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Winter 2010

Prompt Accident Investigation and Preservation of Evidence

By Rodney Pack, ACTAR, C.D.S.
Kimley-Horn and Associates, Inc.

"The best defense is a good offense." Perhaps too few transportation companies today choose to practice this age-old adage, and each year many companies collectively pay millions of dollars defending themselves from meritless lawsuits stemming from vehicle collisions.

These costly payouts are caused in part by the decision not to invest in the documentation of evidence in a timely manner, and instead to rely upon in-house employees or insurance personnel with little or no experience to assess liability and address future potential litigation issues.

In today's litigious society, this mindset of years past reduces the likelihood of a favorable outcome and considerably increases the company's financial exposure.

Furthermore, a valuable, proactive response to crash situations can effectively reduce future losses without incurring great expense. With a slight deviation from the standard methods for collecting physical evidence, sufficient information can be identified and preserved for future potential litigation at a relatively low cost.

Preserving the Scene

By having a crash scene forensically mapped and documented, the physical evidence, roadway configuration, and elevation data can be preserved. Extra attention should be paid to ensure that all tire marks are photographed and included in the survey. Deceiving photographs of unrelated tire marks may be offered later to support a specific allegation and, without proof to the contrary, may elicit erroneous conclusions. By including all visible tire marks in the scene mapping and photographs, the dismissal or explanation of any unrelated marks may be possible.

The data collected during the scene mapping can be saved and stored electronically until needed. It is not necessary to have scale diagrams produced unless and until a claim is made—this time, money, and effort would be best spent elsewhere.

The crash scene should be methodically photographed to include physical evidence, roadway surface conditions, and any peculiar roadway characteristics. Lighting conditions, roadway markings, sight obstructions, and signage should be documented and

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Annual Receptions Honoring the Judiciary

Thursday, February 4, 2010
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President's Message

GDLA continues to offer opportunities for the benefit of members and their firms.

The Deposition Boot Camp this fall was well attended. The faculty was excellent. The feedback was very positive. Congratulations and thanks to Jo Jagor and Will Ellis, who did an excellent job planning this impressive CLE event (see page 14). Watch for announcements for the 2010 Deposition Boot Camp next summer. It is a very good training program for lawyers just beginning their practices.

GDLA will be stronger if we encourage our younger lawyers to become more active in the organization.

The annual Trial Academy shifted from December to January 21-23, 2010. Lynn Roberson assembled an impressive faculty for this year's event. Trial Academy is always a first-rate training program for young lawyers who have some practice experience.

Mark your calendars for Judicial Receptions in Atlanta on February 4 at the 191 Club, and in Savannah on April 22 at the Bohemian Hotel. Look for e-mail announcements with more details. These receptions offer an excellent opportunity for us improve relations between judges and our members.

Our Annual Meeting will be in Ponte Vedra again this year, June 10-13, 2010. If you have attended an Annual Meeting at the Ponte Vedra Inn & Club, you know what a great venue it is. If you have not been there, please come and see for yourself.

As I have mentioned before, and will again, make it a point to ask a younger GDLA member to attend the Annual Meeting. Once there, take some time to introduce them to others. Set up a dinner group that includes them. GDLA will be stronger if we encourage our younger lawyers to become more active in the organization.

Yours for the defense,
Staten Bitting
GDLA President

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Member & Legal News

Peter D. Muller has joined *Goodman, McGuffey, Lindsey & Johnson* as the managing partner of the firm's new Savannah office. The firm, which specializes in defense litigation, is based in Atlanta and also has an office in Orlando, Florida. The new office is located at 530 Stephenson Avenue, Suite 300; Savannah, Georgia 31405; 912-355-6433. Muller, editor of the GDLA newsletter, can be reached at pmuller@gmlj.com.

Constangy Brooks & Smith announces **W. Melvin Haas III** of its Macon office was named to the list of Top 100 Labor Attorneys in the U.S. for 2009 by the Labor Relations Institute, Inc., a leading industry information source. Inclusion on the list puts him in the top one percent of U.S. labor attorneys, making him among the most active in representing companies in National Labor Relations Board-monitored elections. Haas was also named vice chairman of the Labor Relations Committee of the U.S. Chamber of Commerce. He serves as GDLA Secretary-Treasurer.

Albert H. Parnell, a partner at *Hawkins & Parnell* in Atlanta, was honored during the DRI Asbestos Medicine Seminar, for which he has led the planning for 30 years. Parnell has served DRI in many roles, including as a current and founding member of DRI's prestigious Law Institute and a former member of DRI's Board of Directors (1992-1995). He also has served as the program chair or Law Institute liaison for DRI's Damages Seminar for 19 years. DRI's President presented Parnell with a new award honoring outstanding achievement in the role of program chair for DRI CLE events. In the future the award will be presented at DRI's Annual Meeting and will be known as the Albert H. Parnell Outstanding Program Chair Award. Parnell is a GDLA past president.

Former GDLA Board of Directors member **Luanne Clarke** of *Moore, Clarke, DuVall & Rodgers* in Atlanta, Albany, Valdosta, and Columbus has joined with Burt Tillman of Tillman & Associates to form Mediated Dispute Resolutions (MDR). MDR's mission is "to ensure that everyone speaks, everyone is heard, everyone is seen, and we all listen—the answer always lies therein." **Kevin Gaulke** of Moore Clarke's Atlanta office is also mediating with MDR. Each with over 25 years of practical experience in a wide variety of tort, business, employment and workers' compensation actions, Clarke and Tillman offer unique mediation and arbitration skills because they recognize "what it takes to get the deal closed."

Miller & Martin announces that **Christoper E. Parker** has joined the firm's Atlanta office as a member. Parker is on the GDLA Board of Directors.

Bruce Edenfield announces the formation of his new law firm, *Bruce Edenfield, PC,* effective January 2009. With offices just off the square in Dahlonega, the new firm's address is 87 North Chestatee Street, Suite H, Dahlonega, Georgia 30533.

The Savannah firm of *Brennan and Wasden* is celebrating its 20th anniversary this year. Started in 1989 by **Joseph Brennan** and **Wiley Wasden III**, the firm has grown to 11 lawyers handling all types of insurance defense and coverage issues, with a particular emphasis on the defense of professional liability claims. The firm also announces **Tracie Smith** has completed training to be registered with the Georgia Office of Dispute Resolution as a Mediator and Arbitrator in the fields of General Civil Litigation and Domestic Relations.

Continued on next page

Welcome New GDLA Members

Michael J. Hannan III
Thompson, Slagle & Hannan
Johns Creek

Charles G. Hoey
The Hoey Firm, Fayetteville

Tavis L. Knighten
Law Offices of Tavis L. Knighten, Atlanta

Laura C. Marshall
Owen, Gleaton, Egan, Jones & Sweeney, Atlanta

Mark Davis Meliski
Owen, Gleaton, Egan, Jones & Sweeney, Atlanta

Alyssa Peters Morris
Constangy Brooks & Smith
Macon

Courtney M. Norton
Rutherford & Christie
Atlanta

Lindsey McCall Pence
Savell & Williams, Atlanta

Karen J. Robertson
Chambless, Higdon, Richardson, Katz & Griggs, Macon

Ingrid Nuss Rojas
Drew Eckl & Farnham, Atlanta

Kevin T. Shires
Vernis & Bowling, Atlanta

E. Elaine Shofner
Hawkins & Parnell, Atlanta

Nicholas P. Smith
Drew Eckl & Farnham, Atlanta

James F. Taylor III
Fain, Major & Brennan, Atlanta

Cara Weiner
Allen, McCain & O'Mahony, Atlanta

Britton G. White
Brennan, Harris & Rominger
Atlanta

Hall Booth Smith & Slover has signed a letter of intent to move to One Ninety One Peachtree when its current lease expires in 2010, representing a return to its roots. The parent firm first opened its doors in Peachtree Center in 1982. Its Atlanta office has been at Atlantic Center Plaza since 2003. The firm has recently opened a new office in Charleston, South Carolina. Firm Chairman **John E. Hall, Jr.,** was recently appointed as Honorary Consul to the Country of Georgia.

