased access to healthcare by expanding the portability and renewability of healthcare insurance. *See, e.g., In re Diet Drug Litigation*, 2005 W.L. 1253530, *2 (N.J. Super. Ct. Law Div. Apr. 18, 2005). The enabling legislation also called for the creation of regulations under the guise of “administrative simplification.” 42 U.S.C. § 1320d-2 (2000). Unfortunately, those regulations, rather than simplifying the process, have caused confusion and spawned a great deal of litigation. This article is intended to offer guidance regarding how Protected Health Information (“PHI”) can be obtained under HIPAA.

HIPAA is procedural in nature and does not create a federal patient-physician privilege. It creates a procedure by which medical information can be obtained. *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 926 (7th Cir. 2004) (“We do not think HIPAA is rightly understood as an act of Congress that creates a privilege.”). Thus, HIPAA regulations govern the exchange and release of PHI, whether it is in written or oral form. State law, though, still governs whether PHI is discoverable or relevant to a given case.

HIPAA regulations recognize that litigation often requires the disclosure of PHI. *See* 45 C.F.R. § 164.512 (2006). Indeed, HIPAA contains fairly comprehensive regulations addressing the disclosure of PHI in the litigation context, but those regulations do

not necessarily provide the exclusive procedure for the release of PHI during legal proceedings. HIPAA also recognizes that in addition to court-mandated release of PHI a patient may consent to the release of PHI even during litigation.

II. HIPAA Does Not Apply to Workers' Compensation Matters.

It is important to note that HIPAA does not govern the release of PHI in the context of workers' compensation matters. 45 C.F.R. § 164.512(b). In that context, HIPAA regulations provide that a covered entity may disclose PHI without written authorization of the individual or the opportunity for the individual to agree or object when (1) an inquiry is made by an employer about an individual who is a member of the work force of the employer and (2) the covered entity is providing healthcare at the request of the employer regarding a work related injury or illness. 45 C.F.R. §164.512(b).

III. Medical Authorization Forms.

HIPAA regulations recognize that PHI can be released pursuant to a medical authorization form, and nothing in the regulations limits use of these forms solely to the non-litigation context. Current Georgia law requires medical malpractice plaintiffs file a medical authorization form with their complaint. O.C.G.A. § 9-11-9.2 (2006). Medical authorization forms can also be sought through the discovery process or mandated by court order, and HIPAA recognizes that procedure as proper.

State and federal courts have repeatedly allowed litigants in other states to obtain PHI by requiring the patient/plaintiff to execute a HIPAA-compliant medical authorization form. See *Hawes v. Golden*, 2004 W.L. 2244448, *4 (C.A. Ohio 9th Dist. Sep. 22, 2004) (affirming trial court's order requiring the plaintiff to produce all medical records or execute a HIPAA authorization

so that defendant could seek disclosure); *Hitchcock v. Suddaby*, 801 N.Y.S.2d 234 (N.Y. Sup. Ct. 2005). (ordering the plaintiff to supply HIPAA-compliant authorization); *Smith v. Rafalin*, 800 N.Y.S.2d 357 (N.Y. Sup. Ct. 2005) (ordering the plaintiff to supply defendant with appropriate medical authorization). Thus, it is not contrary to HIPAA to require a plaintiff to execute a medical authorization form pursuant to either an appropriate discovery order or O.C.G.A § 9-11-9.2.

HIPAA does spell out what information a medical authorization form must contain. Specifically, HIPAA mandates that each medical authorization form contain certain “core” elements. 45 C.F.R. § 164.508 (2006). A HIPAA-compliant medical authorization form is required to contain the following information:

1. A description of the information to be used or disclosed;
2. The name of the person or entity authorized to make the request;
3. The name or entity to whom the covered entity can make the disclosure;
4. The purpose of the requested disclosure, although “at the request of the individual” will suffice;
5. An expiration date, although “none” is sufficient if it involves a research study;
6. Signature and date the individual signed (if the person signing is a personal representative, a description of that person’s authority); and,
7. The individual’s right to revoke the authorization.

45 C.F.R. § 164.508. Additionally, the authorization form must be written in plain language. None of these requirements is daunting. Compliance is easy.

A medical authorization form can also be obtained via a protective order. In that context, whether an individual has the right to revoke the authorization form and the expiration date may be an issue. Since the expiration date can be an event, a litigation event can be selected by the court, such as the close of discovery or dismissal of the action. The individual signing the release must also have the right to revoke the authorization form, but nothing in HIPAA requires that the right to revoke be consequence free. Accordingly, while the plaintiff must retain the right to revoke, nothing prevents a court from entering an order allowing the plaintiff to revoke the authorization form at any time. However, the Court can insist on dismissal of the action if revocation occurs before the conclusion of litigation.

IV. Medical Authorization Forms and O.C.G.A. § 9-11-9.2.

O.C.G.A. § 9-11-9.2 requires, in a medical malpractice action, that a plaintiff file a medical authorization form authorizing the attorney for the defendant “to obtain and disclose protected health information contained in medical records to facilitate the investigation, evaluation, and defense of claims and allegations set forth in the complaint.” O.C.G.A. § 9-11-9.2. The authorization form must also include language that grants defense counsel the “right to discuss the care of and treatment of the plaintiff, or, where applicable, the plaintiff’s decedent with all the plaintiff’s or decedent’s treating physicians.” *Id.*

O.C.G.A. § 9-11-9.2 creates a filing requirement for medical malpractice plaintiffs. In order to initiate a valid medical malpractice action, the plaintiff must satisfy a variety of procedural requirements that include the filing of an expert affidavit (O.C.G.A. § 9-11-9.1 (2006)) and a medical authorization form

that authorizes the release of PHI and allows defense counsel to seek interviews with the plaintiff's treating physicians. O.C.G.A. § 9-11-9.2. These obligations are placed upon plaintiff and are not governed by HIPAA. HIPAA only governs how a covered entity responds to requests for disclosure. Moreover, for the reasons set forth above, it seems that HIPAA does not preempt O.C.G.A. § 9-11-9.2.²

Preemption "grows from the premise that when state law conflicts or interferes with federal law, state law must give way." *Cont'l Pet Techs., Inc. v. Palacias*, 269 Ga. App. 561, 562 (2004). HIPAA expressly provides that its provisions "supersede any contrary provision of state law . . ." 42 U.S.C. § 1320 d-7(a)(1) (2000). A state law is "contrary" to the regulations promulgated under HIPAA when

- (1) A covered entity would find it impossible to comply with both the state and federal requirements;
- (2) The provision of state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Part C of title IX of the Act or Section 264 Pub. L. 104-191, as applicable.

45 C.F.R. § 160.202 (2006).

Because it is possible to comply with both HIPAA and O.C.G.A. § 9-11-9.2, and because the state law is not an obstacle to the purposes and objectives of HIPAA, it is not preempted. As noted above, both state and federal courts have repeatedly allowed litigants to obtain PHI by requiring a patient/plaintiff to execute a HIPAA-compliant medical authorization form, and O.C.G.A. § 9-11-9.2 can simply be construed as such a statute. V. HIPAA and Discovery.

In addition to recognizing that a patient/plaintiff may release information pursuant to a medical authorization form, HIPAA also can be read as allowing states to enact laws governing the release of PHI as long as those states have procedures which provide the patient/plaintiff with notice and an opportunity to object. *See* 45 C.F.R. § 164.512(e). This HIPAA regulation provides as follows:

(e) Standard: Disclosures for judicial . . . proceedings.

(1) Permitted Disclosures. A covered entity may disclose protected health information in the course of any judicial . . . proceeding:

(ii) In response to a subpoena, discovery requests, *or other lawful process*, that is not accompanied by an order of the court . . . if:

(A) The covered entity receives satisfactory assurance.. . from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been *given notice* of the request . . .

(iii) . . . [A] a covered entity receives satisfactory assurances . . . if the covered entity receives from such party a written statement . . . that:

(A) The party requesting such information has made a good faith attempt to provide written notice to the individual . . .

(B) The notice included sufficient information about the litigation . . . *to permit the individual to raise an objection to the court* [and]

(1) No objections were filed; or

(2) All objections filed by the individuals have been resolved by the court.

There is language in the Federal Register that further suggests the phrase “other lawful process” should be construed as allowing states to create their own procedures. In its final rule promulgating 45 C.F.R. § 164.512(e), Health and Human Services specifically addressed this issue:

[T]he provisions in this paragraph are not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her protected health information. In such cases, we presume the parties will have ample notice and an opportunity to object in the context of the proceeding in which the individual is a party.

65 Fed. Reg. 82462, 82530 (Dec. 28, 2000).

As these expressions of intent indicate, HIPAA was not designed to supplant state law, but rather to ensure that a patient is provided with notice and an opportunity to object before PHI, whether written or oral, is released. Indeed, arguably any state law evidence gathering statute that falls outside the scope of discovery is valid under this particular HIPAA regulation as long as there is notice and an opportunity to object.

HIPAA does not define what is properly discoverable or relevant in medical malpractice litigation, or for that matter, other types of litigation. 45 C.R.F. § 164.512(e). Whether medical information regarding a plaintiff remains private, is relevant, or is discoverable, is therefore governed by Georgia law and not

HIPAA. Georgia has long recognized that, in the context of litigation, a patient puts his care and treatment at issue when suit is filed and waives any privilege “to the extent that the patient places his care and treatment or the nature and extent of his injuries at issue in any civil proceeding.” O.C.G.A. § 24-9-40 (2006). Georgia has also long recognized that *ex parte* conferences to discuss a plaintiff’s medical care are authorized under O.C.G.A. § 24-9-40; *Orr v. Sievert*, 162 Ga. App. 677, 679-80 (1982).

Georgia law controls the scope of medical information or history that may remain private in the litigation context, and O.C.G.A. § 9-11-9.2 simply provides that in a malpractice case a plaintiff’s medical history is information within the pertinent scope of inquiry. State law also governs the propriety of *ex parte* interviews, and state laws that have been interpreted as allowing *ex parte* interviews are not preempted by HIPAA. See *Smith v. Am. Home Prod. Corp. Wyeth-Ayerst Pharm.*, 855 A.2d 609, 624 (N.J. Super. Ct. Law Div. 2003); *Croskey v. BMW of N. Am, Inc.*, 2005 U.S. Dist. LEXIS 3673 *29 (E.D. Mich. February 14, 2005) (permitting *ex parte* conferences under Michigan law with HIPAA-compliant authorization); *Bayne v. Provost*, 359 F. Supp. 2d 234, 242 n. 8 (N.D.N.Y. 2005) (permitting *ex parte* conferences under New York law pursuant to qualified protective order).

Courts have also recognized that a deposition is not the same as an *ex parte* interview. *Bayne v. Provost*, 359 F. Supp. 2d 234, 242 n. 8 (N.D.N.Y. 2005) (“A deposition is not the same as an *ex parte* interview and this Court does not have the authority to limit, control, or nullify the benefits an interview may have over a deposition, and neither should the plaintiff.”); see also *Smith v. Rafalin*, 800 N.Y.S.2d at 359 (standing for the proposition that it would be “manifestly unfair” if a plaintiff could refuse to execute a HIPAA-compliant authorization, and thereby prevent defense counsel from interviewing her physicians *ex parte* because it would allow plaintiff one-sided access to her physicians). HIPAA was never intended to allow plaintiffs to control the timing of the

release of information that is otherwise relevant or discoverable. *Bayne*, 359 F. Supp. 2d at 242 n. 8.

Practically speaking, HIPAA has not altered Georgia's laws governing discovery and has not curtailed the ability of litigants to utilize traditional discovery methods. Currently, there is a debate as to whether oral PHI can be released to litigants without a medical authorization form. HIPAA suggests that, while a medical authorization may not be required, more likely than not, notice of such a request and an opportunity to object is required.

The full effect of HIPAA on the practice of medicine and the practice of law has yet to be realized. The implementation of HIPAA regulations has undoubtedly resulted in closer attention being paid to how and when medical records are released to counsel, and those regulations will likely be the subject of litigation for years to come.

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² Whether O.C.G.A. § 9-11-9.2 is preempted by HIPAA has been the subject of much debate. Currently, there are several cases in the Court of Appeals that may lead to opinions addressing this issue.

TRIAL PRACTICE AND PROCEDURE

*By Erin Brownfield Raley**

I. Introduction

This article examines Senate Bill 3, Georgia's "tort reform" bill, and recent case law that impacts trial practice. This article also provides a brief summary of other legislation enacted in 2005 of interest to trial lawyers.

II. Legislation

Amendments to Titles 8, 9, 24, 33, 43 and 51 of the Official Code of Georgia Annotated, relating respectively to the effect of a claimant's acceptance of a settlement in relation to a construction defect claim; civil practice; evidence; insurance; professions and businesses; and torts occurred during 2005. The following is a summary of those changes.

- A. *Senate Bill 3 (O.C.G.A. §§ 9-10-31, 9-10-31.1, 9-11-9.1, 9-11-9.2, 9-11-68, 24-3-37.1, 24-9-67, 24-9-67.1, 33-3-27(b), 43-34-37(i), 43-34-37(j), 51-1-29.5, 51-2-5.1, 51-12-31, 51-12-33, 51-13-1)*
Tort Reform

1. Venue

Has SB 3 resurrected "vanishing venue" or has it rendered it obsolete? The principle of "vanishing venue" originally arose from the construction of two provisions of the Georgia Constitution: first, that a defendant is entitled to be sued in the county of his residence,¹ and second, that joint tort-feasor residents of different Georgia counties may be sued in either county.² Case law has established that

if suit is brought against two joint tort-feasors, one of whom resides in the county, the court has no jurisdiction over the non-resident defendant unless the resident codefendant is liable in the action. This is so even if a verdict and judgment was obtained against the non-resident defendant.³

"Vanishing venue" lost much of its force as a result of the 1999 amendment of O.C.G.A. § 9-10- 31 because O.C.G.A. § 9-10-31(b) provided for a pre-trial determination of venue.⁴ SB 3, however, which purports to abolish joint and several liability and arguably the concept of "joint tort-feasors," may have rendered "vanishing venue" obsolete. If the concept of "joint tort-feasor" has been abolished, then plaintiffs may be compelled to sue defendants separately in their home counties and the situation of "vanishing venue" would not arise. However, since the Georgia Constitution specifically recognizes joint tort-feasors,⁵ questions regarding the validity of SB 3 exist.

