



## THE PRESIDENT'S MESSAGE

By: David H. Hanks

I hope you are making your plans to attend our Association's annual meeting at Ponte Vedra on April 25 and 26. Joe Chambless, our Executive Vice-President, has planned a fine program and a trip to Ponte Vedra in late April is always a good decision.

The Georgia Defense Lawyers Association is concluding its thirtieth year. It continues to be a wonderful place to establish and renew friendships with lawyers around the state and to consult with each other concerning the changes affecting our practice.

Our year began with the annual meeting last spring in Cancun where our program dealt with issues of alternative fee arrangements. These changes were frankly and helpfully addressed by lawyers and corporate counsel who have been directly and successfully involved in developing and responding to changes in that area of our practice. Our thanks to Sandy Owens and to David Grumbine, Vice-President and Counsel for Whirlpool, for a timely, practical program.

Following our Fall Board Meeting at the Grove Park Inn, I appointed a long-range planning committee to review the goals, objectives and operation of the Association. I encourage you to give members of this committee your thoughts and suggestions concerning your Association's future. Members of this committee are Joe Chambless, Steve Kyle, Greg Melton, Bob Travis, Kay Deming, Salty Forbes, Bruce Welch, David Whitworth, and Dick Richardson.

At our Winter Board Meeting in New Orleans, we received an update on

plans for a joint GDLA/GTLA seminar on professionalism and civility in the practice. With George Duncan as our chairman, plans are underway for this seminar, hopefully at an Atlanta area law school, later this year. Specific plans will be forthcoming. This appears to be a subject of significant interest to the media and the public.

Our mid-year CLE program on February 12th in Macon was helpful and well received by all in attendance. We thank Greg Melton for his hard work in putting this together. We particularly appreciate the contributions of Judge Frank Eldridge to that program. His topic was "Professionalism In The Modern Trial Practice".

Your Association works through committees and it has been a pleasure this year to work with all committee chairmen, including,

Steve Kyle (Atlanta) - Expert Brief Bank Committee

Kay Deming (Atlanta) - Trial Academy

Salty Forbes (Savannah) - Editor, Newsletter

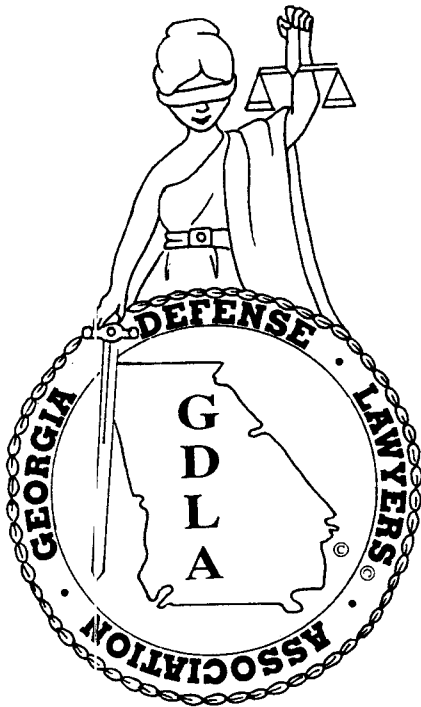
Greg Melton (Dalton) - CLE Committee

Hank Scrudder (Atlanta) - Legislative Committee

Wiley Wasden (Savannah) - Editor, 1997 Georgia Defense Lawyers Journal

Bill Pinson (Savannah) - Amicus Curiae Committee

Dick Richardson (Savannah) -





## Membership Committee

With reference to the Amicus program, presently a brief on behalf of the Association is being prepared by Forbes and Bowman for the defendants who are filing a Motion for Reconsideration to the Supreme Court in Sturbridge Partners, Ltd. v. Walker. This is the case in which the Supreme Court ruled 4-3 that a history of daytime burglaries of vacant apartments was enough to put the apartment on notice that a tenant might be harmed during a crime. In this decision, the Supreme Court effectively overruled Savannah College of Art & Design v. Roe, 261 G 764 (1991). Forbes and Bowman represented one of the defendants in the Savannah College case.

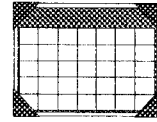
Special thanks are offered to Wiley Wasden, Editor, and all who are writing articles for this year's Journal. That undertaking involves a significant amount of time and we will all benefit from these articles.

It has been a pleasure to work with Joe Chambless, Executive Vice-President, and with Steve Kyle, Secretary-Treasurer. Thanks to both of you.

Make sure you have made your reservations for Ponte Vedra. See you April 25 - 26!

David

## CALENDAR OF EVENTS

1997 Events

April 24-27 **Annual Mtg.-**  
Ponte Vedra Golf and  
County Club, Fla.

**ANNUAL MEETING IN 1998**

APRIL 23-26, 1998 - Cloister at Sea Island

**MINUTES OF BOARD OF  
DIRECTORS MEETING GROVE  
PARK INN, ASHEVILLE, N.C.  
NOVEMBER 2, 1996**

President David Hanks called the fall meeting of the Board of Directors of the Georgia Defense Lawyers Association to order. Present at the meeting were David Hanks, Joe Chambless, Steve Kyle, Greg Melton, George Duncan, Dick Richardson, Tom Young, Bob Travis, Kay Deming, Rick Marchetti, Salty Forbes, Bruce Welch, David Whitworth, Hank Scudder, Rick Rominger, and Wiley Wasden.

Secretary/Treasurer Kyle gave the Treasurer's report. There is \$63,687.28 on deposit with BankSouth and \$1499.85 on deposit in the association's investment account with Smith Barney.

Steve Kyle informed the Board that the Executive Committee had decided to move all the money to a moneymarket account with Smith Barney. It is the most convenient establishment for our Executive Secretary, Al Shurley. To the extent that a formal resolution is needed, a motion was made by David Whitworth, and seconded by Hank Scudder that the officers be given authority to execute the necessary corporate resolution to open this account. The motion was unanimously approved.



A copy of the 1996-97 Budget was distributed to the Board for its review, including the proposed budget for the upcoming Trial Academy. Salty Forbes felt he would need an additional \$600 for increased expansion of the newsletter. George Duncan, Chairman for the upcoming GDLA, GTLA, ICLE, Emory Law School Symposium on Professionalism, stated he might need \$2000 to \$3000 for honorariums to assist with the program. Upon motion duly made and seconded, the budget was unanimously approved.

Steve Kyle made a report on the National Defense Leaders Conference held in Chicago, Illinois, on Oct 23-29, 1996. He expressed his understanding of the overall purpose of the GDLA to promote friendship and networking between insurance defense attorneys. He discussed the regional meeting that occurred between bar leaders of Georgia, Florida and Alabama.

Salty Forbes announced that the next regional meeting will be held in Ponte Vedra, Florida, to coincide with our annual meeting. The regional meeting be held Friday afternoon following the scheduled Friday morning CLE program.