In Memoriam

GDLA mourns the passing of the following members and friends:

Thomas E. Magill. In the words of GDLA Immediate Past President Jimmy Singer, "Tom was a great friend of the association, a tremendous lawyer, and invaluable in his generous work on the GDLA Trial Academy for many years." Tom, age 56, graduated from Tulane University School of Law in 1978, and moved to Atlanta to join Carter, Ansley, Smith and McLendon. In 1996, he formed his current firm, *Magill & Atkinson*, handling personal injury, product liability, business, professional liability, construction defects, contracts, and life and health insurance cases. He also served as a mediator in over 750 cases with Henning Mediation. Tom lost his brave battle with cancer on October 5, 2009. He is survived by his wife of nearly 26 years, Dr. Carol Brock, and three children, Jenny, Connor, and Chris.

Leigh Lawson Reeves. A *magna cum laude* graduate of Mercer University School of Law, Leigh, age 45, was a partner with, *Drew Eckl & Farnham* in Atlanta where she practiced for 18 years. She represented employers and insurers in the defense of workers' comp cases and employment discrimination claims. Leigh was a frequent speaker on topics concerning workers' comp and its overlap with the federal legislation of The Americans with Disabilities Act and the Family Medical Leave Act She passed away on May 11, 2009, after a brave battle with cancer. She is survived by her husband, Hal and three children, Lawson, Avery and Caroline.

Rebecca Boyd Cox McKinley. GDLA Board member **Hall F. McKinley III** of *Drew Eckl & Farnham* lost his wife Becky, age 50, after a brief bout with cancer on July 3, 2009. High school sweethearts, they happily celebrated their 25th Wedding Anniversary on May 12, 2009. She is also survived by their children, Hall Forbes IV, Rebecca Allison, and Caroline Boyd. Becky's effervescent smile and charming personality regularly lit up the GDLA Annual Meeting. She was like family to so many GDLA members, spouses, and other friends.

Judicial Nominations: Get Involved

The first Judicial Nominating Commission (JNC) of Georgia was established by executive order in 1972 by then-Governor Jimmy Carter, and subsequent governors have followed Carter's example. The JNC's purpose under current Governor Sonny Perdue is to recommend candidates to fill vacancies on the supreme court, court of appeals, superior court, and state court.

Chaired by Michael J. Bowers, JNC recommends five candidates to the governor for each judicial vacancy, unless fewer than five applicants are found to be qualified. There is no requirement that the governor appoint a candidate from the nominating commission's list.

As part of the vetting process, JNC regularly invites input from bar organizations during its review of judicial candidates. GDLA is among those invited to participate in this process by having a representative meet with the Commission members, prior to the applicant interviews, to share comments on the candidate(s).

As part of the judicial nominating process, GDLA members are notified of judicial vacancies and candidates by GDLA Judicial Relations Committee Chair and Past President Robert M. Travis of Bryan Cave via our blast e-mail system. GDLA members are strongly encouraged to participate in the important process of selecting judges by e-mailing Bob Travis directly with their perspectives on the candidates, whether positive or negative. While their e-mail responses to Travis will remain confidential, GDLA members may wish to phone Travis instead. His contact information is 404.572.6646 or robert.travis@bryancave.com.

GDLA members are strongly encouraged to participate in the important process of selecting judges.

Any GDLA members interested in serving on the Judicial Relations Committee to assist Travis in this important effort are encouraged to contact him directly.

Appellate Case Law Update

By L. Lee Hicks
McClure, Ramsay, Dickerson & Escoe, Toccoa
Appellate SLC Chairperson

Beneke v. Parker
285 Ga. 733
September 28, 2009

The supreme court has ruled that the 2005 crime-victim tolling statute, O.C.G.A. § 9-3-99, automatically applies to a defendant who has been cited for alleged violation of the Uniform Rules of the Road, because those are misdemeanors. Therefore, in all accidents in which the defendant has been charged, the personal injury statute of limitation does not begin to run until the prosecution has become final or otherwise terminated, regardless of whether the defendant had any criminal intent.

Furthermore, it should be noted that the rationale of this holding is not limited to vehicle accidents, and the tolling will apply to any tort matter in which the defendant has been charged with the violation of any statute which constitutes a misdemeanor.

O.C.G.A. § 9-3-99 was enacted for victims of alleged crimes, tolling the statute of limitation for tort claims until the prosecution has become final or otherwise terminated (provided that such time does not exceed six years).

In *Beneke*, the defendant was involved in a rear-end collision with the plaintiff on April 27, 2005. The defendant was cited under O.C.G.A. § 40-6-49 for following too closely. The citation was disposed of on May 19, 2005. The plaintiff filed suit for personal injuries on May 11, 2007, more than two years after the date of the collision and accrual of the cause of action.

The defendant raised the defense that the action was barred by the statute of limitations and filed a motion for summary judgment, which was initially granted by the trial judge. Then, upon motion for reconsideration, the trial court reversed and denied the motion for summary judgment, applying O.C.G.A. § 9-3-99, which tolls the statute of limitation for tort claims filed by a victim of a crime. The defendant filed an appeal, and the court of appeals affirmed the denial of the motion for summary judgment. The court of appeals held that violation of a traffic statute can cause a tolling under O.C.G.A. § 9-3-99, so long as the defendant had acted with criminal intent or with criminal negligence, which are required for a "crime" under O.C.G.A. § 16-2-1. Therefore, the court ruled that it was a jury issue as to whether the requisite criminality was involved.

The defendant obtained certiorari from the supreme court, which upheld the court in part and reversed in part. In a unanimous decision, the court concluded that the plain language in O.C.G.A. § 9-3-99 tolls the statute of limitation whenever the defendant is cited for a violation of the Uniform Rules of the Road. The court held that there is no need for a jury to determine whether the defendant acted with criminal intent or criminal negligence, because any violation of the Rules of the Road is automatically a misdemeanor, and all misdemeanors are crimes under O.C.G.A. § 16-1-3. The supreme court noted that it is constrained by the plain language of the statute, which is not limited to felonies or specific-intent crimes, and "any undesirable result" is a matter "properly addressed to the General Assembly rather than the courts."

State of Georgia Dept. of Transportation v. Douglas Asphalt Co.
297 Ga. App. 511, April 16, 2009

The court of appeals in an *en banc* ruling overturned the case of *MARTA v. Harrington, George & Dunn, P.C.,* 208 Ga. App. 736 (1993), on the issue of whether a cross-appeal survives the dismissal of the main appeal.

In the GDOT case, a dispute had arisen over alleged breach of contracts and non-payment involving an interstate project between GDOT and Douglas Asphalt Co. After the trial court granted in part Defendant GDOT's motion for summary judgment, Douglas filed a direct appeal to the court of appeals. Thereafter, Defendant GDOT also filed a cross-appeal on the trial court's denial in part of its motion for summary judgment and certain trial court rulings granting Douglas' motions in limine.

The court of appeals dismissed the main appeal by Douglas for failure to file its brief and enumerations pursuant to O.C.G.A. § 5-6-48(e). The cross-appeal for GDOT was dismissed by the court, holding that a cross-appeal may survive the dismissal of a main appeal only if the cross-appeal can stand on its own merits.

Because the cross-appeal by GDOT involved only the trial court's denial of part of its motion for summary judgment and certain rulings on Douglas' motions *in limine*, none of the errors raised by GDOT were final appealable errors. Therefore, all errors alleged by GDOT had required an application for interlocutory review, so the court of appeals dismissed *sua sponte* the GDOT cross-appeal for lack of appellate jurisdiction.

In doing so, the court expressly overturned its earlier decision in *MARTA v. Harrington, George & Dunn, P.C.,* concluding that it had been wrongly decided because it had relied upon *First Union Nat'l Bank v. Floyd*, 198 Ga. App. 99, 100 (1990), which had provided physical precedent only and had contradicted long-established precedent that a cross-appeal survives dismissal of the main appeal only if the cross-appeal has independent grounds for jurisdiction. See *Serco Co. v. Choice Bumper*, 199 Ga. App. 846, 847 (1991).

In overturning *MARTA v. Harrington, George & Dunn, P.C.,* the court of appeals upheld its long-established preference that cases be concluded in the courts below before entertaining appeals and thus avoid piecemeal litigation.

Long v. Greenwood Homes, Inc.
285 Ga. 560, June 17, 2009

In a split decision, the supreme court held that a plaintiff can dismiss an appeal from magistrate court and then re-file the suit in a court of record under the renewal statute, O.C.G.A. § 9-11-61, thus cir-

Continued on page 19

Professional Liability Case Law Update

By Andrew M. Wilkes
Oliver Maner, Savannah
Professional Liability SLC Chairperson

Over the previous six months, the Supreme Court of Georgia issued two noteworthy opinions that significantly alter the manner in which medical malpractice cases are defended at trial. In *Smith v. Finch*, the supreme court altered the use of the "hindsight" charge, a suggested pattern charge that has long been uniformly relied upon by defense counsel, particularly in closing arguments.