SB 3 creates for the first time in Georgia *forum non conveniens*.⁶ This provision applies to both medical malpractice actions and other tort cases. It provides that the court where the action is filed may transfer the case to a different county where there is proper venue within Georgia.⁷ It also provides that the court may refuse to hear the case if it would more properly be tried before a court in a different state.⁸ There are seven factors for the court to consider in deciding whether to transfer the action.⁹

A defendant in a medical malpractice suit can obtain a transfer of venue to the defendant's home county if the tortious act which is the subject of the suit occurred in that county.¹⁰ There may be constitutional problems with this provision because the Georgia Supreme Court previously held that a statute cannot limit the venue choices available under the Georgia Constitution.¹¹ This section became effective upon the Governor's approval and signature on February 16, 2005.

2. Affidavits in Professional Malpractice Cases

The amendment to O.C.G.A. § 9-11-9.1 mandates the contemporaneous filing of an expert affidavit with the complaint in all professional malpractice cases and under all circumstances. Prior to the amendment, a 45-day grace period to file an expert affidavit was available to a plaintiff if certain conditions were present.¹² However, if a defendant, by motion to dismiss, alleges that plaintiff's affidavit is defective on or before the close of discovery, plaintiff may amend the complaint and cure the defect within 30 days of service of the motion under the "relation back" doctrine codified in O.C.G.A. § 9-11-15(c). Prior to the amendment to O.C.G.A. § 9-11-9.1, defendant's motion to dismiss on the grounds plaintiff's expert affidavit is defective was required to be filed contemporaneously with its initial responsive pleading.¹³

This section became effective upon the Governor's approval and signature on February 16, 2005.

3. Plaintiff's Requirement to File Medical Authorization Form

SB 3 requires a plaintiff in a medical malpractice suit to file a medical authorization form allowing the attorney for the defendant to obtain and disclose protected health information contained in plaintiff's medical records.¹⁴ O.C.G.A. § 9-11-9.2 became effective upon the Governor's approval and signature on February 16, 2005 and became applicable to all causes of action pending on its effective date. While this provision facilitates the defense of a malpractice suit, what about the privacy provisions contained in the Health Insurance Portability and Accountability Act (HIPAA)?¹⁵ Does that Act trump under the Supremacy Clause of the United States Constitution?¹⁶

4. Offer of Judgment

O.C.G.A. § 9-11-68 creates an "offer of judgment" rule. Although most of the "offer of judgment" rules of other states are patterned on Rule 68 of the Federal Rules of Civil Procedure,¹⁷ Georgia's version does not appear to be patterned after the same.

The application of O.C.G.A. § 9-11-68 is limited to tort cases as opposed to all civil cases. It became effective upon the Governor's approval and signature on February 16, 2005 and became applicable to all causes of action pending on its effective date. The statute applies to plaintiffs and defendants and provides procedures to make an offer of judgment prior to trial.¹⁸ The statute compels payment of the offering party's attorney's fees and expenses, incurred after rejection of the offer, if the monetary award received by the offeree is not 25 percent more favorable than the offer of judgment.¹⁹ Even if a party prevails, it may end up having to pay attorney's fees and expenses to the party who makes an offer under this rule.

Example

Plaintiff was injured in a car accident. Defendant made a \$10,000 offer of judgment, exclusive of attorney's fees and any pre-judgment interest, which was rejected. Plaintiff received a jury verdict in the amount of \$12,000. Because plaintiff's verdict was not at least 25% more favorable than defendant's offer of judgment, defendant may claim its attorney's fees and costs.

O.C.G.A. § 9-11-68(e) allows a prevailing party to recover attorney's fees if the finder of fact determines the opposing party presented a frivolous claim or defense. This requires the court to conduct a separate "bifurcated hearing" to determine whether the claim or defense was frivolous and whether damages should be

awarded. The need for subsection (e) is suspect as Georgia currently has three fee shifting statutes to punish frivolous claims or defenses.²⁰

A party may elect to either proceed under O.C.G.A. § 9-11-68(e), which appears to allow for a jury to make the decision (although "finder of fact" is vague and can mean the court), or to proceed under O.C.G.A. § 9-15-14 which would permit the court to make the decision, but not under both statutes.

Subsection (e) also makes it possible for a plaintiff who had to pay attorney's fees and expenses, (because she did not receive a monetary award of more than 25% than an offer of judgment), to seek her own attorney's fees and costs because she won her case and was a "prevailing party."²¹

Even though an offer of judgment is available to plaintiffs and defendants, it appears to penalize only plaintiffs who reject settlement offers because a judgment for a defendant would not include any monetary award (the statute does not make any reference to counterclaims or cross-claims).²² The statute is unclear regarding whether the monetary award is the verdict amount or the verdict amount plus pre-judgment interest. It is also unclear how the statute applies to cases involving multiple plaintiffs and defendants where a global settlement is sought. The language of subsection (a)(2) of the statute provides that the offer must "identify the party or parties making the proposal and the party or parties to whom the proposal is being made."²³ The language suggests that, in a situation where global settlement is being sought, the offeror should individualize the offer against each plaintiff or defendant to allow each one of them to evaluate the offer taking into consideration his or her potential liability.

One Georgia court, in an unpublished opinion, has held that O.C.G.A. § 9-11-68 is unconstitutional.²⁴

House Bill 239, proposed in Georgia's first legislative session of 2006, seeks to amend O.C.G.A. § 9-11-68 in an effort to clarify some of the issues above.

5. Admission of Liability

O.C.G.A. § 24-30-37.1 prohibits statements and conduct expressing regret, apology, error and the like from being admitted into evidence in a medical malpractice case.²⁵ It became effective upon the Governor's approval and signature on February 16, 2005 and became applicable to all causes of action pending on its effective date. This statute excludes from evidence statements of acceptance of *legal* responsibility (i.e. "error") in a medical malpractice case in addition to statements of acceptance of *moral* responsibility.²⁶

6. Daubert Standard

O.C.G.A. § 24-9-67.1 brings Georgia's laws regarding competency of expert witnesses to testify into compliance with requirements established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²⁷ This statute applies to all civil actions and became effective upon the Governor's approval and signature on February 16, 2005.

In medical malpractice actions, an expert may only testify if he was licensed in his own state.²⁸ The witness must have had an active practice, or taught in the specialty area, in at least three of the last five years in the area of practice or specialty in which the opinion is to be given.²⁹

Prior to the adoption of SB 3, most expert testimony was admitted into evidence and the jury determined whether the testimony should be given any weight.³⁰ Now, the court is to decide at a pretrial hearing whether a witness qualifies as an expert.³¹ Requirements as

to when the motion challenging the expert must be made are set forth in the statute.³²

Since this statute and the *Daubert* standard apply to all civil cases, it appears that the *Harper*³³ test regarding the standard for novel scientific proof is no longer applicable.

Certain provisions of the statute conflict. While O.C.G.A. § 24-9-67.1(a) allows an expert to rely on trustworthy written hearsay and facts and data not necessarily admissible, O.C.G.A. § 24-9-67.1(b)(1) provides that an expert's opinion must be "based upon sufficient facts or data which are or will be admitted into evidence at the hearing or trial."³⁴ Can an expert rely on hearsay or not?

7. Insurer's Notice Requirement of Medial Malpractice Judgment or Agreement

O.C.G.A. § 33-3-27(b), as amended, requires that every insurer providing malpractice coverage in Georgia must notify the Composite State Board of Medical Examiners whenever it pays a judgment or agrees to pay a settlement of any amount in a medical malpractice case.³⁵ Previously, reporting was only required when the judgment or settlement was in excess of \$10,000. This statute became effective upon the Governor's approval and signature on February 16, 2005.

8. Composite State Board of Medical Examiners' Requirement to Investigate Physician's Fitness to Practice Medicine

O.C.G.A. § 43-34-37, as amended, requires the Composite State Board of Medical Examiners to investigate where there is a malpractice judgment or settlement in excess of \$100,000 or whether there has been two or more previous judgments or settlements against the same physician.³⁶ The Board shall conduct an assessment of the

physician's fitness to practice medicine if it has disciplined the licensee three times in the last ten years.³⁷ This statute became effective upon the Governor's approval and signature on February 16, 2005.

9. Limited Liability of Health Care Professionals Rendering Emergency Medical Care

SB 3 created O.C.G.A. § 51-1-29.5 which affects medical malpractice claims stemming from emergency medical care received by a patient. The statute provides that, where a claim arises out of emergency medical care in a hospital emergency department, obstetrical unit or surgical suite immediately following the emergency evaluation or treatment of a patient, no physician or healthcare provider is liable unless it is proven by clear and convincing evidence that the physician or healthcare provider's actions were grossly negligent.³⁸ The statute also requires that a special jury instruction be given in emergency medical care cases.³⁹

This statute does not apply to all medical care rendered in an emergency room. The care must have been "emergency medical care" where "the absence of immediate medical attention could reasonably be expected to result in placing the patient's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part."⁴⁰ If one's sprained ankle is wrapped too tight in the emergency room resulting in a loss of circulation and subsequent amputation, it would appear that this treatment does not qualify as emergency medical care and the level of culpability is negligence as opposed to gross negligence.

O.C.G.A. § 51-1-29.5 applies to causes of action arising on or after the effective date of SB 3.

10. Limited Liability of Hospital for Torts of Health Care Professionals

O.C.G.A. § 51-2-5.1 provides that a hospital may avoid tort liability based on apparent or ostensible agency by posting appropriate, conspicuous notice in its lobby or other public area in the hospital⁴¹ and requiring patients to sign a written acknowledgement which contains language similar to the posted notice.⁴² The statute sets out guidelines for the form of the notice.⁴³

O.C.G.A. § 51-2-5.1 applies to causes of action arising on or after the effective date of SB 3.

11. Joint and Several Liability

There has been so much discussion regarding whether SB 3 has eliminated joint and several liability in Georgia and replaced it with straight proportionate liability that this article includes the statutory provisions applicable to joint tort-feasors in their entirety for review.

After the enactment of SB 3, Georgia's statutory law relating to recovery against joint tort-feasors is as follows:

§ 51-12-30. Procurer of wrong is joint wrongdoer

In all cases, a person who maliciously procures an injury to be done to another, whether an actionable wrong or a breach of contract, is a joint wrongdoer and may be subject to an action either alone or jointly with the person who actually committed the injury.

§ 51-12-31. Actions brought jointly against several persons; recovery

Except as provided in Code Section 51-12-33, where an action is brought jointly against several persons, the plaintiff may recover damages for an injury caused by any of the defendants against only the defendant or defendants liable for the injury. In its verdict, the jury may specify the particular damages to be recovered of each defendant. Judgment in such a case must be entered severally.

§ 51-12-32. Contribution, right of; right of indemnity continued

(a) Except as provided in Code Section 51-12-33, where a tortious act does not involve moral turpitude, contribution among several trespassers may be enforced just as if an action had been brought against them jointly. Without the necessity of being charged by action or judgment, the right of a joint trespasser to contribution from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.

(b) If judgment is entered jointly against several trespassers and is paid off by one of them, the others shall be liable to him for contribution.

(c) Without the necessity of being charged by an action or judgment, the right of indemnity, express or implied, from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.

§ 51-12-33. Apportionment of damages in actions against more than one person where plaintiff is to some degree responsible for injury or damages claimed

(a) Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.

(b) Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.

(c) In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit.

(d)(1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the

nonparty or if a defending party gives notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault.

(2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

(e) Nothing in this Code section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly stated in this Code section.

(f)(1) Assessments of percentages of fault of nonparties shall be used only in the determination of the percentage of fault of named parties.

(2) Where fault is assessed against nonparties pursuant to this Code section, findings of fault shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action.

(g) Notwithstanding the provisions of this Code section and any other provisions of law which might be construed to the contrary, the plaintiff shall not be entitled to receive any damages if the plaintiff is 50 percent or more responsible for the injury or damages claimed.

O.C.G.A. § 51-12-31 applies to actions against more than one defendant presumably where the plaintiff is not at fault. While damages to be recovered of each defendant must be entered severally where a jury chooses to specify the amount to be recovered of each defendant, the plaintiff "may recover damages for injury caused by

any of the defendants against only the defendant or defendants liable for the injury."⁴⁴ This provision does not appear to eliminate joint and several liability because joint tort-feasors together cause an indivisible injury. A plaintiff not at fault can recover damages from the defendant or defendants liable for his or her injuries. Admittedly, the word "only" is problematic. However, if the legislature wanted to eliminate joint and several liability, it could have said that where a plaintiff is not responsible for injury or damages claimed, each defendant is severally liable and is required to pay only its proportionate share of a plaintiff's loss regardless of the total size of the judgment or the ability of any other defendant to pay.

O.C.G.A. § 51-12-32 authorizes contribution among joint tort-feasors except where a jury or trier of fact has apportioned damages according to each defendant's percentage of fault under O.C.G.A. § 51-12-33 (applicable to actions against more than one defendant where the plaintiff is to some degree at fault). The continued existence of this provision allowing contribution supports the concept that joint and several liability has not been eliminated.⁴⁵

O.C.G.A. § 51-12-33 applies to actions against more than one defendant where the plaintiff has some degree of fault. The statute provides that the total amount of damages awarded to plaintiff be reduced by the percentage of fault of the plaintiff.⁴⁶ After reduction of damages for the plaintiff's fault, the jury then apportions the award among the defendants who were determined to be liable according to the percentage of fault of each defendant. Damages apportioned to each defendant are not a joint liability among all persons liable and there is no right to contribution among the defendants.⁴⁷ This provision also allows blaming liability on "empty chairs" by providing for the assessment of fault to settling joint tort-feasors and, if proper notice is given, assessment of fault to other nonparties.⁴⁸ Additionally, the trier of fact must "consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless

of whether the person or entity was, or could have been, named as a party to the suit."⁴⁹

As a practical matter, O.C.G.A. § 51-12-33 will require the trial practitioner to carefully draft his or her verdict sheet setting forth specific interrogatories. There are other issues regarding burden of proof where defendant wants to assign blame to the "empty chair." Does defendant have to prove by a preponderance of the evidence a prima facie case of negligence on the part of the absent tort-feasor to reduce its own liability? These and other questions will have to be addressed by trial practitioners and the courts.