A discussion was held regarding several ideas that came out of the National Defense Leaders Conference including expansion of the amicus curiae committee, expansion of the newsletter, getting younger insurance defense lawyers involved in the association, and starting a recreational get together at Callaway Gardens. President Hanks announced that he would be setting up a Long Range Planning Committee who would meet before the Winter Board Meeting to present some ideas for the whole Board to consider.

Greg Melton reported on the Winter CLE Meeting. Timing and

location were put up for discussion. January seemed to be the best month. Greg will line up the speakers and try to persuade them to do a two day event, one in the northern part of the state and the other in the southern area. Greg will have the final plans to the Executive Committee within the next two weeks.

Dick Richardson reported on the annual meeting to be held at Ponte Vedra, Florida on April 24-27, 1997. Discussion was held regarding the Winter Board Meeting location and it was decided that Dick would try to finalize plans for New Orleans, La. for January 31-February 2, 1997. In the event of a problem, the Board will meet at the Cloister at Sea Island, Ga.

Salty Forbes, editor of the Newsletter, reported that he is receptive to any articles from the Board for publication. The cost of the newsletter will be going up in order to improve the timing of the publication.

George Duncan spoke on the upcoming symposium on professionalism to be sponsored by GTLA, GDLA, ICLE, and Emory Law School. The joint seminar is set for the second week of March, 1997 at Emory Law School. Details will be given at the Winter Board Meeting.

Roger Dunaway and Neil Dickert have been elected to the office of Judge of the Superior Court and have submitted their resignation from our association. Upon motion duly made and seconded, the Secretary/Treasurer was asked to write to these two new judges to reluctantly accept their resignations, to thank them for their involvement in the association in the past and to wish them good luck in their new positions.

There being no more business, the meeting was adjourned.

This 2nd day of November,  
1996.

## 1996 WORKERS' COMPENSATION



### CASE LAW UPDATE

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I have tried to shorten this paper by avoiding long discussions of the facts of each case, except where necessary. By making brief reference to the facts and emphasizing the holding of each case, I

have attempted to make the paper easier to read and digest.

#### A. EXCLUSIVE REMEDY

Zurich American Insurance Co. v. Dicks, 220 Ga. App. 725 (1996) recognizes a potential tort claim arising from a physical injury to the claimant caused by willful and wanton misconduct of an insurer in refusing to provide or pay for medical treatment. The claimant was injured on the job 12/26/90, and assumed treatment with an authorized treating physician. On 6/21/91 an IME was performed at the request of the employer/insurer, and the IME physician recommended that Ms. Dicks be terminated from her job or placed in a work-hardening program. Based on the IME's recommendation, the insurer suspended claimant's medical treatment and she was fired from her job. The actions of the insurer caused a delay of more than two months in the claimant's medical treatment. When she resumed treatment 71 days later, the authorized physician stated that the delay had significantly worsened her job-related injury, and aggravated her medical condition.

In addition to her comp claim, the claimant made a tort claim against Zurich alleging that the insurer's intentional delay of medical treatment amounted to willful and wanton misconduct and that this intentional delay caused her a separate physical injury, based on the opinion of the authorized treating physician, and that this separate injury, caused by the insurer's delay, did not fall within the exclusive remedy provisions of the Workers' Compensation Act, O.C.G.A. § 34-9-11(a). Zurich filed a motion for summary judgment arguing that the exclusive remedy provision protected it from any such tort claim, and the Court of Appeals denied the motion for summary judgment. Even though the Workers' Compensation Act provides

various monetary penalties for delays in payment and delays in treatment, the Court of Appeals held that Ms. Dicks' theory of a separate physical injury, totally unconnected to the original job-related injury, and allegedly caused by the insurer's willful delay of treatment, removed the exclusive remedy protection.

Weller v. Brown, 266 Ga. 130, 464 S.E. 2d 805 (1996) involved a multi-car accident in which Weller and Brown were drivers of separate vehicles. The wreck occurred while Weller was traveling to an employer-sponsored seminar. Prine, Weller's co-worker, was a passenger in Weller's car. Prine sued all drivers in the accident, including Brown, with the exception of Weller. One of the other drivers, Brown, sued Weller for contribution. Weller raised as a defense O.C.G.A. § 34-9-11, and the Supreme Court reversed the Court of Appeal holding that § 34-9-11 bars a defendant in a personal injury claim from asserting a third-party contribution claim against a co-worker of the plaintiff.

In Zaytzeff v. Safety Kleen Corporation, 222 Ga. App. 48 (1996), Zaytzeff filed a claim for alleged job related injuries against Safety Kleen and the Administrative Law Judge denied the claim, even though the alleged injury was from an accident which occurred on the job, and Zaytzeff had stipulated before the ALJ that the Workers' Compensation Board had jurisdiction to hear the claim. Zaytzeff did not appeal the ALJ's denial of benefits, but filed a tort complaint in State Court. The Court of Appeals granted the employer's motion for summary judgment, affirming the Exclusive Remedy Doctrine for job-related injuries, even though this one was found not compensable by the ALJ.

The Exclusive Remedy Doctrine was re-affirmed under similar facts in the case of Larraga v. Aetna, 222 Ga. App. 654 (1996), where a claimant filed a tort claim in Superior Court when his workers' comp income benefits were suspended. The

employer/insurer's motion for summary judgment was granted and affirmed by the Court of Appeals.

In Eickhorn v. Boatright, 219 Ga. App. 895 (1996), the employee was injured while riding to an out of state job site in a vehicle furnished by his employer for purposes of transporting employees to the job site. The employment began when the employee entered the company-owned vehicle that was provided for his and his employer's mutual benefit. The employer, Deep South Industrial Cleaning, engaged in work providing cleaning to various industrial job sites which required its employees to travel to the job sites and stay several days at a time. In this accident, Eickhorn and Boatright, employees of Deep South, were traveling to a job site in Florida, riding in two Deep South-owned pickup trucks. Deep South did furnish company vehicles for job site travel. The two Deep South-owned trucks collided and Eickhorn sustained a head injury in the collision. Eickhorn brought a tort suit against co-employees and drivers of the company-owned trucks, Boatright and Starling, also naming Deep South, employer, and its automobile carrier, State Farm, as defendants. Boatright and Starling, the drivers of the trucks, Deep South and State Farm, its uninsured motorist carrier, moved for summary judgment on the basis that Eickhorn's injury arose out of and was in the scope of his employment and, thus, his exclusive remedy was under the Workers' Compensation Act.

In reviewing the trial court's grant of summary judgment, the Court of Appeals discussed the only reasonable inference that could be drawn from the uncontroverted facts, viz., that the transporting of Eickhorn to a Florida job site in a company-owned vehicle along with other Deep South employees in company vehicles traveling in a convoy was for the



mutual benefit of both the employer, Deep South, and the employees, including Eickhorn. The Court stated that the facts showed that the provision of company transportation was to "facilitate the progress of the work by ensuring that both equipment and personnel would arrive timely at the out-of-state job site. Accordingly, although the job site was in Florida, appellant's employment began when he entered the company-owned vehicle that was provided for his and his employer's mutual benefit. Therefore, Eickhorn's exclusive remedy for his claims is that provided by the Workers' Compensation Act.