Simultaneous with the pronouncement of *Smith*, the supreme court issued an opinion in *Condra v. Atlanta Orthopaedic Group*, overruling previous case law and holding that evidence regarding an expert's personal practices is admissible both as substantive evidence and to impeach the expert's opinions regarding the applicable standard of care.

<u>Smith v. Finch</u>
285 Ga. 709, June 29, 2009

In *Smith*, the Supreme Court of Georgia disapproved of a portion of the "hindsight" pattern charge which is often given in medical malpractice trials. *Smith*, 285 Ga. at 710. The suggested pattern charge provides:

> In a medical malpractice action such as this, a defendant cannot be found negligent on the basis of an assessment of a patient's condition which only later, in hindsight, proves to be incorrect as long as the initial assessment was made in accordance with reasonable standards of medical care. In other words, the concept of negligence does not include hindsight. Negligence consists of not foreseeing and guarding against that which is probable and likely to happen, not against that which is only remotely or slightly possible.

Suggested Pattern Jury Instructions, Vol. I; Civil Cases (4th ed.) § 62.311. The supreme court stated:

> We now hold that the hindsight instruction, as currently conceived, is not a correct statement of Georgia law as to the standard of care in medical malpractice cases. Specifically, the final sentence of the instruction is plainly inconsistent with the medical decision-making process, which often requires the consideration of unlikely but serious consequences in the diagnosis and treatment of disease, and is

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generally inconsistent with the standard for foreseeability in our negligence law.

Smith, 285 Ga. at 710; *see also Gilley v. Hudson*, 299 Ga. App. 306 (2009). In addition to disapproving the use of the third sentence of the hindsight charge, the court also held that the second sentence is duplicative, although facially accurate, and further disapproved its use as well. *Smith*, 285 Ga. at 712. The court did not disapprove of the entire charge. In fact, the court held that the first sentence of the hindsight charge is appropriate in any medical malpractice case in which the facts warrant it, *i.e.*, where the negligence claim is based in whole or in part on the assertion that the physician made an incorrect assessment of a patient's condition. *Id.* at 711, n.3.

Finally, the court also disapproved the use of the "later acquired knowledge" standard of evaluating the giving of this charge, in which this court has permitted the charge if the evidence raises an issue as to whether the negligence claim is based on later-acquired knowledge not known to the physician when care was rendered. *Id.* at 713, n.5.

Condra v. Atlanta Orthopaedic Group, P.C.
285 Ga. 667, June 29, 2009

In *Condra*, the Supreme Court of Georgia overruled *Johnson v. Riverdale Anesthesia Assocs.*, 275 Ga. 240 (2002), and held that evidence regarding an expert witness' personal practices, unless subject to exclusion on other evidentiary grounds, is admissible both as substantive evidence and to impeach the expert's opinion regarding the applicable standard of care. *Condra*, 285 Ga. at 669. In overruling *Johnson*, the court pointed to the recent enactment of O.C.G.A. § 24-9-67.1, which governs the admissibility of expert testimony in civil actions. Because the admissibility of expert testimony under application of O.C.G.A. § 24-9-67.1 is partially dependent on the expert's personal experience and practice, "it would defy logic to find such [personal practice] experience categorically irrelevant in assessing the credibility of the expert's testimony." *Condra*, 285 Ga. at 670. Citing language from an Arizona appellate case, the court stated, "'[T]he jury is entitled to fully evaluate the credibility of the testifying expert, and the fact that an expert testifies that the standard of care does not require what that expert personally does in a similar situation may be a critical piece of information for the jury's consideration.'" *Id.* (*citing Smethers v. Campion*, 210 Ariz. 167, 108 P.3d 946 (Ariz. Ct. App. 2005)).

The potential that the presentation of this additional testimony could confuse the jury "may be remedied through the careful use of jury instructions," including pronouncement of the principle that a mere difference in views between physicians does not by itself prove malpractice. A party whose expert has been cross-examined will have the ability to elicit explanations for why the expert's practices differ from what that expert attested to as the standard of care. *Condra*, 285 Ga. at 672.

The court acknowledged that the growing body of case law from other jurisdictions supportive of the admissibility of expert personal practices testimony was important in its decision to shift course on this issue. *Id.* at 671.

Application of *Condra* will certainly require defense counsel to think long and hard before bringing an expert to trial whose personal practices differ from the medical treatment at issue in the case. While the holding in *Condra* may make finding experts more difficult for counsel who are hesitant to identify experts whose opinions differ from the treatment provided by the defendant physician, it may also ensure that the experts who are ultimately presented to the jury on behalf of either party are more credible and better capable of supporting their opinions on the relevant medical care at issue.

Andrew M. Wilkes is a partner with Oliver Maner in Savannah. His practice is focused exclusively on litigation, including representation of physicians in medical malpractice cases. He chairs the GDLA Professional Liability Substantive Law Committee.

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Lessons in Civility and Professionalism

By Eric Jenniges and Kathy So
Bovis, Kyle & Burch, Atlanta

"Civility costs nothing and buys everything."[1] There is a widespread perception that the wisdom of these words has been lost on today's young lawyer. A couple associates at our firm recently attended a CLE, and during the obligatory "ethics hour" a discussion ensued regarding collegiality.

This discussion soon turned into a therapy session for veteran lawyers to vent about young lawyers. Many of these old law dogs stood up to tell their war stories and remind everyone what it was like to practice law "back in the day." At the end of the hour, they had completed the eulogy of their dear friend, civility. The partners and older attorneys honed in on one suspect in its murder: young lawyers.

The hour was filled with stories of young lawyers providing thousands of pages of discovery responses containing no more than five responsive pages. There were tales of young lawyers refusing to reschedule depositions despite extreme inconvenience to the opposing party. There were accounts of young lawyers filing motions to compel despite having made only a single phone call to opposing counsel and having sent one curt e-mail as their good faith effort to resolve a discovery dispute. As the discussion ended, it was clear that young lawyers are the scourge of the profession!

As a young lawyer, this should make you angry. It should also make you step back and think. Did we earn this reputation? Is the decline in civility a generational issue or a product of the times?

Part of the problem may be generational, according to Professor Roy Sobelson, Associate Dean at Georgia State University College of Law. Professor Sobelson states he has observed "many of today's young professionals have grown up in an era with fewer social boundaries, fewer forced instances of face to face or other personal contact, and more instances of public misbehavior by lawyers and non-lawyers alike seemingly unaccompanied by substantial negative consequences." There is certainly something to be said for the lack of personal interaction in the current legal environment.

Today, where people do not even pick up the phone to call their *friends*, rather communicating with them by "Facebooking" or by text message, it is easy to see how one could fall into the habit of communicating with opposing counsel and fellow lawyers purely by e-mail. It is important to resist this urge, however. Pick up the phone, if only to introduce yourself. The first time you speak to your opposing counsel should never be at a motion hearing six months into a case.

Next time you need to communicate with opposing counsel, do not send an e-mail; pick up the phone. You can always confirm it in writing later.

Our number one priority as lawyers is to zealously advocate for our clients. We do not, however, have to be unreasonable in doing so. According to Professor Sobelson, although "lawyers should [not] encourage civility and cooperativeness to such a high degree that it compromises their ability to zealously advocate for clients' causes . . . , the duty of zealous advocacy does not require that one unreasonably refuse an opponent's request for a continuance that is justified and the effects of which will be harmless to one's client ... or engage in other similar tactics."

These tactics include unreasonably refusing to give an opponent an extra week to provide discovery responses, rescheduling a deposition that has been arbitrarily noticed at an inconvenient time and place for the opposing party, and filing thousands of pages of unresponsive discovery right at the deadline.

As young lawyers, we often fail to realize that these efforts are ultimately counterproductive to our clients' causes. There will be a time where we need an extra week for discovery, an extension of time to answer, or a deposition rescheduled.

Young lawyers are certainly not solely responsible for the decline of civility in the profession. We could spend pages recounting telephone calls with attorneys who have practiced for more than 30 years that ended with those attorneys screaming, cursing and slamming down the phone. We could tell stories of these experienced lawyers' various other attempts to intimidate young lawyers. That, however, is for another column.