O.C.G.A. §§ 51-12-31 and 51-12-33, as amended, apply only to causes of action that arise after the effective date of SB 3.

12. Cap on Noneconomic Damages

SB 3 places a cap on noneconomic damages in medical malpractice suits.⁵⁰ A plaintiff in a medical malpractice suit may only recover \$350,000 in noneconomic damages against medical providers even if more than one medical providers is liable for the injuries.⁵¹ The cap against a medical facility is \$350,000 with an aggregate cap of \$700,000 per plaintiff where multiple medical facilities are liable.⁵² Plaintiff is also limited to a \$1,050,000 recovery against all possible medical malpractice defendants.⁵³

Caps on noneconomic damages are applicable only to causes of action that arise after the effective date of SB 3.

B. House Bill 307 (O.C.G.A. § 8-2-40(a)(2)) Settlement in Relation to Construction Defect Claim

House Bill 307 amends Code Section 8-2-40 of the Official Code of Georgia Annotated, relating to the effect of a claimant's

acceptance of a settlement in relation to a construction defect claim, providing that a contractor's performance of an offer for settlement or repair does not create insurance coverage or affect the parties' rights under a contractor's liability policy. Effective July 1, 2005.

C. *House Bill 416 (O.C.G.A. §§ 51-14-1, et seq.)
Asbestos and Silica Claims*

House Bill 416 amends Title 51 of the Official Code of Georgia Annotated, relating to asbestos and silica claims, including requirement of prima-facie evidence of physical impairment, a limitation period for filing a claim; the dismissal of pending claims under certain conditions; creating rules applicable to new filings and discovery, providing for *forum non conveniens*, venue, joinder and consolidation of claims. Effective upon the Governor's approval or upon its becoming law without such approval.

D. *Senate Bill 19 (O.C.G.A. § 9-11-23(f), (g))
Class Action Certification*

Senate Bill 19 provides procedures, conditions, a stay of all discovery directed solely to the merits of the claims or defenses in the action prior to class certification and limitations on certification of class actions. It also provides for appellate procedures relating to class actions certification. Effective upon the Governor's approval or upon its becoming law without such approval.

E. *Senate Bill 139 (O.C.G.A. § 51-1-51)
Limiting Gas Provider Liability*

Provides for limited liability for certain liquefied petroleum gas providers. Effective July 1, 2005.

III. Cases

A. Torts

In *Dowis v. Mud Slingers, Inc.*,⁵⁴ the Georgia Supreme Court rejected the adoption of the "most significant relationship test" of the Restatement (Second) of Conflict of Laws⁵⁵ and retained the rule of *lex loci delicti* - that a tort action is governed by the law of the state where the tort was committed.⁵⁶

Tennessee resident, Dowis, was hired by a Missouri corporation, Mud Slingers, to hang sheets of plaster molding at a hotel in Georgia.⁵⁷ Dowis was injured when he fell four stories from the basket of a telescopic boom forklift operated by Mud Slingers.⁵⁸

Mud Slingers had workers' compensation insurance in Missouri where Dowis filed his claim and received benefits.⁵⁹ Missouri law also allowed the filing of tort cases against an employer arising out of a work injury.⁶⁰ Under this Missouri law, Dowis filed a tort action in Georgia seeking damages against Mud Slingers.⁶¹ Dowis sought to have Missouri's workers' compensation law apply. Under the exclusive remedy provision of the Georgia Workers' Compensation Act⁶² and the doctrine of *lex loci delicti*, Mud Slingers obtained summary judgment below.⁶³

The court, affirming the grant of summary judgment, reasoned that the "relative certainty, predictability, and ease of the application of *lex loci delicti*, even though sometimes leading to results which may appear to be harsh, are preferable to the inconsistency and capriciousness that the replacement choice-of-law approaches have wrought."⁶⁴

In the landlord liability case of *Dolphin Realty v. Headley*,⁶⁵ the Georgia Court of Appeals applied the long standing principle that a "tenant will be precluded from recovery, even where such prior acts

are known to the landlord...when he or she has equal or superior knowledge of the risk and fails to exercise ordinary care for his or her own safety."⁶⁶

"Superior knowledge," assigned to the tenant in this case, resulted from the fact that she had been previously attacked by the same person, in the apartment complex laundry room, and the assailant at the time of the first attack, "told [her] he would give her some advice - 'not to go out after dark and not to do laundry after dark.'"⁶⁷ The court of appeals in finding the tenant had superior knowledge stated "[h]ere, after being told by the assailant not to continue to do laundry after dark, [the tenant] proceeded to do just that, knowing her belief as alleged here, that the lighting was insufficient and foliage interfered with some lighting."⁶⁸

The Georgia Supreme Court addressed an issue of first impression, in response to a certified question from the United States Court of Appeals for the Eleventh Circuit, in *CSX Transportation, Inc. v. Williams*,⁶⁹ holding that "Georgia's negligence law does not impose any duty on an employer to a third-party, non-employee, who comes into contact with its employee's asbestos-tainted work clothing at locations away from the workplace."⁷⁰ The plaintiff argued that it was reasonably foreseeable to CSX Transportation, Inc. that the clothing would become tainted, and, as such, CSX Transportation, Inc., "is under a duty to remove the hazard or give warning of the dangers so as to prevent others from being injured."⁷¹ The court rejected plaintiff's argument and stated that policy considerations supported that "an employer's duty to provide a safe workplace does not extend to persons outside of the workplace."⁷²

In a common carrier liability case, *MARTA v. Rouse*,⁷³ the Georgia Supreme Court commented on what constitutes "extraordinary care." The court held that "a common carrier, in exercising extraordinary care, must stay informed of safety advances and product design, but is not held to a *per se* rule that requires those

carriers to buy and incorporate those safety advances into previously-purchased, defective products."⁷⁴

B. *Proximate Cause*

In *Studio X, Inc. v. Weener, Mason & Nathan*,⁷⁵ the Georgia Court of Appeals reaffirmed the standard of proximate cause in a legal malpractice action. The client has the burden of establishing three elements: (1) that it employed the attorney; (2) that the attorney failed to exercise ordinary care, skill and diligence; and (3) that such negligence was the proximate cause of damage to the plaintiff.⁷⁶ "Proximate cause in a malpractice action requires the plaintiff to demonstrate that but for the attorney's error, the outcome would have been different."⁷⁷ Attorneys are entitled to summary judgment if they show that there is an absence of proof that their errors were the proximate cause of their client's damages.⁷⁸

In *Thompson v. Thompson*,⁷⁹ a case involving two joint tortfeasors, where the non-settling joint tort-feasor proceeded to trial, the Georgia Supreme Court held that a jury charge that proximate cause is "sometimes called the dominant cause"⁸⁰ was reversible error based, in part that the words "dominant cause" conflict with the notion that an injury may have more than one proximate cause⁸¹ and, as such, use of the words risked misleading the jury.⁸²

In *Groover v. Johnson*,⁸³ a medical malpractice case, the Georgia Court of Appeals found that, even where a physician and his employer were negligent *per se* in violating a statute regarding limits on the extent to which physicians may delegate authority to nurses, it was not error for the trial court to deny partial summary judgment of the negligence *per se* claim because plaintiff had not shown proximate cause between violation of the statute and plaintiff's injuries.⁸⁴

C. *Discovery*

Several cases reiterated that a party who refuses to engage in discovery may find its lawsuit dismissed with prejudice.⁸⁵ When a party fails to respond to discovery, the court may sanction that party without the necessity of entering an order; but if the court does not enter an order, a hearing must be held before striking an answer or case dismissal.⁸⁶

D. *Work-Product Protection & Waiver*

In *McKesson Corp. v. Green*,⁸⁷ the Georgia Supreme Court held that "when a party discloses materials that have attorney work-product protection to a government agency investigating allegations against the party, it waives the protection."⁸⁸

McKesson bought a company and later learned that it paid too much for the company because its common stock had been overvalued due to accounting fraud.⁸⁹ To investigate the accounting problems, McKesson hired an accounting firm to perform an audit. The accounting firm set forth its findings in a 180-page report supported by three volumes of back-up materials and interview memoranda.⁹⁰

McKesson voluntarily provided the audit documents to the SEC and the United States Attorney's Office, both of which were conducting their own investigations, pursuant to confidentiality agreements specifying that McKesson was not waiving work-product protection.⁹¹

Many of McKesson's shareholders, after a large decline in McKesson's stock, sued McKesson alleging that they had incurred stock losses as a result of the accounting fraud.⁹² During litigation, the shareholders sought the audit report which McKesson claimed was work-product.⁹³

The court reasoned that McKesson waived work-product protection by giving the audit report to the SEC because the SEC had been an actual or potential adversary of McKesson when the documents were voluntarily produced.⁹⁴

Even though McKesson had a confidentiality agreement with the SEC, the court noted that the case for waiver was stronger because the confidentiality agreement allowed the SEC to give the documents to others if it deemed that course of action to be "in furtherance of the [SEC's] discharge of its duties and responsibilities."⁹⁵ Thus, McKesson could not be certain that the audit documents would not be disclosed to others.⁹⁶

E. Statutes of Limitation

The Georgia Supreme Court's holdings in *Tiismann v. Linda Martin Homes Corp.*⁹⁷ and *Scully v. First Magnolia Homes*,⁹⁸ affect the limitations period for a claimant to file a lawsuit for shoddy realty construction.

The court held that the two-year statute of limitations for cases brought pursuant to the Fair Business Practices Act of 1975⁹⁹ is not triggered "until the violation of the statute occurs and plaintiff is entitled to bring an action and seek a remedy."¹⁰⁰ As such, the court stated that the statute was triggered on the date the faulty realty was conveyed to the plaintiff, rather than the date the violation of the statute occurred.¹⁰¹

The court also held that where a "contractor makes improvements to his own real property for the express purpose of sale and the property actually is sold, the applicable period of limitations for claims of damage to realty does not begin to run until the date of purchase of the improved property, regardless of the date of substantial completion."¹⁰²

F. Consumer Protection

In *Henderson v. Gandy*,¹⁰³ the Supreme Court of Georgia held that Georgia's Fair Business Practices Act of 1975 [FBPA]¹⁰⁴ does not apply to physicians in connection with providing medical services.¹⁰⁵

Henderson was admitted by Dr. Gandy to the hospital for emergency bypass surgery.¹⁰⁶ During Henderson's post-operative recover, he developed a bed sore which later became necrotic and resulted in his death.¹⁰⁷ Henderson's surviving spouse filed suit against Dr. Gandy, his professional corporation, and the hospital alleging medical malpractice and violation of Georgia's Fair Business Practices Act of 1975.¹⁰⁸ Dr. Gandy sought and was granted partial summary judgment in the court below.¹⁰⁹

In addressing this issue of first impression, the court adopted the rationale of the Connecticut Supreme Court set forth in *Haynes v. Yale-New Haven Hospital*,¹¹⁰ that "the touchstone for a legally sufficient [FBPA] claim against a health care provider is an allegation that an entrepreneurial or business aspect of the provisions of services aside from medical competence is implicated. . . Medical malpractice claims recast as [FBPA] claims cannot form the basis for a [FBPA] violation. To hold otherwise would transform every claim for medical malpractice into a [FBPA] claim."¹¹¹

G. Arbitration/Res judicata

The Georgia Court of Appeals, in *Yates Paving & Grading Co., Inc. v. Bryan County*,¹¹² addressed an issue of first impression regarding whether the trial court, or an arbitrator, decides the *res judicata* effect of a prior arbitration award in a subsequent arbitration.¹¹³ The court held that the decision is one for an arbitrator to decide and not the courts.¹¹⁴ The Georgia Supreme Court has granted certiorari on this issue.

H. Cross-claims/*Res judicata*

Sani-Agri Services, Inc. v. City of Albany,¹¹⁵ and *Suggs v. Hale*,¹¹⁶ serve as reminders that, although cross-claims are permissive in Georgia,¹¹⁷ *res judicata* can operate to bar a cross-claim in a subsequent action where a previous action involved an adjudication by a court of competent jurisdiction, the two actions had the same parties and subject matter, and the party against whom the doctrine of *res judicata* is raised had a full and fair opportunity to litigate the issues in the first action.¹¹⁸

I. Necessity of Timely Objections

Several recent cases reiterate that objections must be timely made to preserve issues for appellate review.

In *Booker v. Older Americans Council of Middle Georgia, Inc.*,¹¹⁹ the plaintiff waived for appellate review the claim that defense counsel made improper argument during the trial. The waiver occurred because no objection was made at time of the improper argument.¹²⁰ Additionally, when the matter was brought to trial court's attention during a bench conference resulting in the trial court informing defense counsel that line of argument was improper and would not be allowed, plaintiff did not ask the trial court to give curative instruction to jury.¹²¹

In *Peacock v. Spivey*,¹²² the Georgia Court of Appeals held that a property owner's claim that a state employee, who was individually named as defendant in the property owner's suit for alleged contamination of the property owner's land, should not have been appointed by the trial court to supervise cleanup of land following settlement of lawsuit, was waived for appellate review, where the property owner failed to timely object or file a motion to disqualify the state official.¹²³

In *Cherokee Nat'l Life Ins. Co. v. Eason*,¹²⁴ the Georgia Court of Appeals held that the insurer's argument that it was not liable for attorney fees since it did not act in bad faith, even if it was stubbornly litigious, was not preserved for several reasons: (1) the insurer specifically acquiesced and aided in the jury's consideration of stubborn litigiousness as grounds for the award of attorney fees; (2) even though the trial court told counsel they could reserve objections to the charge until after the transcript was prepared, the insurer failed to object to the verdict form or legality before deliberations began; (3) the insurer stated no objection to the form of the verdict after it was returned; (4) the insurer failed to object to either the court's proposed or actual response to the jury's inquiry regarding stubborn litigiousness and attorney fees; and (5) the insurer specifically agreed with the court's proposed instruction which would allow the jury to consider stubborn litigiousness in determining whether attorney fees would be awarded.¹²⁵

In *Ferqueron v. State Farm Mut. Auto. Ins. Co.*,¹²⁶ in an action against an underinsured motorist carrier, the Georgia Court of Appeals held that the insured, who had agreed to the use of general verdict form, had a duty to bring to the trial court's attention the need for a special verdict form before the jury was excused and, therefore, could not complain on appeal that the verdict should have indicated that an award for pain and suffering was not subject to reduction by workers' compensation.¹²⁷

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¹ Ga. Const. art. VI, § 2, para. 6.

