



Apportionment of Fault to Non-Parties Is Here to Stay

By Jacob E. Daly
Freeman Mathis & Gary, Atlanta

One of the most hotly debated issues in the aftermath of the General Assembly's enactment of Senate Bill 3 ("SB3") in 2005 was whether the amendments to O.C.G.A. §§ 51-12-31 and 51-12-33 abolished joint liability. Some members of the plaintiffs' bar scoffed at the suggestion that the General Assembly had abolished joint liability,¹ while some members of the defense bar contended that the General Assembly had done exactly that.² Of course, with respect to defendants named in a lawsuit, the General Assembly unquestionably abolished joint liability insofar as it explicitly provided that damages apportioned to each defendant were an individual

liability, not a joint liability, and were not subject to a right of contribution. The more contentious question was whether the General Assembly abolished joint liability between defendants named in a lawsuit and non-party tortfeasors. Although the answer to this question seemed to be clear to the extent that the 2005 amendments to O.C.G.A. § 51-12-33 required fault to be apportioned among all tortfeasors, regardless of whether they were named as parties, the plaintiffs' bar launched an all-out attack on the validity and constitutionality of this provision of the statute, which was denounced from the outset as "zany."³ Years of litigation ensued, and the issue was not settled until July 9, 2012, when the Georgia Supreme Court issued its much-anticipated opinion in

Couch v. Red Roof Inns, Inc. Before analyzing *Couch* and its impact, we should pause to consider how we arrived at this point.

A History of Joint and Several Liability and Apportionment of Fault

The precise origin of the doctrine of joint and several liability is open to debate, but there is no doubt that it dates back to the early English common law.⁴ Under this doctrine, two or more tortfeasors who caused a single, indivisible injury were jointly and severally liable, meaning that the plaintiff could recover his entire damages from any one tortfeasor, even if that tortfeasor was responsible for only one percent of the damages.⁵ As early as 1851, the Georgia

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The GDLA Elects its First Woman President

The GDLA reached a milestone during its 45th Annual Meeting held at the Ponte Vedra Inn & Club, Florida, June 7-10, 2012. Lynn M. Roberson of Swift Currie McGhee & Hiers in Atlanta was elected President, becoming the first woman to hold that office since the GDLA's founding in 1967.

Ms. Roberson was unanimously elected during the business meeting on June 9, following a motion to accept the report of the Nominating Committee, chaired by Past President Salty Forbes of Forbes Foster & Poole in Savannah. He also presented the other 2012-13 officers and Board of Directors. See pages 44-47 for meeting highlights.



Outgoing President Mel Haas (left) is presented a gavel plaque by incoming President Lynn Roberson at the 45th GDLA Annual Meeting.



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President's Message

GDLA Membership: What's In It For Me (and You)?

As I assumed my new position as President of the GDLA at the Annual Meeting in June at Ponte Vedra, I felt a bit awed by the shoes I have to fill and the great leaders of the bar whom I follow, including Salty Forbes, Warner Fox, Steve Kyle, Mel Haas, Staten Bitting, and so many others.

My minister, Dr. Gil Watson, tells the story of a young child on an outing with her father. In order to allow the child to see the activities unobstructed, the father carries the child on his shoulders. A neighbor approaches and greets the child, saying, "My! How big you have grown!" The child responds in innocence, "This isn't all me." In similar fashion, I have risen to a leadership position in the GDLA by "standing on the shoulders" of those who have gone before, and those who have supported and mentored me over the years.

My father grew up very poor in Alabama and, during the Depression, experienced many hungry days. When he was only six years old, he personally witnessed the accidental death of his beloved older brother, Bill, in a fall out of a tree. Dad was raised by his mother and older sister. He dropped out of school in the 8th grade because he had no shoes to wear and was too proud to go barefooted. Dad left home to give his mother one less mouth to feed and rode the rails, living in the hobo jungles along the tracks. He raised himself out of that poverty and homelessness, served with great distinction in the

military in WW II, and later served his country through his career as an analyst at the National Security Agency. In fact, he briefed at least one U.S. President in the oval office on security matters. My father provided strong shoulders to stand on.

Similarly, my mother was raised on small ranches in northern California. She never went hungry, but only because they always had chickens and cows. She was lucky enough to finish high school before marrying my father, only to see him off to war not to return for many years. She was the glue that held the family together during the many years we all wondered what was wrong with Dad as

he struggled with what we now recognize as depression and post-traumatic stress disorder. My mother's glass was always half full. Dad's was always half empty. But somehow they forged a family and made their way in the world.