While young lawyers are by no means the entire problem, we can do our part to alleviate it. So, next time you need to communicate with opposing counsel, do not send an email; pick up the phone. You can always confirm it in writing later.

[1] Lady May Worthley Montagu

If you have any comments, questions, requests, or just vents for this young lawyers column, feel free to e-mail Eric Jenniges at emj@boviskyle.com or Kathy So at kcs@boviskyle.com. We look forward 2 hearing from u!

Fall Board Meeting Highlights

The GDLA Board of Directors gathered for its Fall Meeting at picturesque Brasstown Valley Resort in Young Harris during peak leaf season, October 22-25, 2009. While the weather decided to turn wet, spirits could not be dampened on Friday night. The group gathered in the hospitality cottage for a reception, then adjourned to the Tack Room at the Stables for a steak and chicken cookout. A roaring fire kept everyone cozy and, after dinner, served as the perfect tool for dessert: Everyone roasted marshmallows and made s'mores.

The Board convened on Saturday morning until noon, then the afternoon was free to enjoy. Activities included horseback riding, hiking, watching college football, shopping, and more.

Following are highlights from the Board meeting:

In attendance were President Staten Bitting of Fulcher Hagler; Executive Vice President Bubba Hughes of Callaway, Braun, Riddle & Hughes; Secretary-Treasurer Mel Haas of Constangy Brooks & Smith; Past Presidents and Directors Sally Akins of Ellis, Painter, Ratterree & Adams, Evelyn Fletcher Davis of Hawkins & Parnell, Salty Forbes of Forbes, Foster & Pool, Warner Fox of Hawkins & Parnell, Ted Freeman of Freeman, Mathis & Gary, Jo Jagor of Hall, Booth, Smith & Slover, Kirby Mason of Hunter Maclean, Walter McClelland of Mabry & McClelland, Matt Moffett of Gray, Rust, St. Amand, Moffett & Brieske, David Nelson of Chambless, Higdon, Richardson, Katz & Griggs, Lynn Roberson of Swift, Currie, McGhee & Hiers, Bob Travis of Bryan Cave, Jason Willcox of Moore, Clarke, DuVall & Rodgers; and Executive Director Jennifer Davis.

The minutes of the Board's Annual Meeting, held at the Westin Casuarina in Grand Cayman on June 11, 2009, were unanimously approved.

Admissions Committee Chair Warner Fox presented 16 applicants for membership, all of whom were admitted (see list on page 5).

A list of members delinquent in their dues was circulated; the Board agreed to contact those on the list they knew, as well as any members from their firm.

Education Committee Chair Matt Moffett encouraged attendance at the upcoming Exponent sponsored Human Factors CLE on November 11, 2009, at Maggiano's. Also, Moffett will follow up on developing several webinars to provide for members in the next year.

Jo Jagor reported the 2009 Deposition Boot Camp, which she co-chaired with Will Ellis, was a tremendous success and received rave written reviews from the 30 attendees. Jason Willcox volunteered to coordinate planning for

Continued on page 22

Fall Board Meeting Snapshots

1. Salty Forbes shows Debbie Hughes how to properly roast (aka burn) a marshmallow. 2. (l-r) Jo Jagor, Warner Fox, and Donna Chambers visit at the reception. 3. (l-r) Judge Henry Newkirk, his wife Lynn Roberson, and Kirby Mason patiently roast marshmallows for s'mores. 4. Jason Willcox (left) and his wife DeeDee (right) dine with Staten Bitting and his wife Cindy. 5. Sally Akins and Pat Fox enjoy the reception. 6. Salty Forbes and Bubba Hughes visit before dinner.

Using Human Factors to Defend Cases

Are you using human factors to defend motor vehicle accident cases? Product liability cases? Patient compliance cases?

On November 11, 2009, a crowd of GDLA members and non-members gathered at Maggiano's to discover why an affirmative reply to those questions could be the key to a successful verdict.

GDLA Platinum Sponsor Exponent presented the fascinating and informative CLE seminar, and attendees learned from experts Joseph B. Sala, Ph.D., and Spencer Borden, MD, CPE, FACR, FAAP, FACMQ, FACPE.

Human factors is the scientific study of how the capabilities and limitations of people shape the ways in which they interact with and use products, equipment, and systems in their environments.

Human factors is a multidisciplinary field drawing on a wide breadth of individual scientific areas: cognitive psychology, developmental psychology, social psychology, kinesiology and industrial engineering. Human factors scientists and engineers study:

- Perception and Reaction
  - Fatigue and Impairment
  - Attention and Distraction
  - Unexpected Events
- Cognition, Learning, and Memory
  - Safety Information
  - Eyewitness Memory
- Human Development and Behavior
  - Childhood through Geriatric
- Performance and Movement Errors
- Accident Patterns for Products and Environments

Common human factors issues include sensation and perception (*e.g,* visibility); information processing (*e.g,* safety information); and development (*e.g*, children). Additional issues include:

- Learning and Memory
  - Eye Witness Testimony
  - Recall of Events
- Hazard Patterns and Risk
  - Consumer Products
  - Recreational Activities

1. Attendees learned how to employ human factors to defend cases. 2. (l-r) Genie Iredale of Fellows LaBriola visits with Lisa Whitfield and Erica Morton of Hicks, Casey & Foster. 3. Dr. Borden discusses patients not properly taking prescription drugs 4. (l-r) Grant Smith of Dennis, Corry, Porter & Smith talks with Dr. Sala.

- Training
  - Skilled vs. Unskilled
  - Learning
- Ergonomics
  - Body Sizes
  - Normal Forces

Dr. Sala presented several case studies. One explored sensation and perception showing the phenomenon of "inattentional blindness" (Simons, D. J., & Chabris, C. F., 1999). Attendees watched a video, and were directed to attend to and count the number of times a certain event occurred. At the end of the video, many of the attendees learned they did not "see" a man dressed in a gorilla outfit walk into and across the scene!

Dr. Sala explained this occurred because attention was focused on the task being performed, and our brains were processing only the information relevant to what we were instructed to be doing and thus filtered out the gorilla's appearance.

The next case study was on visibility using a car wreck scenario marked by low illumination and a hindered line of sight.

Next Dr. Sala demonstrated when posted safety notices, in this case Proposition 65 warnings, are effective or not. He then showed how features alleged to provide a measure of "child resistance," like a button-shift lever in a car, does not always manage to foil attentive and curious toddlers.

Dr. Borden then discussed the high percentage of adults who do not properly follow medication prescriptions, and the ensuing dangers that arise from such a lack of care in being consistent.

Certainly human factors should be considered, and an expert consulted, when any of the foregoing issues are part of a lawsuit you are defending.

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First Deposition Boot Camp a Success

The first annual GDLA Deposition Boot Camp was held August 6-7, 2009, at State Bar headquarters. The seminar was planned by co-chairs Jo A. Jagor of Hall, Booth, Smith & Slover and Will Ellis of Hawkins & Parnell.

Thirty lawyers participated in the intensive training seminar under the leadership of a distinguished faculty: Shaun M. Daugherty, Hall, Booth, Smith & Slover; Ted Freeman, Freeman, Mathis & Gary; Eric Frisch, Carlock Copeland; Trish Peters, Hawkins & Parnell; Hon. William B. Hill, Jr., Ashe, Rafuse & Hill; Andrew Horowitz, Drew Eckl & Farnham; Amy Kolczak, Owen, Gleaton, Egan, Jones & Sweeney; Lynn M. Roberson, Swift, Currie, McGee & Hiers; and C. Jason Willcox, Moore, Clarke, DuVall & Rodgers.

Topics were first presented by a faculty member, then attendees broke into small groups to discuss and role play with a "real" case. Presentations included beginning and concluding the deposition, preparing your witness, defending the deposition, responding to the difficult litigator, questioning the witness, using documents in a deposition and more.

Heidi J.K. Fessler, Director of Research and Education at Merrill Legal Solutions, discussed the court reporter's view during Thursday's luncheon sponsored by Merrill.

Esquire Solutions sponsored Friday's luncheon featuring Fulton State Court Judges Susan B. Forsling and Jay Roth, who shared professionalism perspectives from the bench.

Each day concluded with a reception to give attendees time to network and ask the faculty additional questions.