² Ga. Const. art. VI, § 2, para. 4.

³ *Ross v. Battle*, 117 Ga. 877, 880, 45 S.E. 252 (1903).

⁴ See Ga. L. 1999, p. 734, § 2, stating the intent of the General

Assembly "to provide for a fairer and more predictable rule of venue ... [and] to eliminate the waste of time and resources to courts and parties under the vanishing venue doctrine."

⁵ Ga. Const. art. VI, § 2, para. 4.

⁶ O.C.G.A. § 9-10-31.1(a) (Supp. 2005).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ O.C.G.A. § 9-10-31(c) (1982 & Supp. 2005).

¹¹ *Glover v. Donaldson*, 243 Ga. 479, 482-83, 254 S.E.2d 857, 859-60 (1979).

¹² O.C.G.A. § 9-11-9.1 (2000 & Supp. 2005).

¹³ *Id.*

¹⁴ O.C.G.A. § 9-11-9.2 (Supp. 2005).

¹⁵ Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.). Privacy provisions set forth in 45 C.F.R. § 164.501.

¹⁶ U.S. Const. Art. VI.

¹⁷ *See, e.g.*, Alabama R.Civ.P. 68; Alaska R.Civ.P. 68; Alaska Statute § 9.30.065 (2001); Arizona R.Civ.P. 68; Arkansas R.Civ.P. 68; California Civil Procedure Code § 998 (2002); Colorado Rev.Statutes Ann. § 13-17-202 (2002); Conn. Gen. Statutes Ann. § 52-195 (2002); Del.Code Ann. Tit. VII, § 68 (2002); D.C. R.Civ.P. 68; Fla. Statutes Ann. § 768.79 (2002); Hawaii R.Civ.P. 68; Idaho R.Civ.P. 68; Indiana R.Civ.P. 68; Kansas Civil Procedure Code Ann. § 60-2002 (2001); Kentucky R.Civ.P. 68; Maine R.Civ.P. 68; Mass. R.Civ.P. 68; Michigan R.Civ.P. 2.405; Minn. R.Civ.P. 68; Miss. R.Civ.P. 68; Montana R.Civ.P. 68; Nebraska Rev. Statutes § 25-901 (2001); Nevada R.Civ.P. 68; New Jersey R.Civ.P. 4:58-1 to -3; New Mexico R.Civ.P. 1-068; New York C.P.L.R. 3221 (McKinney 2002); North Dakota R.Civ.P. 68; Ohio R.Civ.P. 68; Oklahoma Statutes Ann. Tit. 12, § 940 (2002); Oregon R.Civ.P. 54; Pennsylvania R.Civ.P. 238; Rhode Island R.Civ.P. 68; South

Carolina Statutes Ann. § 15-35-400 (2005); South Carolina R.Civ.P. 68; South Dakota Codified Laws § 15- 6-68 (2002); Tenn. R.Civ.P. 68; Utah R.Civ .P. 68; Vermont R.Civ.P. 68; Washington R.Civ.P. 68; West Virginia R.Civ.P. 68; Wisconsin Statutes Ann. § 807.01 (2002); Wyoming R.Civ.P. 68 (2003).

¹⁸ O.C.G.A. § 9-11-68(a)(1)-(8) (Supp. 2005).

¹⁹ O.C.G.A. § 9-11-68 (Supp. 2005).

²⁰ O.C.G.A. § 9-15-14 (Frivolous Claims and Defenses); O.C.G.A. § 51-7-80 *et seq.* (Abusive Litigation); and O.C.G.A. § 13-6-11 (Stubbornly Litigious, Unnecessary Trouble).

²¹ O.C.G.A. § 9-11-68(e) (Supp. 2005).

²² O.C.G.A. § 9-11-68(b) (Supp. 2005).

²³ O.C.G.A. § 9-11-68(a)(2) (Supp. 2005).

²⁴ *See* Muenster v. Suh, 2005 WL 2476223 (Ga.Super.).

²⁵ O.C.G.A. § 24-3-37.1(c) (Supp. 2005).

²⁶ *But see* Widner v. Brookins, Inc., 236 Ga. App. 563, 512 S.E.2d 405 (1999); Steverson v. Eason, 194 Ga. App. 273, 390 S.E.2d 424 (1990).

²⁷ 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

²⁸ O.C.G.A. § 24-9-67.1(c) (Supp. 2005).

²⁹ *Id.*

³⁰ O.C.G.A. § 24-9-67 (1982); Buckhanon v. State, 151 Ga. 827, 108 S.E 209 (1921).

³¹ O.C.G.A. § 24-9-67.1(d) (Supp. 2005).

³² *Id.*

³³ Harper v. State, 249 Ga. 519, 292 S.E.2d 389 (1982).

³⁴ O.C.G.A. § 24-9-67.1(b)(1) (Supp. 2005).

³⁵ O.C.G.A. § 33-3-27(b) (1982 & Supp. 2005).

³⁶ O.C.G.A. § 43-34-37(i).

³⁷ *Id.* § 43-34-37(j).

³⁸ O.C.G.A. § 51-1-29.5(c) (Supp. 2005).

³⁹ *Id.* § 51-1-29.5(d) (Supp. 2005).

⁴⁰ *Id.* § 51-1-29.5(a)(5) (Supp. 2005).

⁴¹ *Id.* § 51-1-29.5(b), (c) (Supp. 2005).

⁴² O.C.G.A. § 51-1-29.5(d) (Supp. 2005).
⁴³ *Id.* § 51-1-29.5(c) (Supp. 2005).
⁴⁴ O.C.G.A. § 51-12-31 (2000 & Supp. 2005).
⁴⁵ As does the fact the legislature revived "vanishing venue."
⁴⁶ O.C.G.A. § 51-12-33(a) (Supp. 2005).
⁴⁷ *Id.* § 51-12-33(b) (Supp. 2005).
⁴⁸ *Id.* § 51-12-33(d)(1), (d)(2) (Supp. 2005).
⁴⁹ *Id.* § 51-12-33(c) (Supp. 2005).
⁵⁰ O.C.G.A. § 51-13-1 (Supp. 2005).
⁵¹ *Id.* § 51-13-1(b) (Supp. 2005).
⁵² *Id.* § 51-13-1(d) (Supp. 2005).
⁵³ *Id.* § 51-13-1(e) (Supp. 2005).
⁵⁴ 279 Ga. 808, 621 S.E.2d 413 (2005).
⁵⁵ Restatement (Second) Conflict of Laws (1971).
⁵⁶ 279 Ga. 808, 816, 621 S.E.2d 413, 419 (2005).
⁵⁷ *Id.* at 808, 621 S.E.2d 413 (2005).
⁵⁸ *Id.*
⁵⁹ *Id.*
⁶⁰ *Id.*
⁶¹ *Id.*
⁶² O.C.G.A. § 34-9-11 *et seq.*
⁶³ 279 Ga. 808, 621 S.E.2d 413 (2005).
⁶⁴ *Id.* at 816, 621 S.E.2d 413, 419 (2005).
⁶⁵ 271 Ga. App. 479, 610 S.E.2d 99 (2005).
⁶⁶ *Id.* at 481, 610 S.E.2d at 102 (quoting *Habersham Venture v. Breedlove*, 244 Ga. App. 407, 409-10, 535 S.E.2d 788, 790 (2000)).
⁶⁷ *Id.* at 479, 610 S.E.2d at 101.
⁶⁸ *Id.* at 482, 610 S.E.2d at 103.
⁶⁹ 278 Ga. 888, 608 S.E.2d 208 (2005).
⁷⁰ *Id.* at 891, 608 S.E.2d at 210.
⁷¹ *Id.* (quoting *United States v. Aretz*, 248 Ga. 19, 26, 280 S.E.2d 345, 350-51 (1981)).
⁷² *Id.*

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- ⁷³ 279 Ga. 311, 612 S.E.2d 308 (2005).
- ⁷⁴ *Id.* at 315, 612 S.E.2d. at 311.
- ⁷⁵ 276 Ga. App. 652, 624 S.E.2d 157 (2005).
- ⁷⁶ *Id.*
- ⁷⁷ *Id.* at 653, 624 S.E.2d at 158.
- ⁷⁸ *Id.*
- ⁷⁹ 278 Ga. 752, 605 S.E.2d 30 (2004).
- ⁸⁰ *Id.* at 754, 605 S.E.2d at 32 (quoting *John Crane, Inc. v. Jones*, 278 Ga. 747 at 752, 604 S.E.2d 822 at 826 (2004)).
- ⁸¹ *Id.* at 753-754, 605 S.E.2d at 32.
- ⁸² *Id.*
- ⁸³ 277 Ga. App. 12, 625 S.E.2d 406 (2005).
- ⁸⁴ *Id.* at 17, 625 S.E.2d at 410.
- ⁸⁵ *See* *Russaw v. Burden*, 272 Ga. App. 632, 634-35, 612 S.E.2d 913, 915 (2005) (attorney did not appear at hearing regarding dismissal); *Woods v. Gatch*, 272 Ga. App. 642, 644, 613 S.E.2d 187, 190 (2005) (willful failure to appear for depositions warranted dismissal); *Smith v. Glass*, 273 Ga. App. 327, 327-28, 615 S.E.2d 172, 173 (2005) (dismissal of case where plaintiff failed to appear at rule nisi hearing and offered neither excuse nor explanation for failure to appear).
- ⁸⁶ *Greenbrier Homes, Inc. v. Builders Ins.*, 273 Ga. App. 344, 346-47, 615 S.E.2d 191, 193-94 (2005).
- ⁸⁷ 279 Ga. 95, 610 S.E.2d 54 (2005).
- ⁸⁸ *Id.*
- ⁸⁹ *Id.* at 95-96, 610 S.E.2d 54-56.
- ⁹⁰ *Id.*
- ⁹¹ *Id.*
- ⁹² *Id.*
- ⁹³ *Id.*
- ⁹⁴ *Id.* at 96, 610 S.E.2d at 56.
- ⁹⁵ *Id.* at 97, 610 S.E.2d at 57.
- ⁹⁶ *Id.*
- ⁹⁷ 279 Ga. 137, 610 S.E.2d 68 (2005).

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- ⁹⁸ 279 Ga. 336, 614 S.E.2d 43 (2005).
- ⁹⁹ O.C.G.A. §§ 10-1-390 to -407 (2000 & Supp. 2005).
- ¹⁰⁰ 279 Ga. 137, 140, 610 S.E.2d 68, 70 (2005).
- ¹⁰¹ *Id.*
- ¹⁰² 279 Ga. 336, 338-39, 614 S.E.2d 43, 46 (2005) (quoting *Colormatch Exteriors v. Hickey*, 275 Ga. 249, 251, 569 S.E.2d 495 (2002)).
- ¹⁰³ 280 Ga. 95, 623 S.E.2d 465 (2005).
- ¹⁰⁴ O.C.G.A. § 10-1-390 *et seq.*
- ¹⁰⁵ 280 Ga. 95, 623 S.E.2d 465 (2005).
- ¹⁰⁶ *Id.*
- ¹⁰⁷ *Id.*
- ¹⁰⁸ *Id.*
- ¹⁰⁹ *Id.*
- ¹¹⁰ 243 Conn. 17, 35, 699 A.2d 964 (1997).
- ¹¹¹ 280 Ga. 95, 98, 623 S.E.2d 465, 468 (2005).
- ¹¹² 275 Ga. App. 347, 620 S.E.2d 606 (2005).
- ¹¹³ *Id.*
- ¹¹⁴ *Id.* at 350, 620 S.E.2d 606 at 609.
- ¹¹⁵ --- S.E.2d ----, 2006 WL 509538 (Ga. App.).
- ¹¹⁶ --- S.E.2d ----, 2006 WL 177630 (Ga. App.).
- ¹¹⁷ O.C.G.A. § 9-11-13(g) (1982).
- ¹¹⁸ --- S.E.2d ---, 2006 WL 509538 (Ga. App.);--- S.E.2d ---, 2006 WL 177630 (Ga. App.).
- ¹¹⁹ --- S.E.2d ----, 2006 WL 725844 (Ga. App.).
- ¹²⁰ *Id.*
- ¹²¹ *Id.*
- ¹²² ---S.E.2d---, 2006 WL 820730 (Ga. App.).
- ¹²³ *Id.*
- ¹²⁴ 276 Ga. App. 183, 622 S.E.2d 883 (2005).
- ¹²⁵ *Id.* at 187, 622 S.E.2d at 887.
- ¹²⁶ 271 Ga. App. 572, 610 S.E.2d 184 (2005).
- ¹²⁷ *Id.* at 576, 610 S.E.2d at 187.

UNDOCUMENTED WORKERS IN THE WORKERS' COMPENSATION SETTING A MULTI-STATE SURVEY

*By Richard A. Watts**

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I. INTRODUCTION

A famous legal maxim reminds us that the power of the lawyer is in the uncertainty of the law. Never has a maxim been more true than in cases dealing with undocumented workers. As of the date of this paper, nearly one third of the states have not addressed the issue of whether undocumented workers are entitled to workers' compensation benefits when hurt on the job. Several states include undocumented workers in their definition of employee and automatically provide benefits to the undocumented worker. Several states have decided exactly the opposite, that undocumented workers are not eligible for workers' compensation benefits. Still other states deal with non-resident alien dependents in a death case in a manner different from resident alien dependants. In many states, light duty return to work rules are different for undocumented workers.