In Hitachi Chemical Electro-Products, Inc. v. Gurley, 219 Ga. App. 675 (1995), defendant Hitachi raised as one defense that the plaintiff's complaint was barred by the exclusive remedy provision of the Workers' Compensation Act, O.C.G.A. §34-9-11. Gurley and Johnson worked at a semi-conductor factory owned by Hitachi, and the children of both Gurley and Johnson were born with birth defects. The parents brought suit against Hitachi alleging that the birth defects were caused when the parents were negligently and willfully exposed to hazardous chemicals working in the Hitachi factory. Defendant Hitachi's assertion of the exclusive remedy defense was rejected by the Court of Appeals which held that because the children's claims are not derivative of any claim that could be asserted by their parents for "work-related injuries," the children are "therefore third-party plaintiffs whose claims are not contemplated by the Workers' Compensation Act and whose injuries the Act was not designed to protect."

#### **B. PSYCHIATRIC/PSYCHOLOGICAL CLAIMS**

George v. Southwire, decided by the Court of Appeals at 217 Ga. App. 586 (1995) and by the Supreme Court at 266 Ga. 739 (1996), involved physical injuries to a truck driver's knee, hip, and chest. Mr. George, a driver for Southwire

Company, broadsided a car that had run a stop sign in front of him. In the accident, George saw the female passenger's head bouncing off the grill of his truck, and following the accident, George was placed in the emergency room alongside the other driver, whose lung had collapsed, whose face was "mangled" and who was "gurgling and hollering" for his deceased female passenger. The claimant, George, became so upset that he had to be removed from the emergency room. George was treated for his knee, hip and chest injuries by the authorized orthopedic surgeon and released to return to work, but he continued to receive psychiatric treatment for post-traumatic stress disorder which the psychiatrist testified may have been "brought on or intensified by" the claimant's knee injury. The long-standing rule on psychological claims is found in the statute itself, O.C.G.A. §34-9-1(4): "Injury ... shall not include a disease in any form except where it results naturally and unavoidably from the accident." Under Hanson Buick, Inc. v. Chatham, 163 Ga. App. 127 (1982), that psychological disability without any precipitating or accompanying physical injury is not compensable. It is submitted that the key fact in George v. Southwire is that the psychiatrist testified that the psychological injury (post-traumatic stress disorder) may have been "brought on or intensified by" the claimant's knee injury, a discernable physical occurrence. The Supreme Court's opinion in George specifically held "that a claimant is entitled to benefits under the Workers' compensation Act for mental disability and psychic treatment which, while not necessarily precipitated by physical injury, arose out of an accident in which a compensable physical injury was sustained, and that injury contributes to the continuation of the psychic trauma." (emphasis supplied). Although some might argue that George v. Southwire has signalled a change in the law of psychological injuries, I submit that there is no real change. The truck driver did sustain an actual physical injury in the accident, and the gruesome facts of the accident observed by the truck driver make it

reasonable to expect that he would continue to experience psychological problems, diagnosed as post-traumatic stress disorder.

#### **C. NOTICE TO CONTROVERT - INVALID**

In Cartersville Ready Mix Company v. Hamby, (A96A0951) (1996), Hamby sustained a back injury on the job, but the employer, Cartersville Ready Mix, knew or suspected within a short time after the injury that the injury was not job-related. However, the employer, neither controverted the claim within 21 days of knowledge of injury nor began paying workers' comp benefits within that time period. Under §34-9-221, the claim must either be controverted within 21 days of knowledge of the injury, or workers' comp indemnity benefits must be commenced within 21 days to avoid payment of additional penalties. Instead, the employer here waited approximately five weeks after the accident and began voluntarily paying workers' comp benefits, but it paid no penalty for the late commencement of benefits. O.C.G.A. §34-9-221(h) provides that, if income benefits have been commenced following an injury, the employer may controvert the claim within 60 days of the date the first payment of benefits was due.

Here, after voluntarily commencing benefits, but still within 60 days of the due date of the first payment of benefits, the employer filed a notice to controvert and suspended workers' comp payments on the basis that the injury did not arise out of the employment. The Court of Appeals cited Southeastern Aluminum Cycling, Inc. v. Rayburn, 172 Ga. App. 648 (1984), and held that the employer's notice to controvert was invalid and its suspension of benefits was improper because it had failed to pay the penalty for late commencement of benefits before filing the notice to controvert. Even though the facts here apparently clearly



showed that the claimant's back injury was not compensable, did not arise out of his employment, the employer was barred from denying the claim because it failed to pay the statutory penalty, rendering its notice to controvert invalid. The Court of Appeals stated that "the employer had only to comply with the statute (§34-9-221) by commencing voluntary payment of benefits on time or to pay the penalty ... to ensure that its notice to controvert would be valid." (emphasis supplied). The Court further stated that it was "constrained to ignore as irrelevant the indications in the record that Hamby in fact did not suffer a compensable injury. Had Cartersville Ready Mix followed the procedural requirements and paid all compensation due when it belatedly controverted Hamby's claim, the issue might properly have been decided in its favor."

#### D. HEART ATTACK CLAIM

Kines v. City of Rome, 220 Ga. App. 732 (1996) involved an alleged stress-related heart attack claim. In 1995, the Administrative Law Judge and State Board of Workers' Compensation held that Kines, a 22 year City of Rome policeman, died of a work-related heart attack. Kines died after suffering a heart attack at home, at least 36 hours after his last work shift, and, since he was not on the job when the heart attack occurred there was no "natural inference" or "presumption" that the heart attack was work-related. The issue in this case is whether there was sufficient "competent" evidence from experts to establish a causal relationship between the work and the heart attack.

The Superior Court in Rome reversed the holding in favor of the claimant because of defective hypothetical questions which were submitted to the doctors who testified. The Court of Appeals upheld the reversal of the claim. The claimants contended that the heart attack resulted from work-related stress

and offered in support testimony from two doctors who had never treated and who were not familiar with the deceased officer.

In their depositions, the doctors testified that, based upon the hypothetical facts submitted to them, they believed that job stress was "probably a significant factor" in bringing on the deceased's heart attack. These doctors' testimony was based upon hypothetical facts submitted to them by the claimant's attorney over the objection of counsel for the employer/insured. The Superior Court and the Court of Appeals pointed out that there was significant evidence of other causes for the heart attack which were apparently ignored by the ALJ and the State Board of Workers' Compensation. There was additional evidence that the deceased police officer had been involved in an extra-marital affair for four years and that his wife was pregnant at the time of his death, "facts that would reasonably generate far more stress than would a job he had performed without physical problems for 22 years. The evidence of the deceased's dissatisfaction with his employment does not establish a causal connection between his employment and his heart attack."