PHOTOS:
1. President Staten Bitting of Fulcher Hagler welcomes the group with seminar co-chairs Jo Jagor (left) and Will Ellis (right), and Hon. William Hill (seated center). 2. Hon. Hill (right) talks with John Price of Fulcher Hagler. 3. Shaun Daughtery (left) and Bo Moss of Gray, Rust, St. Amand, Moffett & Brieske visit at the reception. 4. Jeff Wasick (left) of Gray, Rust, St. Amand, Moffett & Brieske talks with Patrick Connell of Ellis, Painter, Ratterree & Adams at the reception. 5. Judge Forsling discusses professionalism. 6. Ted Freeman (center back) leads a breakout group.

PHOTOS: 1. Enjoying the Depo Boot Camp reception are (l-r) Andy Treese of Drew Eckl & Farnham, Sean Gill of Hall, Booth, Smith & Slover, Matthew Bennett of James R. Westbury Jr. PC, and Alyssa Morris of Constangy Brooks & Smith. 2. Lynn Roberson (center) leads a breakout group. 3. Trish Peters (center) leads a breakout group. 4. Andrew Horowitz (right) leads a breakout. 5. Judge Roth discusses professionalism. 6. Jason Willcox (top right) leads a breakout group.

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Harnessing the Power of the Internet:

How Social Media Analysis Informs Jury Research and Trial Strategy

By Christine Martin
DecisionQuest

It is well known that President Barack Obama used savvy social media techniques as part of his successful campaign in 2008, including *Facebook* groups, *Twitter* accounts, *YouTube* videos and more. The President's office continues today to use social media to communicate his policies with videos on *YouTube* to "build public opinion."[1]

What makes social media so powerful? Never before have we had such unprecedented access to the public's conversations, attitudes, and beliefs. We now can listen to the opinions of millions of Americans. If utilized properly, Social Media Analysis is an enormous resource for more informed jury research and trial strategy.

DecisionQuest has developed a proprietary model of Social Media Analysis to effectively seek out and study in depth social media and its impact on specific trial environments. Social Media Analysis is used to perform an extensive study of news media and online communications (blogs, citizen journalism, and reader participation) which influence people's attitudes and beliefs as well as how they understand specific case issues. Social Media Analysis answers the question, "Who is saying what, to whom, to what extent, and with what effect?" Answers help reveal what might be the driving themes and leading messages that are influencing public opinion (potential jurors) about your case issues.

We know that if there is any media coverage of a case or subject matter in the news, it will also be talked about in the social media. Effective Social Media Analysis looks extensively at national and local media coverage and compares it to what is being said in blogs and other online communication. If there are issues that are important to people, there will be opinion groups forming around those issues that discuss it online. The level of community attention and possible activism around case issues can be identified in a study of social media. Sifting out the "noise" and finding the kernels of information with potential to be valuable and useful can be time-consuming, but well worth it. And, once you find those kernels, the work has only just begun. That information needs to be analyzed, further tested, and ultimately crafted into usable recommendations.

Understanding how jurors (and other fact finders) make decisions—then either stand firm on those decisions or change their minds—is key to a worthwhile and effective Social Media Analysis.

Monitoring Public Opinion

It is standard practice for trial teams to monitor the mainstream media to keep an eye on public opinion about their case. Traditional media content analysis has long been effective in identifying the leading stories and discerning public opinion on issues or subject matter that relate to high-profile litigation. Today, the media landscape has changed drastically, and so has the process for effective monitoring of public opinion.

Until recently, "the news" came from a very small number of very large media outlets: ABC, CBS, NBC, PBS, and later FOX and CNN, and the daily newspapers reported as soon as practicable on the lead stories of the day. Today, there has been an immense shift to blogs and citizen-generated journalism.

Rather than the local paper or media outlet having exclusives as existed in the past, we are now seeing an abundance of viewpoints and messages through new content-sharing technologies over the Internet. Influential computer book publisher Tim O'Reilly coined the term "Web 2.0" in 2004 and described the potential of new media to "harness collective intelligence." Not since the invention of the printing press have we seen such wide-reaching development in mass communications.

The New Influencers

There are significant sociological implications to the new media environment. In particular, we have seen the formation of interest groups that are organizing faster and more efficiently than ever before. Today, there are online communities, blogs, message boards, community websites, and affinity groups for every issue, opinion, product, and identity.

Real-time message boards are breaking news faster than any of the old media outlets could have envisioned. The pattern of influence is much more diverse, as is the population that is now driving public opinion. It is more important than ever before to monitor these groups throughout trial preparation.

Advanced Search Technology

Every day there are more sophisticated search engines and advanced conversation-tracking technologies that are smarter and faster than before. It is no longer enough simply to *Google* your client or case issue. Many of us have had the frustrating experience of obtaining too many results when typing a

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NEVER (SEE) YOUR CASE THE SAME WAY AGAIN

DECISIONQUEST, one of the nation's leading trial consulting firms, specializes in assisting clients through the expert use of the art of persuasion – using research, visual communications, social media analysis and litigation public relations. Over the past 30 years, DecisionQuest principals have been retained in over 15,000 high-risk engagements nationwide.

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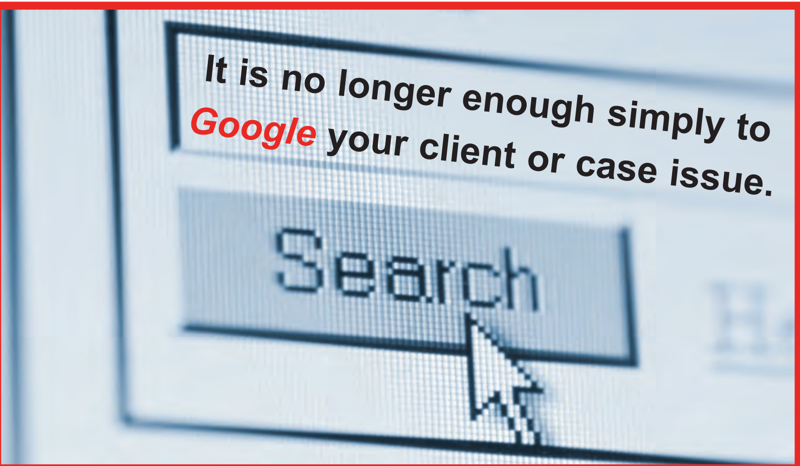
key word or two into *Google*. Although *Google* and *Yahoo!* are still the most popular search engines worldwide, there are hundreds of other useful engines that are much more specific in getting the information needed.

Search technology is evolving very quickly. For example, there are RSS (Really Simple Syndication) news alerts and new feeds, aggregated search engines, meta search engines, as well as advances in web tracking and blog monitoring services. For the most efficient search ability, one must stay on top of the cutting edge of these ever-evolving search engines.



Filter out the "Noise"

Advanced searching techniques are only the beginning of a comprehensive social media study. As indicated earlier, a good online researcher must know how to narrow the scope and refine and focus a search so that it yields only the most important information. Social Media Analysis provides this online organization through social bookmarking sites and tagging websites. Sophisticated offline coding and classification of the vast amount of information obtained is necessary to distinguish the most useful information in your search.

There is no shortcut for in-depth social research into the public's attitudes and beliefs about a case or subject matter. You first must find and then listen closely to the conversations of the "communities of interest." The rigorous social media study that Social Media Analysis performs analyzes thousands of readers' comments in news stories, examines the multitudes of blogs that react to news stories or public events, and examines numerous posts on community websites and message boards as well as a large array of other online communications.

Applied Social Science Analysis

Effective analysis must be driven by knowledge about how people filter information and make decisions. DecisionQuest's years of social science expertise and jury consulting experience applied to the case facts generates the first path we forge in conducting the analysis. What questions need to be answered? Why will this be helpful? Inevitably our search leads us to seek information about issues/attitudes we did not know existed when we started.

We know that the jury and other fact finders "filter" the world through their pre-existing attitudes, beliefs and values. These pre-existing attitudes and opinions influence the acceptance or rejection of new information, the evidence and the story you tell at trial. By reading the community message boards, comments on popular blogs, and reader responses to news media reports, we can begin to study the pre-existing attitudes and opinions that exist about a subject or case-related issue.

Focused Reporting

A focused Social Media Analysis typically begins with the development of an "issue tree" based on our years of jury research experience, a discussion with the trial team about case facts, legal issues, stakeholder groups, and of course, the trial lawyer's specific concerns.

The final comprehensive report contains useful information such as the top pro-plaintiff and pro-defense attitudes and what case facts not publicly known have the most powerful potential of swaying those attitudes. In addition, preliminary recommendations are made that could inform formal jury research and influence many areas of your case strategy (discovery, venue studies, settlement hearings, brief preparation, witness selection and preparation, motions, etc.). The controlled setting of formal jury research can test the actual responses of potential jurors hearing both plaintiff and defense arguments presented at trial.