The purpose of this paper is to provide a "big picture" analysis of how undocumented workers are handled in different workers' compensation arenas. Untold numbers of undocumented aliens enter the United States each year in order to take advantage of the opportunities so prevalent here. Statistics from the United States Immigration and Naturalization Service prove conclusively that the number of undocumented workers residing within the borders of the United States continues to grow by leaps and bounds. According to the Immigration and Naturalization Service's own statistics, about five million undocumented workers were residing in the United States in October, 1996. (www.ins.usdoj.gov.) The population of undocumented immigrants was estimated to be growing about 275,000.00 per year. The seven states with the largest numbers of undocumented immigrants were California (2.0 million), Texas (700,000), New York (540,000), Florida (350,000), Illinois (290,000), New Jersey (135,000), and Arizona (115,000). These numbers are increasing everyday. The issue will not go away. It is important to realize that the rules are inconsistent from state to state and to understand the analysis behind each state's decision making process.

In this paper I will discuss the status of the federal law with regard to undocumented workers, the compensability issues and how they are dealt with from state to state, and other specific issues regarding undocumented workers in the workers' compensation arena.

II. FEDERAL LAW AND UNDOCUMENTED WORKERS

The hiring of foreign workers is governed by federal law and regulations including 8 U.S.C. §1324(a), the Federal Immigration Reform and Control Act of 1986 ("IRCA"), and 8 C.F.R. §274(a).1 et.seq. Under IRCA, it is unlawful for an employer to knowingly employ an undocumented worker who is not authorized to work in the United States. The IRCA does not prohibit an undocumented worker from seeking or accepting employment in the United States. See, Champion Auto Body v. Gallegos, 950 P.2nd 671 (Colo. App. 1997). However, 8 U.S.C. §1324c(a) makes it a crime for undocumented workers to undermine the employer verification system by forging or providing forged documents. The Supreme Court has acknowledged that falsification of documents is an illegal act. See, Hoffman Plastic Compounds, Inc. v. National Labor Relations Board.

Section 1324(a) of the IRCA provides:

It is unlawful for a person or other entity:

(A) to hire, or recruit or refer for a fee for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment, or
(B)(i) to hire for employment in the United States an individual without complying with the requirements

of subsection(b) of this section [which requires employer to keep an I-9 immigration form and inspect and keep copies of, various types of documents an employee may provide to show they have the proper documents to be allowed to work in the United States.].

This code section also provides:

(2) It is unlawful for a person or other entity, after hiring an alien for employment in accordance with (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

8C.F.R. Section 274(a).1 defines the words “hire” and “employment” as follows:

(c) The term hire means the actual commencement of an employee for wages or other remuneration. For purposes of subsection 274A(a)(4) of the Act and section 274a.5 of this part, a hire occurs when a person or entity uses a contract, subcontract or exchange entered into, renegotiated or extended after November 6, 1986, to obtain the labor of an alien in the United States, knowing that the alien is an unauthorized alien;

(h) The term employment means any service or labor performed by an employee for an employer within the United States, including service or labor performed on a vessel or aircraft that has arrived in the United States and has been inspected, or otherwise included within the provisions of the Anti-Reflagging Act codified at 46 U.S.C. 8704, but not including duties

performed by non-immigrant crewman defined in sections 101(a)(10) and (a)(15)(D) of the Act.

Based upon these federal laws and regulations, it appears quite clear that an employer may not lawfully employ an illegal alien or continue to employ an illegal alien once the employer is notified and verifies that they are in the country illegally. Further, the Supremacy Clause of the United States Constitution provides that when federal law and state law conflict, federal law will prevail. This doctrine creates two schools of thought with regard to unlawful aliens:

1) If the undocumented worker is not legal to be here, and cannot legally be hired, why should they be allowed to receive workers' compensation benefits at all?

Or:

2) If you allow employers to escape liability for on the job injuries when an undocumented worker is hurt, you actually promote or encourage employers to break the law and hire illegals. This thwarts the purposes of the federal law. So, workers' compensation should be provided regardless of alienage.

Thus, our conflict.

III. INDIVIDUAL STATES AND UNDOCUMENTED WORKERS

Most states that have decided the issue have found that undocumented workers are entitled to workers' compensation benefits, but the states have arrived at this decision through varied analysis. Many states remove all ambiguity regarding undocumented workers by specifically including them in their definition of "employee" in their workers' compensation statute. Florida,

Nebraska and North Carolina have all dealt with undocumented workers in this manner. Other states have court decisions including undocumented aliens into their worker's compensation act.

A) States allowing recovery by undocumented aliens

Many states have judicially decided case law which allows workers' compensation benefits to be awarded to undocumented workers. Louisiana is one of those states. In Artiga v. M. A. Patout And Son, 671 So.2d 1138 (La. Ct. App. 1996) the Louisiana Court of Appeals held that the State Workers' Compensation Act did not exclude illegal aliens from receiving benefits, when justified. In that case, the employer paid benefits for several months after an undocumented employee injured his back, but ceased payments when it was informed by the INS that the employee was illegal. The alien filed a claim with the Workers' Compensation Office, and the Administrative Law Judge held that this undocumented worker could be denied the right to pursue benefits. However, the Court of Appeals reversed, and held that the Louisiana Workers' Compensation Act, (La.R.S. §23:1035(A)) implicitly included illegal aliens under the definition of employee. Under that definition, an employee was "every person" performing services for hire. Moreover, the Act excluded several categories of workers, but did not exclude illegal aliens. For these reasons, the Court held that an undocumented workers could receive workers' compensation benefits in Louisiana.

Oklahoma courts have also included undocumented workers as employees under their Workers' Compensation Act. In Lang v. Landeros, 918 P.2d 404 (Okla. Ct. App. 1996), Landeros, an illegal alien, was injured while working in a restaurant and filed for workers' compensation benefits. The Workers' Compensation Court in Oklahoma ordered payment of Landeros' workers' compensation benefits. The Oklahoma Appellate Court affirmed and reasoned that, under Oklahoma's Workers' Compensation Act, the definition of "employee" included "any person" engaged in employment, and the

statute made no reference to the citizenship status of the employee. Therefore, Oklahoma law did not preclude compensation for injured employees who happen to be undocumented workers.

The State of Connecticut has also provided protection to undocumented workers. In Dowling v. Slotnik, 712 A.2d 396 (Conn. 1998) the Slotniks hired Victoria Dowling, an undocumented worker, as their live-in nanny. Dowling slipped and fell on the Slotniks' icy driveway, and injured her right arm and hand. Although she brought a timely claim for workers' compensation benefits, the Slotniks had never obtained workers' compensation insurance or health insurance coverage for Dowling. However, the Commissioner found that Dowling's injuries caused her to become disabled for over a year, and ordered the Slotniks to pay disability benefits.

The Slotniks appealed all the way to the Supreme Court of Connecticut. That Court found that the IRCA neither expressly or implicitly pre-empted Connecticut from awarding workers' compensation benefits to an illegal alien. The Court reasoned that there was a strong presumption against pre-emption of state and local legislation aimed at public health and safety, such as workers' compensation legislation. The Supreme Court of Connecticut did acknowledge that the IRCA was intended to reduce the incentives for employers to hire illegal aliens by imposing civil and criminal sanctions against employers who normally employ unauthorized workers. The Court, however, rejected the Slotniks argument that providing the workers' compensation benefits to illegal aliens would frustrate the purpose of the IRCA removing the "magnet" that draws illegal aliens to the United States. The Court believed that illegal aliens do not enter the United States with the hopes of obtaining workers' compensation benefits. Moreover, excluding illegal aliens from receiving workers' compensation benefits would give employers incentive to hire undocumented workers.

The Supreme Court of Connecticut also rejected the claim that illegal aliens were not “employees” under §31-275(9) eligible for workers’ compensation benefits. The statute defined “an employee” as “any person” who has entered into a contract of service with an employer. Although the Court did note that the statute did not include illegal aliens, the term “any” strongly suggested that the Legislature intended to include all workers - even those illegally present in the United States.

One Justice in this case wrote a dissenting opinion. He based his dissent on what he believed was a “common sense” position that an illegal alien engaged in an illegal contract of employment could not be entitled to benefits. Employment benefits such as workers’ compensation served, according to the Justice, as an incentive for illegal immigrants to remain in the United States and the majority’s decision frustrated the goal of Congress to stem illegal immigration into the United States.

In New Jersey, the Court of Appeals found that, to be eligible for workers’ compensation benefits, all that was required was a contract for hire of employment and an injury arising out of employment. See Fernandez-Lopez v. Jose Cervino, 671 A.2d 1051 (1996).

Texas has invoked the Equal Protection Clause of the United States in order to award workers’ compensation benefits to undocumented workers. In Commercial Standard Fire & Marine Co. v. Galindo, 484 S.W.2d 635 (Tex. Ct. Civ. App. 1972), a Texas Appellate Court held that illegal aliens were entitled to workers’ compensation benefits under Texas Law and the Equal Protection Clause of the U. S. Constitution. Although Galindo was an illegal alien and had been deported eight times before his injury, the Court determined that his contract for employment with Commercial Standard did not aid him in entering the United States illegally. Galindo was therefore covered by the Workers’ Compensation Act of

Texas, and entitled to benefits. The Court also pointed out that the Equal Protection Clause not only applied to United States citizens, but all individuals residing within the borders of the United States as well - illegal or legal. Therefore, all illegal aliens seeking recovery for work, labor, and services were protected under the Equal Protection Clause, and were entitled to receive workers' compensation benefits even though their entry into the United States violated immigration laws.

B) States not allowing recovery

Some states have refused to award workers' compensation benefits to undocumented workers. The highest courts of both Virginia and Wyoming have held that illegal aliens are not entitled to workers' compensation benefits. The Virginia Court has since been legislatively over-ruled, but the analysis of the Virginia and the Wyoming Courts is worth addressing. Both states reached their decisions by focusing on the IRCA and the term "employee" in the Workers Compensation Statutes of each state.

In Granados v. Windson Development Corp., 509 S.E.2d 290 (Va. 1999), the Virginia Supreme Court held that an illegal alien cannot be considered an "employee" under the Workers' Compensation Act because the Immigration Control and Reform Act of 1986 prohibits illegal aliens from entering into an employment contract in the United States, and therefore precluded an award of workers' compensation benefits. The Virginia Supreme Court affirmed the commission's denial of benefits to Granados, an illegal alien, based on the language of Virginia's workers' compensation statute and IRCA. Under §65.2-101 of the Virginia Code, an "employee" is defined as "every person, including a minor, in the service of another under any contract of hire." According to the Court, an undocumented worker cannot be lawfully employed in the United States, thus precluding Granados from legally contracting and receiving workers' compensation benefits as a "employee" and

rendering the employment contract between Granados and Windson null and void. The Court also rejected Granados' argument that the denial of benefits violated the Equal Protection Clause. The Commission denied him benefits not because he was an illegal alien, but because he failed to demonstrate the threshold burden that he met the definition of "employee" under the Act. Subsequent to Granados, the Virginia Legislature amended the workers' compensation act to clarify the term "employee" to include "aliens".

The State of Wyoming has also precluded workers' compensation benefits to an illegal alien. In Felix v. Wyoming Workers' Safety & Compensation Division, 986 P2d 161 (Wyo. 1999), the Wyoming Supreme Court held that an alien who is not lawfully authorized to work in the United States is not considered an "employee" entitled to workers' compensation benefits. Brown Enterprises hired Felix, an unauthorized alien, to operate a potato seed cutter. Shortly thereafter, Felix injured his arm while operating the seed cutter, and both Felix and Brown filed a joint injury report to the Workers' Compensation Division. However, the Division denied benefits to Felix because he was not an "employee" under Wyoming's Statute Annotated §27-14-102(a)(v)(ii), and Felix appealed. According to the Court, benefits under the Wyoming Workers' Compensation Statute are only available to workers who meet the definition of "employee." Section 27-14-102(a)(vii) specifically included "legally employed minors and aliens authorized to work by the United States Department of Justice, Immigration, and Naturalization Service." The statute also contained thirteen exclusions that unauthorized aliens were not among those listed as exclusions. Although the Legislature was silent on the issue illegal aliens, the Court nonetheless determined that illegal aliens were not considered employees entitled to workers' compensation benefits; if the Legislature had intended to include all employed aliens within the coverage of workers' compensation, it would not have precisely stated "that aliens authorized to work here are considered employees." *Id.* at 164. Felix argued that unauthorized aliens should

be considered employees because the Legislature took the time to fashion thirteen exclusions that did not include illegal aliens in the list. However, the Court rejected this argument based upon the principal of *In Pari Materia* - all parts of the statute should be construed together. According to the Court, read as a whole the Wyoming statute excluded illegal aliens as “employees” and they were not entitled to workers’ compensation benefits.

IV. NON-RESIDENT ALIEN DEPENDANTS AND WORKERS’ COMPENSATION DEATH BENEFITS

While most states permit non-resident alien dependents to receive workers’ compensation benefits of a spouse, parent, or child that is killed on the job, Courts disagree on how much aliens residing outside the United States can receive compared to dependents within the United States borders. Some states mandate that non-resident and resident alien dependents receive the same amount of benefits. See Arkansas (A.C.A. §11-9-111); Minnesota (M.S.A. §176.161); Mississippi (M.C.A. §71-3-27); New York (N.Y. Workers’ Compensation Law §17); Ohio (Oh. St. §4123.90); and West Virginia (W. V. St. §23-4-15a).

Several other states permit non-resident alien dependents to receive as little as 50% of the benefits that would be received by resident dependents. See Arizona (A.R.S. §23-1046 C - death benefits paid to an alien not residing in the United States shall be only 60% of benefits paid to alien residents in the United States); Delaware (19 Del. §2333 - compensation to non-resident alien dependents should be 50% of amount paid to residents); Kentucky (K.R.S. §342.130 - compensation to non-resident alien dependents shall be 50% of the amount provided for residents); and Washington - Hawksworth v. Clifford, 226 P. 272 (Wash. 1924) (non-resident alien dependents allowed only 50% of compensation ordinarily allowed to residents).