The Court of Appeals discussed the hypothetical question submitted to the experts and stated that, while the sufficiency of the facts supporting an expert opinion usually goes to the weight, rather than the admissibility, of the expert's testimony, in this case, the facts which were not supplied to the doctors testifying resulted in questions that were not only insufficient, but were misleading. "As a result, the testimony provided in the expert depositions was not competent and credible evidence, and ... the Superior Court correctly concluded that the ALJ could not base an award of benefits upon responses to flawed hypothetical questions." It should be noted that newly-amended O.C.G.A. §34-9-1(4) now requires that the medical expert testimony

be provided to support all claims of alleged work-related heart problems.

#### E. SUBROGATION

O.C.G.A. §34-9-11.1 gives the workers' compensation employer/insurer a lien against any tort recovery received by an injured employee when the employee has been fully compensated for the injury. In cases where the injured employee has filed a third-party lawsuit against the alleged tortfeasor, §34-9-11.1 gives the employer/insurer a right to intervene in the action to protect and enforce its lien.

In similar factual situations, Rowland v. State of Georgia, Department of Administrative Services (DOAS), 219 Ga. App. 899 (1996), and DOAS v. Deal, 220 Ga. App. 846 (1996), the Court of Appeals held that because the workers' comp employer/insurer, DOAS, did not give notice to the third-party tortfeasor or its insurer of its right of subrogation, when the plaintiff/employee settled with the tortfeasor giving the tortfeasor a full release, the employer/insurer DOAS could not enforce its workers' comp subrogation lien.

In Wausau Insurance Company v. McLeroy, 266 Ga. 794 (1996), the Supreme Court, upon certified questions from the 11th Circuit, held that §34-9-11.1 does not allow a workers' comp carrier to recover death benefits paid to an employee's survivor by a third-party tortfeasor. A 1995 amendment to §34-9-11.1(b) allowed subrogation against death benefits, but the Supreme Court in Wausau held that such amendment was not retroactive.

In Dowdy v. Earthwise Restaurant Management, Inc., 221 Ga. App. 220 (1996), the Court construed the newly-amended workers' comp subrogation statute, §34-9-11.1 with reference to the "applicable statute of limitations" for any personal injury action filed by an employee against a third-party tortfeasor.



The plaintiff/employee, Pamela Dowdy, sustained slip and fall injuries while on the job, and later settled her workers' comp claim with her employer's insurer. Less than two years later, Ms. Dowdy filed a premises liability action against the restaurant where the slip and fall occurred. The Court held that the applicable statute of limitations for this slip and fall is two years under O.C.G.A. §9-3-33 and thus, Ms. Dowdy's suit versus the restaurant was timely. The newly-amended §34-9-11.1 further provides that if the third-party claim is not brought within one year of the injury, then the employer or workers' comp insurer may but is not required to assert the employee's cause of action in tort, either in its own name or in the name of the employee. Further, subsection (e) of the code section states that these provisions of the workers' comp subro statute shall apply retroactively to injuries occurring on or after July 1, 1992, as did the injury in Ms. Dowdy's case. See also, Cleveland v. Snowdrop Properties, 221 Ga. App. 448 (1996).

#### ATTORNEY FEES

The Court of Appeals continues to hold that where the employer/insurer has reasonable grounds for defending a claim, attorney fees may not be awarded to the claimant. Whether reasonable grounds for defense exist is generally an issue of fact to be determined by the ALJ/State Board of Workers' Comp. However, the Court is sometimes called upon to review the State Board's finding of whether reasonable grounds existed for defense. In Pet, Inc. v. Ward, 219 Ga. App. 525 (1995), the Court once again pointed out that there was evidence in the medical records which apparently ignored by the ALJ/State Board of Workers' Comp and, thus, an assessment of attorney fees against the employer was not warranted.

The Court of Appeals had another

occasion to reverse an assessment of attorney fees against the employer in Autry v. Mayor and Aldermen of the City of Savannah, 222 Ga. App. 691 (1996). Because there was evidence in the record to support employer's defense, the award of attorney fees against an employer was not warranted. The fact that the State Board did not accept the defenses raised by the employer, City of Savannah, does not render those defenses unreasonable or unfounded, and, therefore, "the finding of the Board that the City's defense was made without reasonable grounds is without evidence to support it," and the attorney fee award was reversed.

#### F. ATTORNEY FEES - SUBSEQUENT INJURY TRUST FUND

It should be noted that in the 1996 session, the legislature has amended O.C.G.A. §34-9-367 to provide that the SITF can be held liable for assessed attorney fees when it is proven by a preponderance of evidence that the SITF refused without reasonable grounds to pay a claim. This is a legislative reaction to the Supreme Court's holding in Georgia Subsequent Injury Trust Fund v. Muscogee Iron Works, 265 Ga. 795 (1995).

#### G. APPEALS - STANDARD OF REVIEW

In 1994, the legislature amended O.C.G.A. §34-9-103(a) to provide that "the findings of fact made by the Administrative Law Judge in the Trial Division (at the State Board of Workers' Comp) shall be accepted by the Appellate Division (of the State Board) where such findings are supported by a preponderance of competent and credible evidence contained within the record." This 1994 amendment essentially modified

what was previously a "de novo" standard of review by the State Board Appellate Division of the ALJ's findings. In Clinical Arts Home Care Services v. Smith, 218 Ga. App. 671 (1995), the Court of Appeals held that although the State Board of Workers' Compensation was "previously authorized to engage in a de novo consideration of the evidence and substitute its findings for those of the ALJ ... the Appellate Division does not have such authority under the new standard of review." A couple of cases more recently have addressed the question of the appropriate standard of appellate review: Bennett-Murray, Inc. v. Barnes, 222 Ga. App. 137 (1996) and AT&T v. Cotten, 222 Ga. App. 261 (1996). In these cases, the Court discusses the new standard of review, pointing out that, although it is no longer a "de novo review" of the ALJ by the Appellate Division, the Appellate Division still can:

1. weigh the evidence;
2. determine the credibility of evidence; and
3. engage in a broader standard of review than that permitted under the "any evidence" standard.

#### H. CHANGE IN CONDITION

The majority of appellate decisions involving change in condition currently grow out of Maloney v. Gordon County Farms, 265 Ga. 825 (1995). Maloney and its progeny set forth the details of the claimant's burden of proof when the claimant is seeking to prove a change in condition to re-commence indemnity benefits. If the claimant has a compensable injury and is under medical restrictions, and is then terminated by his or her employer for cause, in order to meet his or her burden of proof to re-commence benefits, the claimant must prove that



he

1. suffered a loss of earning capacity as a result of the compensable injury;
2. continues to suffer physical limitation attributable to the injury; and
3. has made a diligent but unsuccessful effort to secure suitable employment following termination by the original employer.