The long-established methodology of formal jury research is an important tool for trial attorneys researching opinions about their case. However, without the vast information that is developed by Social Media Analysis, you could be missing valuable attitudes and opinions (both widespread and local) to test during jury research exercises. Utilizing a much different methodology, Social Media Analysis exposes unknown or little-known attitudes and opinions to supplement jury research and further inform trial practice.

Christine Martin is a Senior Consultant in the New York office of DecisionQuest, a trial consulting firm and GDLA Platinum Sponsor. Martin conducts rigorous analytical studies of the impact of news media and online communications on public attitudes and opinions related to case issues. She recently worked with the defense team in United States of America v. Michael Carona and Debra Hoffman. *She can be reached at cmartin@decisionquest.com* ©*2009* DecisionQuest. *All rights reserved.*

[1]Jim Rotenberg and Adam Nagrourney, *Melding Obama's Web to a YouTube Presidency,"* NYT, Jan. 26, 2009

Continued from page 7

cumventing the judgment which had been entered in magistrate court.

Long had initially filed a claim in magistrate court against Greenwood Homes, Inc., a builder from which Long had purchased a home. A pipe had burst, and Long alleged negligence against Greenwood.

The magistrate court judge entered judgment in favor of Defendant Greenwood, and Long appealed to superior court pursuant to O.C.G.A. § 15-10-41(b)(1). After the case was assigned to superior court, the appellant dismissed the case without prejudice under O.C.G.A.§ 9-11-41(a)(1)(A). Three months later, Long utilized the renewal statute, O.C.G.A. § 9-11-61, and refiled the same claims against Greenwood in state court.

Greenwood answered and filed a motion for summary judgment on the ground that when Long dismissed the superior court action, O.C.G.A. § 5-3-7 applied and barred Long from renewing the action, because a valid judgment had been entered on the same claims by the magistrate court judge. The state court judge denied Greenwood's motion for summary judgment, and Greenwood pursued an interlocutory appeal. The court reversed the trial court's decision, holding that O.C.G.A. § 5-3-7 and O.C.G.A.§ 9-11-41(a) were in conflict with each other in this case. Applying rules of statutory construction, the court of appeals concluded that O.C.G.A.§ 5-3-7 was a specific statute, rather than a general statute; therefore, its application in this case governed. O.C.G.A. § 5-3-7 states that an appeal suspends a lower court's judgment and does not invalidate the judgment. If appeal is withdrawn or dismissed, the lower court's judgment is reinstated, and the rights of the parties are fixed as if there had never been an appeal.

The Supreme Court of Georgia granted certiorari to Appellant Long. The majority, in an opinion by Justice Benham, concluded that the dismissal of the appeal in superior court was not a dismissal of the appeal but of the case. The court concluded that the *de novo* nature of an appeal from magistrate court to state court or superior court allowed the appellant to utilize the Georgia Civil Practice Act to its fullest extent, including the provisions of O.C.G.A. § 9-11-41(a) and O.C.G.A. § 9-11-61. Therefore, the appellant was allowed to dismiss the superior court action without prejudice and to refile the action.

However, Justices Melton, Hines and Thompson joined in dissent. Justice Melton wrote that the "plain and unambiguous" terms of O.C.G.A. § 5-3-7 applied. Justice Melton applied the statutory construction principle that the plain language of a statute must be followed unless the language produces an absurd, impractical, or contradictory result, "regardless of the desire to relieve a party of some real or imagined hardship."

He further noted that the *de novo* standard was a standard of review which by nature is an instruction to the reviewing court of how to proceed in review of the lower court's decision, but the standard of review does not change the fact that the appellant has appealed the decision of a lower court and seeks to have that lower court's decision altered. Because the appeal does not invalidate the lower court's decision but only suspends it, any dismissal of the matter in the higher court is a dismissal of the appeal and reinstates the lower court's judgment.

Justice Melton noted that the majority's opinion allows any losing party in magistrate court to appeal the lower court's judgment to state or superior court and then dismiss and refile the action so as to allow the losing party to invalidate the lower court's judgment in the matter. The prevailing party can do nothing but watch as its favorable judgment is rendered meaningless. Justice Melton expressed concern this makes any judgment by a magistrate court judge uncertain and unreliable.

Despite Justice Melton's broad concern about any party being able to avoid the consequences of the magistrate court judgment through this maneuver, it should be noted that only a plaintiff can dismiss without prejudice an action and utilize the renewal statute. Therefore, a defendant who appeals a magistrate court judgment to state or superior court cannot dismiss and refile.

<u>Armstrong v. Rapson</u>
299 Ga. App. 884
August 28, 2009

The court of appeals affirmed the denial of the defendants' motion for summary judgment in this medical malpractice action brought by Rapson. Rapson had filed suit for damages arising out of a surgery by orthopedist Dr. Armstrong, and against his professional corporation, Orthopedic Surgery, P.C. The defendants filed a motion for summary judgment contending that there was no evidence to show that Dr. Armstrong has acted negligently during the surgery. The motion was denied by the trial court, and the defendants filed an interlocutory appeal.

The court of appeals affirmed the lower court's denial because the defendant had failed to meet his burden to affirmatively prove the error in the appellate record. The trial court's order denying the motion for summary judgment stated that it had relied upon the "entire record" in reaching its decision. However, the defendant had omitted portions of the trial record. When the defendant filed his notice of appeal, the notice was not in the form directed by O.C.G.A.§ 5-6-37, wherein the notice designates portions of the record to be *omitted* on appeal. Instead, the notice instructed that only the items listed on the notice of appeal be included in the record.

The statutory scheme provides the appellate courts with information about what is specifically omitted on appeal. However, designating the items to be included in the record does not provide the appellate courts with this information and places the courts in the position of not knowing what is omitted and whether or not the omitted portions are relevant to the issues on appeal. Therefore, the court concluded that in absence of a complete appellate record to review, the judgment

Continued on next page

below is presumably correct and must be affirmed.

In support of its decision to affirm the lower court's judgment, the court noted that the brief of the appellee referred to deposition testimony by a nurse which appeared relevant to the issue of summary judgment. This deposition was not one of the items designated to be included in the appellate record by defendants and remained with the trial court.

Sunbelt Asphalt Products, Inc. v. American Saturated Felt, Inc.
A09A1821, October 7, 2009

The court of appeals affirmed judgment for American Saturated Felt, Inc. and the denial of Sunbelt Asphalt Products, Inc.'s motion for directed verdict, motion for J.N.O.V., and certain evidentiary rulings by the trial court.

The appellate court needed to review the evidence and testimony at trial in order to rule, but the appellant had failed to submit a transcript with the appellate record. Therefore, the court concluded that the appellant had failed to meet its burden to affirmatively prove its enumerations in the record, and the judgments and rulings were presumed correct.

The court noted that the notice of appeal had made no mention of the record or trial transcript, although the transcript was cited in the appellant's brief. The court communicated with the trial court clerk, who averred that his records indicated that a trial transcript was never filed. However, the docket did reflect that the trial court had granted appellant additional time to file the trial transcript of evidence and proceedings. Because the transcript was not sent to the court of appeals, the court could not review the proceedings to determine if there were any errors by the lower court. Therefore, the judgment against the appellant was affirmed.

Owens v. St. Victor
A09A1488, October 2, 2009

The appellant proceeded *pro se* in his appeal of certain orders by the lower court related to a discovery dispute between the parties. The court of appeals dismissed the appeal *sua sponte* because the appellant had failed to obtain a certificate of immediate review. Although the court had entered sanctions against other defendants, including striking of those defendants' respective answers, the action was still pending below. Therefore, the appellant's use of direct appeal did not grant the appellate court jurisdiction, and the court dismissed the appeal.

Silman v. Associates Bellemeade
S09G0490, October 19, 2009

The supreme court granted certiorari to determine whether the court of appeals had erred by failing to apply the supreme court's recent decision in *Baxley v. Hakiel Industries*, 282 Ga. 312 (2007) on the issue of spoliation. The supreme court affirmed the decision of the court of appeals, even though the court of appeals decision had not discussed the *Baxley* case.