Several other states disagree on the issue of whether or not non-resident alien dependents can challenge state laws limiting benefits on equal protection grounds. Georgia, Illinois, Arizona and Utah have held that non-resident aliens challenging the constitutionality of states limiting workers' compensation benefits (specifically death benefits) lack the requisite standing to do so. In Barge-Wagener Construction v. Morales, 429 S.E.2d 671 (1993), the Georgia Supreme Court held that treating non-resident alien dependents differently than resident survivors in awarding death benefits did not violate the Equal Protection Clause of either the Georgia or the United States Constitution, nor did non-resident aliens challenge state law by "stepping into the deceased's shoes." According to the Supreme Court of Georgia, aliens residing outside the United States could not invoke the Constitution or protections reserved for citizens and residents. Moreover, the death benefits vested in the alien dependents, not in the deceased himself; therefore, the survivors of the worker could not assert the constitutional rights of the deceased worker in order to challenge the constitutionality of the Georgia Statute. However, the Georgia Legislature repealed the statutory provision limiting death benefits recovery for non-resident aliens the year after the Barge Wagener decision. See also, Garabe v. Industrial Commission, 666 N.E.2d 1 (Ill. 1996) (non-resident alien dependents cannot invoke Equal Protection Clause to challenge Illinois law awarding only 50% compensation for deceased worker); Pena v. Industrial Commission of Arizona, 683 P.2d 309 (Ct. App. 1984) (non-resident alien dependents not entitled to Equal Protection, and could not challenge Arizona Law allowing them to only recover 60% of benefits awarded to other dependents); Martinez v. Industrial Commission, 720 P.2d 416 (Utah 1986) (Utah law limiting death benefits for non-resident alien dependents to 50% of resident dependents did not violate the Equal Protection Clause nor interfere with the United States power regarding immigration and treaties.)

However, a few states have done exactly the opposite and invalidated their own laws limiting benefits to non-resident aliens on

equal protection grounds, including Florida and Kansas. In De Ayala v. Florida Farm Bureau Casualty Ins. Co., 543 So.2d 204 (Fla. 1989), the Florida Supreme Court reviewed a workers' compensation statute which limited death benefit recovery for non-resident alien dependents to \$1,000.00. Although the employer argued that the alien dependents residing outside the United States did not have standing to challenge the Florida law, the Court rejected this argument, took a very different approach than Georgia did in Barge-Wagener. According to the Court, the case hinged not on the vested rights of the surviving family, but rather on the constitutional rights of the deceased worker. They found that any worker in Florida was entitled to the fruits of his or her labor, regardless of whether the dependents resided outside the United States or not. The DeAyala Court concluded that the non-resident alien dependents did have standing, and also struck down the statute as unconstitutional.

In Jurado v. Popejoy Construction Co., 853 P.2d 669 (Kan. 1993), the Supreme Court of Kansas adopted the approach of Florida and held that the Workers' Compensation Statute which limited non-resident alien dependents recovery of death benefits to \$750.00 while other dependents could recover up to \$200,000.00 was unconstitutional. The Court concluded that the constitutional rights of the deceased worker, not his dependents, governed.

V. DISCOVERY ISSUES

From a defense prospective, discovery is a very difficult part of a case involving a foreign national. Obviously, the use of a good translator during the deposition is very important. The interpreter should be sworn in independent of the claimant's swearing. Frequently, problems arise when a claimant answers a question in great length and the interpreter simply translates it as "yes." Situations also arise when the translator is talking back and forth with the claimant and then translates the answer. Such dialogue should not be allowed between the translator and the employee. The translator

should simply serve as a “conduit” for the words and state exactly what the employee is saying. This should be made clear to the interpreter at the very beginning. Make sure to stress to the translators that they are not to “guess” at the claimant’s answers and modify that answer in any way. If they do not understand the claimant’s accent or if they have any question as to what they are saying they should indicate such to the attorney and not speculate as to what is being said.

A) Pleading the Fifth Amendment

Quite often an employee who is an undocumented worker will plead the Fifth Amendment when asked under oath about his illegal alien status. Employers will do so based on the protection of the Fifth Amendment which allows them not to “self incriminate.” Although there is no case law available which would force a response to a question for which the employee requests Fifth Amendment protection, there are some ramifications to taking a Fifth Amendment plea. Several civil cases have found that pleading the Fifth Amendment in a civil case can allow the fact finder to construe the “non answer” against them. See Fidelity Banks Life Ins. Co. v. Wedco, Inc., 586 F. Supp. 1123 (D.C. Nev. 1984). Asserting the Fifth Amendment in pre-trial depositions can also allow the fact finder to consider the implication as circumstantial evidence of wrongful conduct by the defendant since it hampers the other side’s trial or hearing preparation. See F. T. C. v. Kitco of Nevada, Inc., 612 F. Supp. 1282 (D.C. Minn. 1985). When a person asserts the Fifth Amendment privilege he or she normally receives a judicial ruling on the validity of the claim and he has an opportunity to reconsider before being penalized for refusal to answer. Rogers v. Webster, 776 F.2d 607 (1985). Even if an undocumented worker does not answer the question, the inference can be drawn by the fact finder that he is, in fact, undocumented and illegal. That may be enough to meet the burden of proof when using the illegal alien defense.

B) Discriminatory Discovery

Some extremely aggressive claimants' lawyers have taken the position that asking an employee about his alienage or about his status as an illegal alien constitutes a "discriminatory practice" which may be redressable under federal law. The position is that the INS Regulations specify that an employer cannot require the individual to produce a particular type of work authorization. 8 C.F.R. §8274a.2(b)(1)(v). In addition, §274 B(a)(6) of the INA makes it an unfair immigration related practice to request more documents than the law requires or to refuse documents that on their face appear genuine. 8 U.S.C. §1324b(a)(6). An employer who engages in such conduct can be subject, according to these claimants lawyers, to charges under the IRCA's anti-discrimination provisions or under Title VII of the Civil Rights Act of 1964. Some claimants attorneys even go so far as to say that asking the questions regarding alienage under oath during the deposition violates these anti-discrimination provisions.

The theory is that the defense attorney taking the deposition would never ask a question regarding alienage but for the surname of the claimant. For example, if the claimant has the Hispanic surname of Fernandez, the question regarding the alienage would be asked. If the claimant's last name were Smith, the question would not be asked. The theory is that the motivation to ask the question is discriminatory on its face and, therefore, constitutes discovery abuse. It is argued further that the alienage of the employee is irrelevant to the claim.

First, all defense attorneys taking these depositions can avoid the claim of discovery abuse if they ask the alienage questions of every single claimant they depose. Then, it cannot be argued that the surname was the impetus for the questioning. Second, it is difficult to imagine a fact finder agreeing with the analysis that the alienage of the employee is irrelevant in light of the case law discussed above

regarding how illegal aliens are dealt with case to case. It may not even be admissible, but it is certainly relevant and it is certainly discoverable.

Finally, this position extends to the potential discrimination of the employer as well. It is the contention of the claimant's attorneys that asking for a reverification of and new inspection of documents proving the eligibility of the claimants to work in the United States violates federal law. The list of justification for these "reverification events" is limited under the Immigration Laws and, according to this line of thinking, an injury on the job does not qualify as a "reverification event." The employer must assure that reverification the status of employees within the parameters of the law.

VI. REHABILITATION ISSUES

In most states, it is common to hire a rehabilitation counselor (both vocational and physical) to aid the claimant in returning to their job after an on the job injury. In light of the language in the IRCA which makes it unlawful to "recruit or refer for a fee" for employment an undocumented worker, is it arguably a violation of federal law for a rehabilitation counselor to provide vocational counseling for an undocumented worker.

Questions remain in this area. Can a vocational rehabilitation counselor legally prepare a claimant to return to a specific job? That would appear to violate a ban against "recruit or refer for a fee". If they cannot, how far can they go as a counselor to ready a claimant for a job? What exposure does the counselor have (legally) if they go beyond the acceptable return to work activities?

Some claimant's lawyers are trying to get around these issues by a two-prong strategy. First, they argue that the job training is actually training for the claimant to learn (once again) to "structure their activities." In other words, claimants are not being trained to

return to work, but being trained to return to a normal work type schedule. If claimants are being retrained to return to the work force, that is simply an ancillary result of the activities.

Second, claimant's attorneys are taking the position that this retraining is to provide claimant with skills for which they can search for a job back in their own home country. That way, the vocational counseling is not in violation of any federal law and is simply to get claimant back to work when they return to wherever claimant came from, originally.

VII. LIGHT DUTY ISSUES

Consider the following scenario: Employee shows up at your construction job site. He fills out an I-9 and provides a social security card and a driver's license. That employee is later hurt on the job. After the accident takes place, you find out that claimant is an undocumented worker and has provided to you false information and documents regarding his eligibility to work in the country. In your state, undocumented workers are eligible for benefits. The claim is initially picked up and wage and medical benefits are paid. At some point, the authorized treating physician returns the undocumented worker to light duty restrictions of no lifting of more than forty pounds and no repetitive bending. The employer may have work available within those restrictions. Your state law allows you to cut off workers' compensation benefits if claimant either returns to a light duty job or refuses suitable light duty. Can you offer that job?

Again, the IRCA provides that it is unlawful for a person to "hire, recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien." Of course, you now have suspicion that this person is undocumented and illegal. If you offer them a light duty job that is available, you may be violating federal law.

There are essentially two choices here. An employer could argue that benefits should immediately be suspended because, under the applicable law, you could normally extinguish your workers' compensation exposure by offering a job. Without the ability to offer the job, the undocumented worker is actually receiving greater benefits than someone who is a naturalized United States citizen. This is a windfall to the undocumented worker and justifies suspension of benefits unilaterally.

The second option is to offer the light duty job, but make proof of legality a pre-requisite to starting the light duty job. Be careful to avoid the "reverification" pitfalls in the discrimination section addressed above.

One corporation in Oregon took the second option, and offered an undocumented employee a light duty job. The Oregon Court of Appeals concluded that their legislature intended employers of undocumented workers to be able to get the benefit that was available to employers of legal workers who were able to perform light duty work. See, Hernandez v. Saif Corp., 35 P.3d 1099 (Ore. Ct. App. 2001). The court held that undocumented workers who were returned to light duty work and were to receive temporary partial disability (TPD) payments would have their benefits reduced to what they would have received but for their undocumented status. The court found when an employer proposes modified work with a salary equal to that of the worker's former position and the undocumented worker remained ineligible to take the job, the undocumented worker should be treated as receiving wages in the same amount as if he had actually returned to the modified job. Thus, the net lost and TPD entitlement would be zero. The court was careful to mention that the modified work offered by the employer must be work that the employer would have offered to the undocumented worker if the worker had been authorized to work in the United States.

Michigan's Workers' Appellate Commission found that an undocumented worker cannot return to light duty work without committing multiple criminal violations. See, Vazquez v. Eagle Alloy, Inc., Docket # 01-0182 (2002). The criminal violations eliminates the employee's entitlement to benefits. For example, the Commission noted that in order to work, the undocumented worker would need to falsify his/her legal capacity to obtain work as well as falsify his/her social security number in violation of 18 U.S.C. § 1001. Michigan also has a perjury statute, M.C.L. § 750.423, that criminalizes false statements made to Michigan agencies. The violations could subject the undocumented worker to over thirty years in prison. Therefore, in order to discourage further violations of the law, an employer is permitted to suspend benefits until the undocumented worker obtains proper authorization to work in the United States.

VIII. EMPLOYER RESPONSIBILITIES

The employer has two main responsibilities with regard to undocumented workers and their hiring. The first is to make sure they follow all filing and form requirements with the federal government. The second requirement, the "Clean Hands Doctrine", essentially dovetails the first requirement. Unless everything is done by the employer to comply with the law, the employer may not have "clean hands" and not be able to use the undocumented worker defense. Once a decision is made to hire a job applicant, an employer must complete verifications of the employee's work eligibility with a form I-9, employment eligibility verification form. On the first day the employee begins work, the employer must have the employee complete Section One (1) of the I-9 form, in which the employee affirms whether he or she is a citizen, permanent resident alien, or an alien with another type of employment authorization. The employee also states in Section One (1) whether his/her employment authorization expires, lists the expiration date and signs the form. Within three business days of the commencement of employment, the

employee must present the employer with original documents evidencing the employee's identity and employment eligibility. An employer must attach to Section Two (2) of the form that the employer has inspected the documents and believes the employee to be able to work in the United States. For employment of three days or less, the inspection of documents must occur no later than the first date of employment. The statutes and the INS Regulations contain a list of documents that can demonstrate both required elements, and separate lists of documents that establish only identity or only employment authorization. If the employee cannot produce a document in the first group, he or she must produce a document for inspection for each of the second (2) groups. The law permits an employer to make copies of the documents presented by the employee and can attach those documents to the I-9 form, but the employer is not required to do so.

Of course, economic pressures on employers, particularly those that are labor intensive jobs, sometimes cause employers to ignore the requirements of proving eligibility to work in the United States. This could be a fatal blow to any defense used by an employer based upon an employee's undocumented status. Even in states where undocumented workers are not eligible for benefits, the eligibility defense is ignored if the employer has not fulfilled their own obligations to screen applicants during the hiring process to make sure they are eligible to work. The theory is that an employer who ignores federal law in their hiring practices should not benefit from state law excluding one of their hired employees from state benefits. The employer must have "clean hands." Of course, an employer who follows the rules and establishes a more diligent screening process for its employees will be in a better position to show that the employee has committed a fraud and provided false employment information if that employee is hurt on the job. It is imperative for employers to follow the required procedures.

IX. PARALLEL TO EMPLOYMENT LAW

The United States Supreme Court recently decided in Hoffman Plastic Compounds, Inc. v. National Labor Relations Board, No. 00-1595 (March 27, 2002), whether the NLRB can award back pay to undocumented aliens who are wrongly fired. By way of background, the NLRB found that the employer unlawfully discharged several employees, and ordered that they be reinstated with back pay. Upon discovery that one of the employees was an undocumented worker, the employer terminated his back pay. The Supreme Court held that any unauthorized worker who is not lawfully present and employed in the United States is not entitled to back pay.

The Supreme Court further stated that “awarding back pay to illegal aliens runs counter to policies underlying IRCA.” The court reasoned that awarding back pay would condone and encourage future violations. If the undocumented worker had departed for his home country, he would no longer be entitled to back pay. Therefore, the undocumented worker would have the incentive to remain in the United States, undermining immigration laws.