In Sadeghy v. Suad, Inc., 219 Ga. App. 92 (1995), the Court of Appeals indicated that the ALJ and Appellate Division at the State Board had not made any findings of fact addressing the suitability of the claimant's potential jobs, although there was some evidence that the claimant had attempted to find suitable employment. The case was remanded for a new hearing on that issue.

In Harrell v. City of Albany Policy Department, 219 Ga. App. 810 (1996), the claimant received workers' comp benefits for a foot injury until he returned to work as a corrections officer. He was terminated after being found asleep on the job. Following his termination, the claimant Harrell testified that he made a good faith effort to find employment elsewhere, and that, failing to do so, he was entitled to a re-commencement of his income benefits.

On cross-examination, many inconsistencies were brought out in Harrell's testimony, and due to these inconsistencies and Harrell's lack of credibility, the Court questioned whether Harrell had made a diligent, sincere, effort to find suitable employment elsewhere, and remanded the case to the Appellate Division for reconsideration in light of these requirements of Maloney. The Court of Appeals held that the Appellate Division could deny Harrell's claim for disability benefits on the ground that he did not make a diligent effort to secure suitable employment following his termination by the Albany Policy Department, and that his ability to find suitable employment was not proximately

caused by his continuing job-related physical disability.

In Lukowski v. Capitoline Products, Inc., 222 Ga. App. 140 (1996), and LCP Chemicals v. Strickland, 221 Ga. App. 742 (1996) the Court of Appeals discussed fact situations in both cases in which the claimants failed to meet the burden of proof set forth in Maloney, thus clarifying that the law continues to require that the claimant meet all elements of this burden of proof.

Likewise, in McEver v. Worrell Enterprises, 223 Ga. App. 627 (1996), it was held that the Maloney burden of proof was not met. In McEver, a vocational rehab supplier testified that in his opinion, two of the prospective employers who he contacted on behalf of the claimant did not hire the claimant because of her limitations. The rehab supplier's opinion was based solely on his telephone conversations with these prospective employers ever said that the claimant's injury would prevent her from being hired. In the ALJ's award granting benefits to the claimant, the only evidence supporting the ALJ's findings was the inadmissible hearsay testimony of the vocational rehab supplier.

The Court's opinion in McEver is particularly instructive:

"It is clear from the ALJ's award, as well as the Appellate Division's award... that the proper burden of proof was employed in this case ... Contrary to McEver's contention, Maloney does not completely eliminate the proximate cause element from the claimant's burden of proof. The claimant simply is no longer required to produce direct evidence of proximate cause. Once the claimant shows that she has made diligent but unsuccessful efforts to obtain suitable employment, the fact finder may, in its discretion, infer from the evidence that the claimant's disability is the proximate cause of her unemployment. However, Maloney does not require the fact finder

to draw this inference, and it is not an abuse of discretion for it to make an alternative inference. That is, the fact finder could properly infer that the claimant's continuing unemployment was due to a number of reasons other than her disability. Thus, it is not necessarily sufficient for the claimant simply to show that she has unsuccessfully sought employment."

#### ALL ISSUES CASE - Claimant's Burden to Prove Good Faith Job Search

Over the past couple of years, many claimants have argued that the burden of proof described in Maloney and subsequent cases was required of the claimant only in change in condition cases. That logic was never well-supported, and, in Diamond Rug & Carpet Mills v. Moses, 221 Ga. App. 807 (1996), the Court of Appeals ruled that the Maloney rational and burden of proof set forth therein is required of the claimant in all issues cases as well as change in condition cases.

#### I. NEWLY DISCOVERED EVIDENCE

For a new trial to be granted on the basis of newly-discovered evidence, it is required that the newly-discovered evidence not be merely cumulative of evidence presented in the previous hearing. In Distribution Concepts Company v. Hunt, 221 Ga. App. 449 (1996), the claimant did not produce as a witness one McBride, who the claimant contended would have testified in his behalf. After he lost his claim for benefits, the claimant moved for a remand based upon "newly-discovered evidence" after he located McBride and arranged for McBride to testify. The Court ruled that McBride's testimony, in essentially corroborating the claimant's own testimony at the first hearing that he did in fact report his accident to his employer, would have been cumulative of the claimant's testimony, and, thus, did not amount to newly-discovered evidence.



## J. IDIOPATHIC INJURY

In Prudential Bank v. Moore, 219 Ga. App. 847 (1996), the claimant fell on the job and struck her head on the baseboard. The ALJ denied the initial claim for benefits, finding that the fall was idiopathic and not compensable. The Court of Appeals re-stated the existing law, that idiopathic injuries are not generally compensable since they do not arise out of the employment, although they occur in the course of employment. The exception in which idiopathic injuries can be compensable, occurs in circumstances where the claimant, while falling, strikes some object particularly related to the workplace such as a work bench, piece of machinery or other equipment. The theory is that the object such as the bench or piece of equipment puts the claimant at "increased risk" and therefore makes the claim compensable. See, U.S. Casualty Company v. Richardson, 75 Ga. App. 496 (1947). The claimant in Prudential Bank argued that the baseboard which she struck her head should be analogous the bench or piece of machinery and, thus, should make her claim compensable. The Appellate Court disagreed, finding that the baseboard, like the floor, is a mere structural hazard to which the claimant is exposed, and is not peculiar to her employment.

## K. INSURANCE COVERAGE

In Cox v. Advoni, 222 GA. App. 413 (1996), the question was whether the employer had the requisite minimum of three employees which would subject him to the Workers' compensation Act. The ALJ and State Board Appellate Division found that the employer, Travel Host Inn, owned by Advoni, did have three employees, consisting of the claimant, the night manager and a secretary. On appeal, the Superior Court found that the secretary was employed by a separate corporation owned by the employer, but the Court of Appeals reversed the

Superior Court relying on the any evidence rule.

The question in Peters v. Kevin Moody Construction, 223 Ga.App. 133 (1996), was whether a workers' compensation claimant who is himself an employer in his own business and has exempted himself from workers' compensation coverage which he obtains for his own employees ( 34-9-2.2) in his own business may nevertheless be a covered employee of another employer. The Court of Appeals reviewed the provisions of 34-9-2.2 and held that where a person, in his capacity as an employer in his own business, elects to exempt himself from coverage as an employee of such business (his own), if he is acting as an employee of another business, nothing in 34-9-2.2 estops him from claiming under his employer's workers' compensation coverage in that other employer's business.

Such person is obviously stopped from making a claim against his own company when he has exempted himself from coverage as an employer, but he is not estopped from making a claim when he is not the employer against whom the claim is being made, and the business in which he makes the claim is not the business as to which he exempted himself as not being a covered employee.