The action arose out of a claim for damages by filed by the plaintiff after a deck at a friend's rental home had collapsed while the appellant was standing on it. After the deck collapsed, the defendants (property owner and property management company) had the debris from the deck removed. At the time of the removal, there was no pending litigation, and no evidence was submitted that there was actual contemplation of litigation.

After the plaintiff filed her complaint for damages and defendants answered, the defendants filed a motion for summary judgment on the grounds that there was no evidence that the defendants had actual or constructive knowledge regarding a defect in the construction or condition of the deck. The plaintiff moved for sanctions, arguing that by removing the debris the defendants had destroyed or failed to preserve the evidence which was necessary to show a defect, despite the likelihood that the potential for litigation existed.

The trial court granted the motion for summary judgment and denied the motion for sanctions. The trial court entered findings, *inter alia*, that the removal of the debris did not create a presumption that the debris contained evidence harmful to the defendants, because at the time of removal there was no actual pending or contemplated litigation. The plaintiff appealed, contending that the language "potential for litigation" found in the opinion of *Baxley v. Hakiel Industries* expanded the spoliation standard. The plaintiff argued that "potential for litigation" can include situations beyond where litigation is pending or contemplated.

In *Baxley*, the supreme court had concluded that the destruction by a bar manager of a videotape of the environs of the bar on the night an intoxicated bar patron left and was later involved in a motor vehicle collision was spoliation of evidence. The destruction of the videotape raised the rebuttable presumption that the contents of the videotape were harmful to defendant. The court concluded that the bar manager was aware of the potential for litigation when he made the decision to destroy the tape and failed to preserve any evidence which may have been caught on tape tending to show that the patron would soon be driving. Appellants contended that this language of "potential for litigation" applied in the circumstances where the debris from the collapsed deck was removed.

However, the supreme court in *Silman* rejected the expansion, concluding that the plaintiff had taken the phrase out of its proper context. The court held that the *Baxley* phrase "potential for litigation," when taken in its proper context, did not expand previous case law and referred merely to litigation which is actually pending or contemplated. The court affirmed that spoliation refers to the destruction of or failure to preserve evidence that is necessary to contemplated or pending litigation.

Akuoko v. Martin
298 Ga. App. 364
June 16, 2009

The plaintiff was involved in a motor vehicle collision on March 6, 2006. The plaintiff filed a complaint for bodily injury arising out of the

collision on February 29, 2008. The plaintiff failed to perfect service until after the expiration of both the statute of limitations and the five-day grace period. Service was perfected on March 19, 2008.

After filing a timely answer, the defendant filed a motion for summary judgment on the grounds that the late service did not toll the expiration of the statute of limitations, and that the plaintiff could not establish that the plaintiff had acted diligently and with reasonable efforts to ensure the defendant was served as quickly as possible.

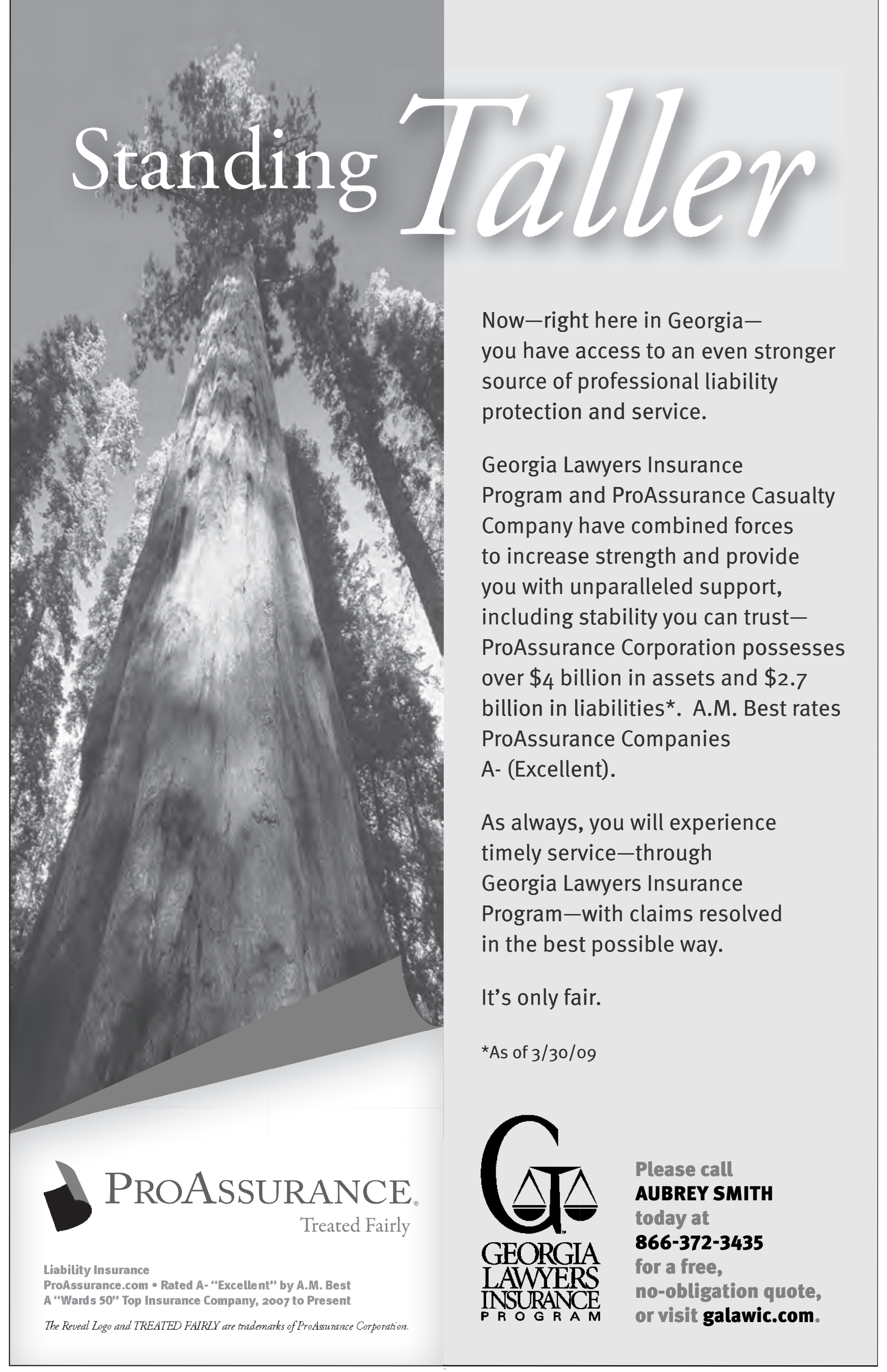
The plaintiff submitted an affidavit which generally stated the actions that had been taken, including several phone calls to the sheriff's office, during which the plaintiff was told that the sheriff had been out several times but had been unable to perfect service. The affidavit did not contain specific details about the specific date on which the plaintiff had notice from the sheriff's office of the difficulty in perfecting service and what actual steps the plaintiff had then taken to ensure that service was effectuated as quickly as possible.

The trial court granted the motion for summary judgment, finding that the plaintiff was guilty of laches and had failed to demonstrate on the evidentiary record that the plaintiff had acted with due diligence to ensure the defendant was given notice of the complaint as quickly as possible after the statute of limitations expired. Thus, the late service could not relate back to the filing of the complaint, and the cause of action was barred by the statute of limitations.

The court of appeals affirmed the grant of summary judgment, noting that the evidence submitted by the plaintiff must demonstrate with specificity the actual dates and details of what actions were taken especially once the plaintiff was on notice from the sheriff's office of the difficulty in perfecting the service. "Once the plaintiff becomes aware of a problem with service, ... his duty is elevated to an even higher duty of the greatest possible diligence to ensure proper and timely service." It was within the trial court's discretion to find that the plaintiff had not complied with that duty. The court distinguished this case from *Lee v. Kim*, 275 Ga. App. 891 (2005), in which the plaintiff had relied upon the sheriff to execute his duty to perfect the service upon defendant in a timely manner within the five-day period and was without notice that the sheriff had failed to do so.

The court stressed that its decision here is not to be taken to encourage a plaintiff to fail to affirmatively check with the sheriff's office on the status of the service, but rather that the plaintiff should understand the duty to demonstrate with specificity, rather than general statements, that the plaintiff acted with due diligence to effect service as quickly as possible.

Lee Hicks is a member of McClure, Ramsay, Dickerson & Escoe in Toccoa. He practices civil litigation, local government law, personal injury, civil rights and wills. He chairs the GDLA Appellate Substantive Law Committee.