Undocumented workers in the employment law setting parallels the issue of undocumented workers in the workers compensation setting. The Supreme Court noted in Hoffman that “[u]nder the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies.” Either the employer knowingly hires an undocumented worker, or the worker subverts the hiring process by offering fraudulent documents. If the employer hires an undocumented worker, the employer will be subject to sanctions and penalties under the IRCA. On the other side of the coin, the law should not award undocumented workers fraudulent acts in permitting the workers to receive benefits for a job obtained through criminal fraud.

X. CONCLUSION

This is, obviously, an expanding area of the law. Many states are just now addressing these issues. The interplay between federal immigration law and state workers' compensation law is not, by any means, set in stone. As more internationals flock to the United States, we will be confronted with these issues more and more often. To be informed about these issues will make us more capable of dealing with them in the future.

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WORKERS' COMPENSATION CASE LAW OVERVIEW: April 2005-April 2006

*By Timothy F. Callaway, III**

EXCLUSIVE REMEDY

Dowis v. Mud Slingers, Inc., 2005 Ga. LEXIS 713 (October 24, 2005)

BACKGROUND: The employee was a Tennessee resident who was employed by a Missouri-based employer, to work at a job site in Georgia. The employee was injured while working on at the Georgia job site. The employee filed a workers' compensation claim with the employer in Missouri and received benefits. The employee subsequently filed a tort action against the employer in Georgia; this was permissible under the Missouri workers' compensation and tort laws. The trial court granted summary judgment to the employer, on the basis that the application of the *lex loci delicti* rule required that Georgia substantive law be applied to the employee's tort action, because the accident occurred in Georgia. Under Georgia law, the Workers' Compensation Act's exclusive remedy provision barred the employee's tort claim against the employer. The Court of Appeals affirmed the trial court's grant of summary judgment.

ISSUE: Whether the rule of *lex loci delicti* applies in workers' compensation cases involving situations raising conflict of laws issues.

HOLDING: The Supreme Court of Georgia affirmed the holding of the lower courts, and also affirmed that the rule of *lex loci delicti*, which provides that a tort action is governed by the

substantive law of the state where the tort occurred, is still the law in Georgia, despite the fact that some other states have abandoned this approach to resolving conflict of law issues. Because Georgia law governs the employee's tort claims, the employee's tort claims are barred by the Workers' Compensation Act's exclusive remedy provision.

Crisp Regional Hospital v. Oliver, 2005 Ga. App. LEXIS 1038 (September 23, 2005)

BACKGROUND: The claimant filed a lawsuit against the defendant employer, a hospital, alleging vicarious liability due to negligence, in addition to professional malpractice claims against the treating physicians. The Gilmer Superior Court granted summary judgment as to the claimant's negligence claim against the hospital, on the basis that the Workers' Compensation Act barred the claimant's negligence claims against the hospital.

ISSUE: Whether the Workers' Compensation Act exclusive remedy provision precluded the claimant from recovering in tort against the hospital.

HOLDING: The Court of Appeals held that the hospital was entitled to summary judgment, with respect to the claimant's negligence claim, because the Workers' Compensation Act provides the claimant's exclusive remedy against the employer.

Theesfeld v. Image Electrolysis & Skin Care, Inc., 274 Ga. App. 38 (2005)

BACKGROUND: The injured party was working as an independent contractor for a spa, when she injured herself at work, by falling off a stool. She filed a workers' compensation claim against the spa for this accident, and then subsequently filed a civil suit against the spa. The State Court of Gwinnett County granted

summary judgment to the spa on the basis that the plaintiff's claims were barred by the Workers' Compensation Act's exclusive remedy provisions.

ISSUE: Whether payment of workers' compensation benefits, pursuant to a State Board-approved settlement agreement bars a subsequent tort suit against the employer.

HOLDING: The Court of Appeals reversed the trial court's grant of summary judgment to the defendant spa, with respect to the defendant spa's argument that the plaintiff's suit was barred by the Workers' Compensation Act's exclusive remedy provision. Because there was no evidence of the payment of compensation benefits, pursuant to a Board-approved settlement agreement, the exclusive remedy provision of the Workers' Compensation Act did not bar the plaintiff-employee's civil suit against the defendant spa. The Court of Appeals ultimately granted summary judgment to the defendant based upon other grounds.

Travis Pruitt & Associates, P.C. v. Hooper, 277 Ga. App. 1 (2005)

BACKGROUND: The employee filed a suit in the Superior Court of Gwinnett County, against the employer, based upon claims arising out of the sexual harassment by a co-employee. The offending co-employee's conduct consisted of unwanted sexual advances, unwanted notes, emails and phone calls, and verbal abuse in reaction to her refusal of his advances.

ISSUE: Whether the Workers' Compensation Act provides a remedy for an intentional tort committed by a co-employee in the workplace, which is purely personal, and not in furtherance of the employer's business.

HOLDING: The Court of Appeals held that the sexual harassment directed towards the employee was not compensable under the Workers' Compensation Act, because it was intentional conduct directed towards the employee for purely personal reasons, and not in furtherance of the employer's business.

Glover v. Ware, 2005 Ga. App. LEXIS 1368 (December 9, 2005)

BACKGROUND: This is a wrongful death case involving a decedent who lived in a trailer on the landscaper-employer's farm. The employer took care of all of the decedent's basic living needs, took care of the decedent's social security insurance payments, and had a close relationship with the decedent. On the day of the accident, the decedent accompanied the employer in a company van to the job site, not as an employee, but to go along for the ride. The employer asked the decedent if he would help out with the project and the decedent agreed. The decedent had never worked for the employer before, and there was no discussion of compensation. The decedent was killed when he fell off the back of the truck and the mulching machine ran over him. The decedent's family subsequently filed a claim for workers' compensation death benefits, and a wrongful death suit. The trial court granted summary judgment, with respect to the wrongful death claim, on the basis that the suit was barred by the exclusive remedy provisions of the Workers' Compensation Act.

ISSUE: Whether there was conclusive factual evidence to prove that the decedent was an employee to bar the plaintiff's wrongful death claim, based upon the exclusive remedy rule of the Workers' Compensation Act.

HOLDING: The Court of Appeals reversed the trial court's grant of summary judgment to the employer, with respect to the wrongful death claim, because the employer's unusual relationship to the decedent and the employer's earlier statement to his workers'

compensation insurance carrier, stating that the decedent was not an employee, created genuine issues of material fact with respect to the decedent's employee status.

JURISDICTION

Sears v. Macon Water Authority, 2005 Ga. App. LEXIS 1203 **(November 2, 2005)**

BACKGROUND: The employee, a painter, was injured when he fell off a ladder during the course of his employment. Two days after his fall, he suffered a heart attack. The administrative law judge held that the heart attack was related to the fall injury, in that the fall constituted an aggravation of the employee's pre-existing heart disease. The ALJ ordered the employer to pay the claimant's medical expenses pertaining to the heart attack, as presented before the ALJ; this award was affirmed by the State Board of Workers' Compensation Appellate Division. When the employer appealed the ALJ's decision to the Superior Court of Bibb County, the trial court affirmed the ALJ's award and then added a provisions that the employer was "not required to pay any future medical expenses related to the Claimant's heart condition."

ISSUE: Whether an issue must be presented to the ALJ or Appellate Board for consideration, before it can be ruled upon in a state trial court (such as the Superior Court of Bibb County).

HOLDING: The Court of Appeals held that the trial court exceeded its jurisdiction by making a finding of fact regarding the compensability of the claimant's future medical bills that were related to his heart condition. Implicit in the trial court's holding was a factual finding that the claimant's fall was no longer the cause of his disability, a finding which was not made by the Board. The Court of Appeals affirmed the superior court judgment to the extent it affirmed the original ALJ award and reversed with respect to the portion of the

superior court judgment addressing the payment of future medical expenses.

Builders Ins. Group, Inc. v. Ker-Wil Enterprises, Inc., 2005 Ga. App. LEXIS 788 (2005)

BACKGROUND: The employer/insurer denied a claimant benefits for a work place injury. The insurer denied coverage based upon its timely cancellation of the employer's workers' compensation policy prior to the accident at issue. The insurer filed a petition for declaratory judgment as to its rights with respect to the workers' compensation policy at issue. The employer filed a motion to dismiss. The trial court dismissed the declaratory judgment petition and the insurer subsequently appealed.

ISSUES: Whether the insurer was entitled to declaratory judgment, with respect to its rights under the insurance policy at issue, and whether Board or the superior court has subject matter jurisdiction to resolve the underlying coverage issue.

HOLDING: The Court of Appeals affirmed the trial court's dismissal of the petition for declaratory judgment, on the basis that the insurer's denial of coverage prior to the filing of its petition for declaratory relief indicated that it was not uncertain or insecure as to its rights or status, with respect to the policy at issue. The Court of Appeals further held that the Board has ancillary authority to resolve policy coverage issues.

CONTINUOUS EMPLOYMENT

Ray Bell Construction Company v. King, 2006 Ga. App. LEXIS 13 (January 5, 2006)

BACKGROUND: The decedent in this case was employed by the employer as a construction superintendent on a job site, lived

in company housing that was provided to him so he could be close to the job site, and drove a company-owned vehicle for both work and personal use. The decedent was killed in a motor vehicle collision in an adjacent county, on a Sunday (not a regular working day) when he driving the company truck back to either his job site or company housing, after delivering family furniture to a storage shed. The ALJ awarded workers' compensation death benefits to the decedent's mother, basing its decision upon the fact that the claimant was carrying work tools in his truck, and the decedent was either returning to his job site or company housing. The Appellate Division and superior court affirmed this award on the same basis.

ISSUE: Whether there was sufficient evidence to support that the decedent was injured in the course of his employment, under the continuous employment doctrine.

HOLDING: The Court of Appeals held that the decedent was killed in the course of his employment. Under the continuous employment doctrine, continuous employment can be shown if an employee is working away from home and is required by their employment to live and work in an area which is geographically limited by the location of the employer's job site. The court held that the decedent was in a state of "continuous employment", because his personal mission of delivering the family furniture ended when he turned around after delivering his family furniture, and headed back to either his job site or company housing, and because he was in the general geographic area of his employer at the time of the accident. Other facts which supported the continuous employment were the decedent's use of a company-owned vehicle at the time of his accident and the presence of the decedent's work tools inside that vehicle.

See Travis Pruitt & Associates, P.C. v. Hooper, 277 Ga. App. 1 (2005), *supra*.

CHANGE IN CONDITION/STATUTE OF LIMITATION

**Georgia Pacific Corp. v. Cross, 2005 Ga. App. LEXIS 1063
(September 28, 2005)**

BACKGROUND: The employee suffered an autoimmune disease, as a result of his exposure to sulfuric acid in the workplace, in 1995. The employee continued to work after 1995. The employee missed work from November 2000 to February 2001, due to right elbow pain and swelling, and from August 2001 to November 2001, due to left leg and ankle pain. In November 2001, the employee was diagnosed with an autoimmune disease and was told that his autoimmune disease was caused by his exposure to sulfuric acid. The employee's last day of employment was January 4, 2002. The employee filed a workers' compensation claim on January 28, 2002. The ALJ denied the employee's claim on the basis that the employee failed to show an occupational injury, and on the basis that the employee's claim for an occupational injury arising in 1995 was barred by the one-year statute of limitations. The Appellate Division affirmed the ALJ's finding of an "occupational injury", but reversed the ALJ, with respect to the timeliness of the claim, because it determined that the employee was forced to stop work on January 4, 2002, due to an aggravation of his work-related arthritic condition. The Superior Court affirmed the award to the employee, and the employer subsequently filed for discretionary appeal in the Court of Appeals.

ISSUE: Whether the employee's claim was time-barred in the absence of evidence to support that he had sustained a new injury as of the date he stopped working.

HOLDING: The court held that there was sufficient evidence under the "any evidence" standard, to support a change in condition, because the employee and others testified that the employee's continued employment following his 1995 exposure to sulfuric acid

aggravated the arthritic condition caused by his exposure to sulfuric acid. The court further held that the employee's claim was timely filed under O.C.G.A. § 34-9-80 (claim must be filed within 30 days of the accident), because the employee's injury arose when he stopped working on January 4, 2002, due to a gradual worsening of his condition which was in part due to the physical activity of his employment.

CHANGE IN CONDITION VS. NEW ACCIDENT

Footstar, Inc. v. Stevens, 2005 Ga. App. LEXIS 969 (September 1, 2005)

BACKGROUND: The claimant sustained her original workplace injury on November 8, 1999, when cases of merchandise fell and injured the claimant's head, neck and shoulder. The insurer at the time of the claimant's original injury accepted the claim as "medical only", because she continued to work regular duty for the employer, despite the physical difficulties caused by her injuries. The original insurer was replaced by a new insurer on January 1, 2001. Following an October 19, 2001 hearing to determine which insurer was responsible for the claimant's medical treatment, the ALJ determined that the original insurer was responsible for the claimant's continuing medical expenses, because she continued to work for the employer and had not sustained any new injuries or had any new accidents since her original accident. The original insurer appealed; the Appellate Division affirmed. However, before the ALJ had issued his decision on December 18, 2001, the claimant's new physician wrote a note dated November 30, 2001, saying that the claimant was to perform only light duty work with lifting restrictions and no overhead work. However, the ALJ's record was closed at this time. The claimant's condition continued to deteriorate, and she left her employment on January 5, 2002. The original insurer refused to pay income benefits for reasons which are not entirely clear, other than the insurer notifying the employer that it was not prepared to take any

action regarding the claimant in late 2001; the employer paid the claimant income benefits out of its own pocket.

On October 31, 2003, the ALJ held a hearing to determine whether the claimant was entitled to income benefits, and if she was entitled to income benefits, which insurer was the responsible carrier with respect to those benefits. In an award dated December 24, 2003, the ALJ determined that the new insurer was responsible for the payment of income benefits, on the basis that the two-year limitation period for change-in-condition-based claims did not apply to “medical only” claims, hence precluding a change-in-condition. The decision established January 5, 2002 as the fictional “new accident” date, and held that the new insurer, which was the insurance carrier on January 5, 2002, was responsible for the payment of the employee's income benefits. The Appellate Division reversed the ALJ, in part, holding that the original insurance carrier was responsible for the payment of benefits, on the basis that there was a change in condition for the worse. The Superior Court of Glynn County affirmed the Appellate Division's holding.