In Underwood v. Dunn, 221 Ga.App. 185 (1996) it was established that Underwood was a stockholder and chief financial officer of the employer, and was responsible for obtaining the employer's workers' compensation insurance as required by statute. Since Underwood failed to obtain workers' compensation coverage, and the claimant Dunn suffered a compensable work-related injury, the claimant's award was uncollectable against the employer due to the employer's insolvency. The claimant then filed a civil action against the individual corporate officers alleging that they were individually liable because they breached their statutory duty to obtain workers' compensation insurance. The Court held that when the employer's insolvency due to

lack of workers' compensation insurance renders the employee's workers' compensation award uncollectible, the employee may seek recovery from the individual agent or agents of the employer who had the duty, but failed, to obtain and provide the workers' compensation coverage.

## L. SETTLEMENTS

The Court of Appeals upheld a Board-approved stipulated settlement in Watson v. Zurich-American Insurance Company, 221 Ga.App. 4 (1996). The claimant, Watson, settled his case with Zurich-American for \$35,000.00 and 12 months of future medical treatment, which settlement stipulation was approved by the State Board. Over a year later, Watson sued the insurer alleging that he was fraudulently induced to settle his claim. The Court affirmed a grant of summary judgment to Zurich-American, and pointed out that there was no evidence that the claimant Watson was prevented from learning the terms of the settlement agreement before he signed it, and no evidence of any medical condition or other disability which would have prevented him from reading and understanding the terms of the settlement agreement. Even if it had been proven that the insurance adjuster misrepresented the agreement to Watson, there was no evidence to show that Watson was prevented from reading or understanding the settlement agreement himself. The agreement, of course, specifically provided that the settlement was not subject to future modification and was final and binding.

## M. STATUTE OF LIMITATIONS

Under O.C.G.A. §34-9-82(a) an initial claim for workers' compensation benefits must be filed within one year of the date of injury. This one-year statute of limitation can be tolled where the employer initially accepts the claim and provides medical treatment. In such a case, where the employer provides



remedial medical treatment for the on-the-job injury, such remedial medical treatment can toll the one year statute. In Queen Carpet v. Moynihan, 221 Ga.App. 797 (1996), the Court of Appeals held that the date that the last remedial treatment was provided by the doctor, and not the date that such last remedial treatment was paid for by the employer, is the controlling date for the one year period of limitation in 34-9-82(a). In this case, while the claimant was injured on 3/29/92, he did not file his claim until 11/9/93, but the employer had paid for remedial medical treatment through 11/30/92. The Workers' Comp Board Appellate Division found that, since remedial medical treatment had been paid through 11/30/92, the claim filed on 11/9/93 was timely. The Appellate Court reversed, stating that the last remedial medical treatment was provided by the doctor on 10/14/92, and, therefore, the claim filed 11/9/93, was barred by the one year statute of limitation.

#### N. CLAIMANT MISREPRESENTATION - RYCROFT

In Georgia Electric Company v. Rycroft, 259 Ga. 155 (1989), the Georgia Supreme Court recognized that misrepresentations on the job application by a potential employee can make the contract of employment voidable to prevent recovery of workers' compensation benefits by that same employee if he or she is later injured. However, the Rycroft test specifically requires a causal connection between the misrepresentation and the resulting later injury. In Dynasty Sample Company v. Beltran, (A96A0837) (1996), the claimant Beltran was injured when two of his fingers were severed on a piece of machinery. The employer, Dynasty, denied the claim for benefits and terminated Beltran when it learned that Beltran had intentionally misrepresented on his application the fact that he was an illegal alien, and had presented false documents to Dynasty at the time he applied for employment. The Court

rejected this argument, pointing out that it did not meet all prongs of the Rycroft test, and particularly failed to meet the requirement of a causal connection between the original misrepresentation and the subsequent injury. There was no causal connection between Beltran's misrepresentation of his citizenship, and his later injury on-the-job.

#### O. INDEPENDENT CONTRACTOR

A 1991 amendment to O.C.G.A. §34-9-1 provides, in pertinent part, that for purposes of the Workers' Compensation Act, "an owner-operator (of an 18-wheel tractor trailer) as such term is defined in code section 40-2-87 shall be deemed to be an independent contractor. In Upshaw v. Hale Intermodal Transport Company, (A96A1648) (1977), the Court of Appeals was faced with an injury to Upshaw, the owner-operator of a tractor trailer, who leased his truck and his services as a driver to Hale Intermodal Transport Company. Upshaw's claim for workers' compensation benefits was denied based upon the newly-amended 34-9-1 which defines him, an owner-operator, as an independent contractor, and not an employee of Hale Intermodal. The claimant Upshaw presented several arguments that federal law contradicts Georgia law on this issue and preempts the Georgia law. After reviewing various provisions of the federal law and case holdings under federal law and regulations, the Court found that nothing in the federal law contradicts the newly amended 34-9-1(2) that an owner-operator is deemed to be an independent contractor and, thus, Upshaw is not entitled to workers' compensation benefits from Hale Intermodal Transport. It should be noted, and the Court pointed out, that the claimant Upshaw was driving under the terms of a written lease that complied specifically with all provisions of the federal statute and regulations, and also had signed a document called "Independent Contractor Release from Workers' Compensation Claims" in which he acknowledged being

an independent contractor.

#### EFFECTIVE USE OF MOTIONS IN

LIMINE: By: Morton G. Forbes

John A. Foster

Continuation from newsletter Volume 3 Issue 3...

#### VII. HOW DO YOU INSULATE THE JURY FROM INADMISSIBLE EVIDENCE

The resolutions of issues of admission or exclusion of evidence can be taken up at the Pre-Trial Conference or a Motion in Limine can be used for this purpose. Where the judge does not choose to litigate admissibility in advance of trial, he can still order that specific items of evidence not be mentioned to the jury or offered in evidence until a determination of admissibility has been made. Where the issue first arises at trial, the judge can order the jury removed, conduct a conference at the bench, or adjourn to chambers. The considerations in choosing one of these options will range from the nature of the determination to be made to the acoustics of the courtroom.

Take for example the question "did the driver say anything?". This is not objectionable under the "hearsay rule" because it does not ask for the contents of the evidence. But it does, literally, "suggest" to the jury that there is inadmissible evidence. Even the mention of a witness who cannot be called, due to the invocation of the spousal privilege, might be considered as a means of "suggesting" inadmissible evidence. The judge has a duty to keep out, not only direct statements of inadmissible evidence, but also everything from which such evidence may be inferred. His task is awesome, indeed. There are a great many other means by which inadmissible evidence may be brought to the attention of the jury. One popular ploy is to display exhibits on the counsel table. Or the attorney can bring into the courtroom large photographs of documents not admitted into evidence. These are



especially difficult to prevent. Statements or questions during voir dire or in the opening statement of counsel may also be used to avoid the effects of exclusionary rules. Then there is the use of hypothetical questions or leading questions to plant in the minds of the jury ideas never expressed from the witness stand. The job is complicated by the difficulty of distinguishing between the honest mistake or good faith mention of evidence believed admissible and the conscious attempt to slink by exclusionary rules.