Continued from page 11

Deposition Boot Camp 2010. Jagor and Ellis expect to hold a cocktail networking reception for young lawyers to mingle with their counterparts and also more seasoned mentors.

Trial Academy Chair Lynn Roberson reminded the Board that the seminar was shifted from December to January, and will be held January 21-23 at Callaway Gardens Lodge & Spa. She has developed an excellent experienced faculty, who willingly donates their time to the Trial Academy. Board members were encouraged to send one or more associates, and to spread the word since it is open to GDLA non-members.

President Staten Bitting reported on behalf of Substantive Law Committees (SLC) Chair Johnny Foster of Forbes, Foster & Pool. The SLCs range in size from 20 - 84 members. They contribute to the *Law Journal* and *Newsletter*. Once we launch a new Web site, the SLCs will be asked to more regularly contribute case law updates as they happen. There are vice chairs needed for several of the committees. Among the expectations for the SLCs is to help plan webinars. Also, the SLCs function as opportunities for individuals to show their interest in GDLA, get involved, and move up the ranks to the Board of Directors.

Web site co-chairs, Kirby Mason and David Nelson, presented a sneak preview of the new GDLA Web site, which will debut in early 2010.

Judicial Relations Committee Chair Bob Travis explained the challenge his committee faces in trying to get individuals to provide input on judicial candidates when asked by the Judicial Nominating Committee Chair Mike Bowers. We need to spread the word about this important opportunity to impact judicial selections, so more members will answer the call when asked to give opinions on candidates (see article on page 6).

The Board next discussed upcoming meetings, planned by Meetings Chair Steve Kyle of Bovis, Kyle & Burch. The annual Judicial Reception and Board meeting in Atlanta was set for February 4 and 5, respectively. The reception will be held at the 191 Club and the Board meeting will be held at Hawkins & Parnell. The 2010 Spring Board Meeting was tentatively scheduled to be held in Savannah on April 22-23, with a Judicial Reception taking place the first night and the Board meeting the next day. The Annual Meeting is scheduled for June 10-13, 2010 at the Ponte Vedra Inn & Club.

Ted Freeman discussed the status of the 2010 *Law Journal*, for which he will serve as editor. Presently he has 10 articles committed with April 1, 2010 as the deadline for submission. The *Law Journal* will again be mailed in May along with the dues notice.

President Bitting reported Peter Muller of Goodman, McGuffey, Lindsey & Johnson is continuing to serve as *Newsletter* editor.

Sponsorship Chair Sally Akins discussed the sponsorships program. Due to the economy, we will keep the Platinum, Gold and Silver at the same level in terms of cost and benefits. We are always looking for leads, and are pursuing some contacts made at the DRI Annual Meeting.

Evelyn Fletcher Davis reported on the 2009 DRI Annual Meeting, held in Chicago in October. As part of that meeting, Georgia participated with its counterparts in the State and Local Defense Organizations (SLDO) program. Along with President Bitting, Roberson and Jennifer Davis, she took part in SLDO programming to share ideas on a range of topics from starting a younger lawyers section to social media's impact on trade groups. The Board is exploring the question of increasing participation by young lawyers in the GDLA.

Fletcher also encouraged attendance at the DRI Women's Seminar March 25-26, 2010, at the Westin in Scottsdale, Arizona.

Roberson discussed the National Center for Judicial Excellence, and the value it brings in educating judges in a non-partisan fashion. Many of Georgia's judges have attended the program, and the upcoming class is already sold out.

President Bitting reported on behalf of Amicus Committee Chair Jamie Weston of Hull Barrett. There have been two requests for amicus briefs, which Weston has been handling himself. The Board was asked to consider how to offer him additional support.

The Board of Directors voted Jeffrey S. Ward of Gilbert, Harrell, Sumerford & Martin in Brunswick as a new Board Member for the Southern District.

The Board approved President Bitting's plan to activate a Long Range Planning Committee, to be composed of a past president, current Board member and two younger lawyers.

Mel Haas gave the Treasurer's report on the current financial status of the Association.

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Prompt Accident Investigation and Preservation of Evidence

Continued from page 1

photographed, as well as the approach of all vehicles involved. Attention should be paid not only to physical evidence present during the inspection, but also to the lack of physical evidence in a particular location (*e.g.*, no pre-impact skids).

Preserving the Vehicle Evidence

A proper vehicle inspection may provide invaluable evidence. Therefore, utilizing the services of a trained reconstructionist who is familiar with identifying physical evidence and the more common issues involved in accident-related litigation is crucial.

Initial photographs should establish the vehicle's identification. Photographs should then be taken from all sides at varying heights, with close-ups of contact damage or paint transfer—both crash-related and pre-existing. Before taking a close-up, a "set-up shot" should be taken to reveal what is being depicted in the close-up. Damage photographs should include a scale or measuring tape when possible to allow for proper evaluation later if needed. Vehicle damage height is a common concern in many traffic crashes in order to identify corresponding damage to respective vehicles. Oftentimes, an elevated view of the crash damage more clearly depicts the extent of damage and portrays the relative crush depth for later evaluation.

The condition and position of the air bag, gauges, headlamp switch, windshield, and seat belts all should be documented.

If lamp usage could be a concern in the future, (once permission has been obtained) bulbs may be documented, removed, and labeled for preservation. This may require the removal of the entire lamp assembly. In some cases, these bulbs may conclusively determine whether the lamps were in use at the time of the crash. This allegation is quite common in crash litigation but can be easily quelled with the collection of proper evidence.

The condition of the tires and wheels should be documented. Many allegations in lawsuits involve insufficient tire tread.

Finally, the condition of the tires and wheels should be documented. Many allegations in lawsuits involve insufficient tire tread. Wheel rims often contact the roadway surface during crashes, and closely documenting their condition can sometimes assist in determining specific vehicular dynamics by attributing a certain wheel to a gouge in the roadway.

Preserving Commercial Vehicle Evidence

If a commercial vehicle is involved, the determination should be made whether the Engine Control Module (ECM) may contain crash-related information. The information available will vary depending upon the engine manufacturer and the model of the vehicle. Other concerns include the potential for losing data if the vehicle is moved from the crash scene or during attempted data extractions. If data is available, but for some reason is improperly handled or discarded, there could be serious repercussions.

Factory-trained service technicians are not always familiar with the process to download data for reconstruction purposes; not all data is included in a traditional download. Many service technicians are also unaware that their laptop field computers may have default settings within the programs that automatically reset the data upon extraction.

Therefore, an ill-advised attempt to extract information could lead to complete data erasure with only a partial report secured.

Many companies now utilize On-Board Event Recording and electronic logging devices. Depending upon the device and its customized settings and features, these devices may contain valuable information. Whether crash-related or not, the timely download and retention of the available data are recommended.

Retaining Documents

The retention time required for many commercial documents is specifically covered in the Federal Motor Carrier Safety Regulations. Dilemmas sometimes arise when the required retention times do not coincide with statutes limiting the time for filing suit on injury cases, and allegations of spoliation of evidence can arise. If

crash-related documents are discarded prior to the expiration of the time statute, one should be able to articulate why these records were not retained.

Conclusion

While most serious injury accidents immediately warrant the expense of collecting and preserving evidence, many companies often opt to forego this timely opportunity if the injuries do not immediately appear serious, and they instead choose other means to assess future liability.

With a basic evidence preservation costing $3,000-$5,000 to sufficiently secure evidence and assess future potential claims, this expense can be justified even if only one in ten incidents results in a claim being filed. With the average payout on personal injury claims continuing to increase year to year, the cost to have evidence properly documented for several potential claims is still far less than the cost of one significant injury claim settlement. Good or bad, understanding the strengths and weaknesses of a potential claim earlier allows for proper handling of the claim in the future. To quote Sir Francis Bacon, “Knowledge is Power.”

Rodney Pack is a Senior Project Manager at Kimley-Horn and Associates in Orlando, Florida. His background includes a B.S. in Forensic Investigations, several years experience as a law enforcement officer and hundreds of hours of specialized training regarding traffic accident investigation and reconstruction, both as a student and as an instructor. His diverse background and experience have allowed him to investigate thousands of crashes of all kinds, with his specialty being complex commercial vehicle crashes and analyzing electronic control module data. Rodney can be reached at 407.375.4260 or at Rodney.Pack@Kimley-Horn.com. Kimley-Horn is a GDLA Platinum Sponsor.

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