ISSUES: Whether the evidence in the record establishes a change in condition, or a fictional new accident; whether the two-year statute of limitations for change-in-condition claims, established by O.C.G.A. § 34-9-104, applies to "medical only" claims.

HOLDING: The Court of Appeals explained the distinction between a “change in condition” and a “new accident”, as follows: A “change in condition” occurs where the employee suffers a workplace injury, is awarded compensation, returns to his regular job duties, but as a result of the wear and tear of daily living and normal work activities, his condition deteriorates to the point where he cannot perform his regular work. A “new accident”, on the other hand, occurs in a situation where the employee is injured on the job, continues to work at his regular job duties without an agreement or award of compensation, and is forced to stop working, as a result of

the gradual worsening of his condition, due in part to his regular work activity. The Court of Appeals further explained that in this case, the employee's condition was established as compensable by the ALJ's December 18, 2001 award; therefore, there was a compensable change in condition, and the original insurer was responsible for indemnity payments. The Court of Appeals finally determined that the two-year limitations period provided for in O.C.G.A. § 34-9-104 was not limited to claims where indemnity had been paid from the outset; an award of medical expenses was an award of compensation, within the meaning of the Workers' Compensation Act.

Roberts v. The Jones Company, 2006 Ga. App. LEXIS 143
(February 7, 2006)

BACKGROUND: The claimant sustained a compensable injury to her right wrist when employed at the employer, Flash Foods. She was placed on light duty, and then later terminated for reasons unrelated to her injury. She engaged in a diligent search for suitable alternate employment, and found employment as a Huddle House waitress, a job that paid less than her job at Flash Foods. The claimant filed for TTD benefits, for the period she was searching for employment following her termination from Flash Foods, and for TPD benefits, as a Huddle House employee. Her application for TPD benefits was based upon her lower pay as a Huddle House waitress. The ALJ granted the claimant's application for TTD benefits, for the period of her temporary unemployment where her search for suitable alternate employment was unsuccessful, and denied her application for TPD benefits for the time she was working in a lower-paying position at Huddle House, based upon her failure to introduce evidence that her injury forced her to accept less lucrative employment.

ISSUE: Whether the ALJ erred in holding that the claimant did not meet the burden of proof for establishing her entitlement to TPD, based on a change in condition.

HOLDING: The Court of Appeals reversed the ALJ's judgment denying TPD benefits and remanded the case back to the ALJ to reconsider the claimant's entitlement to TPD, based upon the precedent regarding the burden of proof for change in condition, set forth in MaLoney v. Gordon County Farms, 265 Ga. 825, 464 S.E.2d 606 (1995) . In MaLoney, *supra*, the Supreme Court of Georgia explained that in order to receive workers' compensation, based on a change in condition, the employee must show that he suffered a loss of earning power as a result of his work injury, continues to suffer from physical limitations caused by that injury, and that the employee engaged in a diligent, but unsuccessful search for suitable alternate employment. *Id.*, at 828. The Court of Appeals' reversal was based upon the premise that requiring claimants to show that their wage loss from post-injury employment was caused by the injury would discourage motivated workers from seeking reemployment after suffering from a compensable injury. In, the Georgia

John v. Rooker & Associates v. Patterson, 276 Ga. App. 410 (2005)

BACKGROUND: The employee was run over by a pickup truck and injured his back. Hewas employed as a heavy equipment operator for 30 years. The employee's injuries were designated as catastrophic, and he was awarded TTD benefits. The employee subsequently began to perform odd jobs for an old friend, at an apartment complex. The employer sought to reduce the employee's compensation from total disability benefits to partial disability benefits, because the employee had returned to work as a maintenance worker at the apartment complex, and that a change in the employee's lifting restrictions qualified him for certain employment. The ALJ, the Appellate Division, and the Superior Court of Gwinnett County all held that the evidence did not support the argument that the employee returned to work, and therefore a reduction of compensation, based upon a change in condition, was not warranted.

The Appellate Division also held that the employer/insurer did not meet their burden of showing that the claimant was capable of returning to work, and that suitable light duty work was available.

ISSUE: Whether the employee's performance of odd jobs for the manager of an apartment complex was sufficient evidence to support a change in condition.

HOLDING: The Court of Appeals affirmed the lower court, finding that the evidence did not demonstrate that the employee had actually returned to work. The court's conclusion was based upon the fact that the employee was a close friend of the apartment manager, had children and grandchildren living in the apartment complex, but was not actually employed by his friend's apartment complex. The employee would volunteer to perform occasional odd maintenance jobs for his friend, during his regular visits to the apartment complex, but was not paid actual wages for those odd jobs. Instead, he was paid gas money for driving to various stores to pick up various items. The court also found that the employer's argument that there was suitable alternate employment available to the employee, based upon jobs identified in a labor market survey, lacked merit, because even if these jobs were suitable, there was no evidence that these jobs were actually available to the employee, or that the employee was informed of these jobs.

See Georgia Pacific Corp. v. Cross, 2005 Ga. App. LEXIS 1063 (September 28, 2005), *supra*.

Oconee Area Home Care Services, Inc. v. Burton, 2005 Ga. App. LEXIS 1113 (October 12, 2005).

BACKGROUND: The claimant injured his back at work on July 16, 2003. He returned to work on August 4, 2003, but ended his employment on August 26, 2003, due to his back pain. The employer changed insurance carriers on August 1, 2003. The ALJ held that the

accident occurred on July 16, 2003; the pre-August 1 insurance carrier was the responsible carrier. The Appellate Division affirmed the ALJ's decision; the Superior Court of Hart County reversed the Appellate Division, holding that the evidence showed that the claimant sustained a new injury on August 26, 2003, and that the new insurer was responsible for the indemnity payments.

ISSUE: Whether the employee's disability was the result of a change-in-condition from his July 16, 2003 injury, or a new accident on August 26, 2003, for the purpose of determining which insurer was responsible for the payment of indemnity benefits.

HOLDING: The Court of Appeals held that there was sufficient evidence under the "any evidence rule" to support a change in condition, based upon the evidence in the record, which showed that the employee was first injured on July 16, 2003, received indemnity benefits for two weeks of missed work, and was forced to quit working, as a result of a gradual deterioration of his condition. Therefore, the original, pre-August 1 insurer was responsible for the payment of workers' compensation benefits.

CHANGE IN CONDITION/WC-104

Metropolitan Atlanta Rapid Transit Authority v. Bridges, 276 Ga. App 220 (2005)

BACKGROUND: The claimant aggravated pre-existing problems with his right knee and back during the course of his employment, in October 2001. The employer paid compensation for the injuries. The claimant's treating physician at that time released the claimant for return to light duty work on November 9, 2001; a WC-104 form regarding this change in condition was filed with the Board. Following surgery performed by another physician in January 2002, the claimant was released to regular work duty in April 2002. The claimant filed a WC-2, stating that the claimant had undergone a

change in condition for the better, attached a release from the physician who had performed the January 2002 surgery to this form, and suspended TTD. The claimant sought to have his temporary total disability benefits reinstated and requested a change in his authorized treating physician. In November 2002, the ALJ reinstated the claimant's TTD benefits, ordered a change in treating physicians, and established that the claimant had only been capable of sedentary work since the 2001 accident.

In January 2003, the employer unilaterally reduced the claimant's TTD benefits to TPD benefits, under O.C.G.A. § 34-9-104. The Form 104 filed by the employer was based upon the claimant's prior treating physician's assessment of the claimant's condition in February 2002. The ALJ held that the claimant was entitled to TTD benefits, and that the employer's unilateral suspension of TTD benefits was improper, because the employer failed to comply with O.C.G.A. § 34-9-104(a)(2), which required that the employer file a WC-104 form with the Board, with a physician's statement saying that the claimant could do light duty work. The employer had attempted to rely upon an earlier 2001 WC-104 form and medical report, which was based upon another prior treating physician's opinion. The insurer had not filed the appropriate WC-104 form with the Board. (The employer tried to introduce a WC-104 based upon the claimant's condition in February 2002, when he had a different treating physician). The ALJ's decision was affirmed by the Appellate Division and the Fulton County Superior Court.

ISSUE: Whether the employer met its burden of establishing a change in condition, pursuant to O.C.G.A. § 34-9-104(a)(2), by relying upon a WC-104 form pre-dating the Board's November 2002 award establishing the claimant's condition.

HOLDING: The Court of Appeals affirmed the ruling that O.C.G.A. § 34-9-104(a)(2) requires strict compliance. It held that the WC-104 form and the medical report, which the employer attempted

to present to the Court of Appeals was never before the Board or in the record before the Court of Appeals. Furthermore, the 2001 WC-104 form which the employer also attempted to rely upon pre-dated the ALJ's November 2002 award establishing the claimant's condition. That award is res judicata in the absence of another event, such as the filing of a WC-104. Therefore, the employer did not meet its burden of establishing strict compliance with O.C.G.A. § 34-9-104(a)(2).

PENALTIES/REIMBURSEMENT

Trax-Fax v. Hobba, 2006 Ga. App. LEXIS 126 (February 2, 2006)

BACKGROUND: The claimant was president and sole shareholder of the employer. The claimant was injured on July 28, 1998, and was awarded TTD benefits. The claimant returned to work less than a year after his accident, but improperly continued to receive benefits after his return to work. The insurer suspended the claimant's benefits on April 24, 2002, but did not file a notice of suspension of benefits until December 10, 2003. The ALJ ruled that the insurer was entitled to full reimbursement of the overpaid TTD, as well as attorney fees and litigation expenses, and assessed the claimant with a civil penalty. The claimant appealed this ruling to the board, contending that O.C.G.A. § 34-9-245 is a total bar to any reimbursement claims asserted more than two years after the actual overpayment of benefits. The Appellate Division affirmed the ALJ's ruling, but reversed the award of litigation expenses. The superior court reversed the ALJ ruling in part, ruling that O.C.G.A. § 34-9-245 was a statute of repose, which effectively barred the insurer from recovering any payments made before December 10, 2001, and reversed the ALJ's award of attorney's fees, expenses, and the civil penalty.

ISSUE: Whether O.C.G.A. § 34-9-245 should be applied as a statute of repose, to bar the insurer and employer from recovering payments of benefits made more than two years prior to filing a notice of suspension of benefits, and whether there was sufficient evidence to support to imposition of attorney’s fees, the assessment of a civil penalty and referral to the Board’s Enforcement Division for further investigation, under the “any evidence” rule.

HOLDING: The Court of Appeals held that O.C.G.A. § 34-9-245 is a statute of repose and is an absolute bar to claims for reimbursement, where the application for reimbursement was filed more than two years after the overpayment was made; therefore, the insurer was only entitled to reimbursement for overpayments made on or after December 10, 2001. The Court of Appeals further held that there was sufficient evidence in the record to support an award of attorney’s fees, the assessment of the civil penalty, and the referral of the matter to the Enforcement Division, under the “any evidence” standard, because the claimant knowingly misrepresented himself as being totally economically disabled, even though he continued to draw income from his own company.

ILLEGAL ALIEN

Martines v. Worley & Sons Construction, 2006 Ga. App. LEXIS 159 (February 14, 2006)

BACKGROUND: The claimant is an illegal immigrant who suffered a work-related injury to his left foot. The claimant was released to return to work with restrictions and was offered a light duty position as a delivery truck driver. The claimant accepted the position, and even reported to work at that position on September 23, 2005, but was unable to work at that position. He could not legally obtain a Georgia driver’s license, because he was an illegal alien, and not a resident of the State of Georgia. The claimant was not disqualified from driving a truck, due to his health or driving

capability. The claimant contended that his inability to read and write precluded him from getting a drivers' license. The claimant further contended that he was physically incapable of performing the job, based upon his physician's finding of total disability, two days after he was supposed to try the light duty position.

The ALJ and the Appellate Division held that the light duty position offered to the claimant was not suitable alternate employment. Because the claimant did not possess a driver's license, they awarded TTD benefits. However, the Superior Court reversed the award of TTD benefits, based upon the lack of evidence in the record that the claimant had a change in condition, and that the claimant's refusal of the light duty position was not justified. The Superior Court held that the Board had applied the wrong legal standard to determine the suitability of the light duty position offered to the claimant, by focusing upon the legal reason why the claimant would not accept that position, namely, the claimant's illegal alien status, rather than upon the claimant's physical and occupational qualifications for the position. The Superior Court reasoned that if all illegal aliens could justify their refusal to accept light duty employment, based upon their illegal status alone, no illegal alien would have the "legal" ability to accept any offer of employment; this would be analogous to cases where incarcerated persons were precluded from accepting suitable employment.

ISSUE: Whether refusal to accept a light duty position is justified where the reasons for the refusal are legal, and not related to the claimant's health or job skills.

HOLDING: The Court of Appeals held that the claimant's legal inability to accept the light duty driving position offered to him was not justified, because the evidence in the record regarding the claimant's health and job skills demonstrated that the claimant was in fact capable of driving a truck, and that his inability to obtain a Georgia license was the result of his personal choice to enter the

country illegally, and he was barred from legally getting a drivers' license. The court analogized this case to those cases where the individual's driver's license was suspended or revoked for a violation of the law, or where the person was incarcerated upon after an adjudication of guilt. *See, e.g. Scott Housing Systems v. Howard*, 256 Ga. 675, 353 S.E.2d 2 (1987; *Mize v. Cleveland Express*, 195 Ga. App. 56, 392 S.E.2d 275 (1990). This holding also relied upon the reasoning in the Court of Appeals' 2004 decision in *Earth First Grading v. Gutierrez*, 270 Ga. App. 328, 606 S.E.2d 332 (2004), a workers' compensation case involving an undocumented employee, where the court held that illegal alien status did not preclude an employee from meaningfully accepting employment, for the purpose of receiving workers' compensation benefits. *Id.*, at 331.

The claimant's stated inability to read and write was not a bar to obtaining a driver's license; the Department of Motor Vehicles allows the oral testing of illiterate applicants. The court in this case further held that the claimant was physically capable of performing the light duty position on the day he reported for it, based upon the statutory test which focuses upon the employee's physical condition at the time the light duty position is offered; when the claimant reported to work on September 23, 2005, he had no complaints of pain. He left because he was unable to provide the proper documentation, a valid driver's license.

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