**VIII. MOTIONS IN LIMINE CAN BE USED TO SPECIFICALLY LIMIT ARGUMENTS OPPOSING COUNSEL WILL BE ALLOWED TO MAKE IN CLOSING ARGUMENTS**

An example is Brown v. State, 150 Ga. App. 831, 258 S.E.2d 641 (1979). In that case, at the conclusion of all the evidence, the District Attorney filed a Motion in Limine showing that the Defendant had been served with a list of twenty-one (21) potential witnesses and that list was supplemented with two additional witnesses. The State subpoenaed sixteen (16) witnesses but only eleven (11) were actually used at trial. The State asked the Court to instruct defense counsel to refrain from referring in his closing argument to the fact that the State failed to produce some of the witnesses identified. The trial court granted the Motion in Limine. The Court of Appeals held that it was proper to refuse to allow the Defendant to argue this point to the jury.

**IX. MOTIONS IN LIMINE MAY BE USED IN LIEU OF MOTION FOR SUMMARY JUDGMENT UNDER CERTAIN SITUATIONS**

Motions for Summary Judgment can be used to get a ruling from the Court as

to which facts are material facts; that is, which facts are legally significant. This involves consideration of what the true legal issues are in the particular case. Motions in Limine can be used for the same purpose. An example is Gosnell v. Waldrip, 158 Ga. App. 685, 282 S.E.2d 168 (1981). The Gosnell case was an action on a promissory note. The Defendants contended that, relying on the Plaintiff's inducements, they sold the property to a third-party who assumed the obligations under the promissory note. The property, a modular home, was subject to two Deeds to Secure Debt. The holder of the first Deed to Secure Debt foreclosed and the Plaintiff purchased the property at the foreclosure sale. Hence, there was a merger of estates and a novation. The Defendants wanted to raise the novation and the merger as defenses, but the Plaintiff filed a Motion in Limine which the trial court granted excluding any evidence about the foreclosure by the holder of the first Deed to Secure Debt. By objecting to specific evidence of the foreclosure, the Plaintiff got the trial court to make a ruling on what the true legal issues in the case were, holding that the foreclosure and novation were not legally relevant; that is, they were not material facts. The same could have been accomplished through a Motion for Summary Judgment, but in this instance, it appears that it was too late to file a Motion for Summary Judgment since the opinion indicates that the Motion in Limine was made orally at trial. Accordingly, the Plaintiff was able to get the same result by making an oral Motion in Limine at trial that he could have gotten by filing a Motion for Partial Summary Judgment. Motions in Limine can be effectively used in this way to clarify or to limit the legal issues which will be tried.

**X. EXAMPLES OF WHAT TYPES OF EVIDENCE AND/OR**

**ARGUMENTS MOTIONS IN LIMINE MIGHT CONTAIN**

(1) The relative wealth or economic standing of the Plaintiff or the Defendants. Continental Casualty Co. v. Wilson Avery, 115 Ga. App. 793, 796 (1967); Usry v. Bostick, 112 Ga. App. 75, 78-79 (1965); American Casualty Co. v. Seckinger, 108 Ga. App. 262, 263 (1963).

(2) The financial condition of the Plaintiff prior to, at the time of, or subsequent to the events complained of in this suit. Continental Casualty Co. v. Wilson Avery, 115 Ga. App. 793, 796 (1967); Usry v. Bostick, 112 Ga. App. 75, 78-79 (1965); American Casualty Co. v. Seckinger, 108 Ga. App. 262, 263 (1963).

(3) The Plaintiff's financial needs and/or the importance of the verdict to the Plaintiff. Continental Casualty Co. v. Wilson Avery, 115 Ga. App. 793, 796 (1967); Usry v. Bostick, 112 Ga. App. 75, 78-79 (1965); American Casualty Co. v. Seckinger, 108 Ga. App. 262, 263 (1963).

(4) Whether or not Plaintiff had to borrow any funds or pay off any loans. Continental Casualty Co. v. Wilson Avery, 115 Ga. App. 793, 796 (1967); Usry v. Bostick, 112 Ga. App. 75, 78-79 (1965); American Casualty Co. v. Seckinger, 108 Ga. App. 262, 263 (1963).

(5) Referring to verdicts in other cases. Wilson v. Northside Plumbing, 128 Ga. App. 625, 626 (1973); Central of Ga. Rwy. v. White, 49 Ga. App. 290 (1934).

(6) Reference to Plaintiff's requirement to pay attorney's fees. SCL v. Thomas, 125 Ga. App. 716 (1972).

(7) Asking jurors to put themselves in Plaintiff's place. SCL v. Wallace, 227 Ga. 363 (1971).

(8) Expressing personal belief in the veracity of any witness. Manning v. State, 123 Ga. App. 844, 846 (1971).

(9) Reading excerpts from other cases. Griffin v. State, 154 Ga. App. 261, 265 (1980).

(10) Counsel or witnesses referring to or suggesting the existence or lack of insurance from any person or entity not a party to the litigation, or any collateral source of Plaintiff or Defendants. Thomas Milling Co. v. Branch, 118 Ga. App. 857

(1968).

(11) References to the need to punish or deter any Defendant from similar conduct in the future. Engle v. Finch, 165 Ga. 131 (1927).

(12) Estop Chiropractor from testifying or in the alternative to estop Chiropractor from testifying as to the causation of Plaintiff symptoms. O.C.G.A. §43-9-1(s); Honeycutt v. Honeycutt, 237 Ga. 497 228, S.E.2d 881 (1976).

(13) To estop the Plaintiff from testifying that his physical condition was caused by this incident. Eberhart v. Morris Brown College, 181 Ga. App. 516, 352 S.E.2d. 832 (1987).

(14) Motions in Limine may be used in lieu of Motion for Summary Judgment under certain situations. Gosnell v. Waldrip, 158 Ga. App. 685, 282 S.E.2d 168 (1981).

(15) Motion in Limine prevents the Plaintiff from qualifying the jury as to an insurance carrier. Gonzales v. Wells, 213 Ga. App. 494, 445 S.E.2d 332 (1994).

(16) That the Defendant furnished or offered or promised to pay medical, hospital, or similar expenses occasioned by the alleged injury.

(17) Movant seeks to limit Plaintiffs' claims for punitive damages on the grounds that Plaintiffs are not entitled to punitive damages. O.C.G.A. §51-12-5; O.C.G.A. §51-12-5.1; Mallard v. Jenkins, 186 Ga. App. 167, 169 (1988); Alliance Transportation, Inc. v. Mayer, 165 Ga. App. 344 (1938); Ticor Construction Company, Inc. v. Brown, 255 Ga. 547 (1986); Stolle Corporation v. McMahon, 195 Ga. App. 273 (1990); and Community Federal Savings & Loan Association v. Foster Developers, Inc., 179 Ga. App. 861 (1986).

(18) It is expected that the Plaintiff, Plaintiff's counsel or one of Plaintiff's witnesses may attempt to say that "Two witnesses to the incident informed Plaintiff that they

had notified Defendant of this hazardous condition prior to the Plaintiff's fall."

(19) Estop Plaintiff from testifying that she could not seek medical attention because she could not afford the same.

(20) Testimony regarding human perception should be excluded because it would provide the jury with nothing more than an opinion that humans see things, and then decide what to do about them, and then they do it. An expert opinion on an ultimate factual issue is admissible only if it concerns a conclusion which the jurors would not ordinarily be able to draw for themselves. To be admissible, the expert's opinion must be "beyond the ken of the average layman." Walker v. Bishop, 169 Ga. App. 236, 312 S.E. 2d. 349 (1983); McGahee v. Phillips, 211 Ga. 118, 84 S.E.2d. 19 (1954); Garwood v. International Paper Company, 666 F.2d 217 (5th Cir. 1982),

(21) To estop the Plaintiff's from mentioning any subsequent remedial measures that Defendant made on the design of a product. Doster, et al. v. Central of Ga. Railroad Co., et al., 177 Ga. App. 393, 339 S.E. 2d 619 (1985); Orkin Exterminating v. Dawn Food Products, 186 Ga. App. 201, 366 S.E.2d. 792; Gunter v. Jackson Electric Membership Corp., 198 Ga. App. 629, 402 S.E.2d. 309 (1991).

(22) Collateral sources. Denton v. Conway Express, Inc., 261 Ga. 41 (1991); Georgia Power Company v. Falagan, 261 Ga. 41 (1991); Bennett v. Haley, 132 Ga. App. 512, 525 (1974).

(23) Prior claims. See O.C.G.A. §24-2-1 and 24-2-2; Goforth v. Wigley, 178 Ga. App. 558, 559-60 (1986).

(24) Unrelated accidents/injuries. O.C.G.A. §24-2-1 and 24-2-2; Goforth v. Wigley, 178 Ga. App. 558, 559-60 (1986); United Motor Freight Terminal Company, Inc. v. Hixon, 76 Ga. App. 653, 655 (1948); Barnes v. Cornett, 134 Ga. App. 120, 122 (1975).

(25) Character, prior arrests, driver's license. O.C.G.A. §24-2-1 and 24-2; Currie v. Haney, 183 Ga. App. 506, 507 (1987) (habit of speeding); Green, Georgia Law of Evidence, 3rd Ed., §§64,

65-68.

(26) Financial status. O.C.G.A. §24-2-1; Adams v. Camp Harmony Association, 190 Ga. App. 506, 508 (1989); Denton v. Conway Express, Inc., 261 Ga. 41 (1991); Georgia Power Company v. Falagan, 261 Ga. 41 (1991); Northwestern University v. Crisp, 211 Ga. 636, 641 (1955); Brunswick & Western Railway Co. v. Wiggins, 113 Ga. 842, 850 (1901); Higgins v. The Cherokee Railroad, 76 Ga. 149(3); Bennett v. Haley, 132 Ga. App. 512, 525 91974). See also Georgia State Bar Rules, DR 7-102(A)(3), (4) and (5); DR 7-106(C)(1); Rule 4-102(d) Standard 45; and O.C.G.A. §9-10-185. As to the punitive damages phase of the trial, see O.C.G.A. §51-12-5.1; Hospital Authority of Gwinnett County v. Jones, 259 Ga. 759, 764 fn. 13 (1989); Holman v. Burgess, 199 Ga. App. 61, 63 (1991). See also Green, Georgia Law of Evidence, 3rd Ed. □74.

(27) Uninsured defendant. See O.C.G.A. §24-2-1; Adams v. Camp Harmony Association, 190 Ga. App. 506, 508 (1989); Denton v. Conway Express, Inc., 261 Ga. 41 (1991).

(28) Personal obligation of Defendant. Adams v. Camp Harmony Association, 190 Ga. App. 506, 508 (1989); Denton v. Conway Express, Inc., 261 Ga. 41 (1991).

(29) Future of award proceeds. See O.C.G.A. §24-2-1 and 24-2-2; Gusky v. Candler General Hospital, 192 Ga. App. 521 (3) (1989). See also Hall v. Chicago & Northwestern Railway Co., 125 N.E.2d 77, 86 (Ill. 1955).

(30) Ineffectiveness of money damages. O.C.G.A. §24-2-1; Gielow v. Strickland, 185 Ga. App. 85, 86 (1987); Central of Georgia Railway v. Swindle, 260 Ga. 685, 687 (1990); Adams v. Camp Harmony Association, 190 Ga. App. 506, 508 (1989).

(31) Regrets. O.C.G.A. §24-2-1.

(32) Taxes. O.C.G.A. §24-2-1.

(33) Time of employing attorney. O.C.G.A. §§24-2-1 and 24-9-24.

(34) Attorney fee. O.C.G.A. §24-2-1; Stoner v. Eden, 199 Ga. App. 135



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(1991).

(35) Equally available witness. See O.C.G.A. §24-4-22; Bank of Emanuel v. Smith, 32 Ga. App. 606 (1924); Bradford v. Parrish, 111 Ga. App. 167 (1965).

(36) Defense witness credibility. O.C.G.A. §24-2-1.

(37) Plaintiff witness credibility. Manning v. State, 123 Ga. App. 844, 845-6 (6) (1971).

(38) Untendered evidence. O.C.G.A. §24-2-1.

(39) Insurance rate effects. O.C.G.A. §§24-2-1 and 24-2-2.

(40) Tax effects. O.C.G.A. §§24-2-1 and 24-2-2.

(41) Demand for filed information. O.C.G.A. §§24-2-1; 24-10-26; McAdam v. Weikel & Smith Spice Co., 64 Ga. 441 (1879).

(42) Demands for additional medical exams. O.C.G.A. §24-2-1.

(43) Demand for physical assistance. O.C.G.A. §24-2-1.

(44) Seat belt. See O.C.G.A. §24-2-1; Katz v. White, 190 Ga. App. 458

(1989); Boatwright v. Czerepinski, 194 Ga. App. 697 (1990; O.C.G.A. §40-8-76.1(d)); Cannon v. Lardner, 258 Ga. 332 (1988).

(45) Seat belt opinions. City of Fairburn v. Cook, 188 Ga. App. 58, 69 (1988).

(46) Prior moving traffic violations and collisions. O.C.G.A. §§24-2-1 and 24-2-2; Myers v. Barnard, 180 Ga. App. 192 (1986); Underwood v. Butler, 166 Ga. App. 527, 529 (1983).

(47) Prior pleadings. O.C.G.A. §9-11-16.

(48) Reference to IME. O.C.G.A. §9-11-35.

(49) Other similar claims. O.C.G.A. §§24-2-1 and 24-2-2.

(50) Settlement. O.C.G.A. §24-3-37.

(51) Time of filing. O.C.G.A. §24-2-1, -2.

(52) Filing of tax returns. O.C.G.A. §24-2-1, -2.

(53) Cross examination by multiple counsel.

(54) Merging incident.