Those of you who know me also know I owe great credit to my husband, the Honorable Henry Newkirk, as he has supported me throughout my career. I certainly could not have attained significant leadership opportunities without a partner who truly celebrated my success and took in stride the time commitment to make it all happen. It also did not hurt my advancement to be married to one of the most admired and respected judges in Georgia!

Continued on page 9

**The GDLA always
has opportunities
for young
(and not-so-young)
attorneys to
contribute through
writing, speaking,
or other work.**



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Selected Areas of Expertise

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Member News

Lynn M. Roberson of *Swift Currie McGhee & Hiers* in Atlanta was sworn in as the 105th President of the Atlanta Bar Association at its Annual Meeting in May. In an unprecedented event, she will simultaneously serve as President of the GDLA; she is the first woman to hold that office (see article on page 1). Her landmark achievement was featured in the *Atlanta Business Chronicle* article, "First Woman to Head Lawyer Group Paid Dues" (August 24, 2012).

The Atlanta Bar Association announces that **Gregory T. Presmanes** of *Bovis Kyle & Burch* in Atlanta and **Michael J. Rust** of *Gray Rust St. Amand Moffett & Brieske* in Atlanta are Members-at-Large on the 2012-2013 Board of Directors. **Rita A. Sheffey** of *Hunton & Williams* in Atlanta is also on the Board as Immediate Past President. **W. Ray Persons** of *King & Spalding* in Atlanta is a Member-at-Large on the Atlanta Bar Foundation Board of Directors. In addition, **Emory Speer Mabry III** of *Mabry & McClelland* in Atlanta is Chair of the Dispute Resolution Section and **Melissa Reading** of *Owen Gleaton Egan Jones & Sweeney* in Atlanta is Chair of the Women in the Profession Section.

During the Atlanta Bar Association Annual Meeting in May, **Henry D. "Hank" Fellows, Jr.** of *Fellows LaBriola* in Atlanta was presented the Charles E. Watkins, Jr. Award, recognizing distinctive and sustained service to the Atlanta Bar Association.

Gray Rust St. Amand Moffett & Brieske announces the elevation of **Wayne S. Melnick** to partner. Mr. Melnick serves on the GDLA Board of Directors and chairs its Education Committee. His practice

involves property and casualty claims litigated in state and federal courts, including products liability, premises liability and automobile and motor carrier accidents.

Chambless Higdon Richardson Katz & Griggs, with offices in Macon, Atlanta and Albany, announces that **Jason D. Lewis** has been elevated to partner. His practice focuses primarily on representing governmental entities in employment discrimination, civil rights and general liability claims. He also represents clients in business litigation and personal injury cases.

The following were elected to the State Bar of Georgia's Board of Governors with terms to expire 2014: GDLA Vice President and newsletter editor **Sarah B. "Sally" Akins** of *Ellis Painter Ratterree & Adams* in Savannah, Eastern Circuit, Post 1; **J. Anderson Davis** of *Brinson Askew Berry Seigler Richardson & Davis* in Rome, Rome Circuit, Post 2; GDLA Board of Directors member **Jeffrey S. Ward** of *Drew Eckl & Farnham* in Brunswick, Brunswick Circuit, Post 2; **Janice M. Wallace** of *Beck Owen & Murray* in Griffin, Griffin Circuit, Post 1. **Catherine Koura** of *Stone & Boehm* in Duluth is also serving Atlanta Circuit, Post 5, through 2013. Additionally, State Bar Board of Governors members **Patrick T. O'Connor** of *Oliver Maner* in Savannah, Eastern Circuit, Post 3, and **Rita A. Sheffey** of *Hunton & Williams* in Atlanta, Atlanta Circuit, Post 17, were elected to the State Bar's Executive Committee. This prestigious body is comprised of the officers and six members elected by and from the Board of Governors to meet monthly and exercise the power of the Board when it is not in session.

The following are serving on the Board of Directors of the State Bar

of Georgia's Young Lawyers Division (YLD) Executive Council: **J. Patrick Connell** of *Ellis Painter Ratterree & Adams* in Savannah; **M. Anne Kaufold-Wiggins** of *Balch & Bingham* in Atlanta; **John B. Manly** of *Bouhan Williams & Levy* in Savannah; and **Brantley C. Rowlen** of *Lewis Brisbois Bisgaard & Smith* in Atlanta. In addition, the following are District Reps: **Nicole C. Leet** of *Gray Rust St. Amand Moffett & Brieske* in Atlanta, Northern District; **Amanda M. Morris** of *Hall Bloch Garland & Meyer* in Macon, Middle District; and **Kevin C. Patrick** of *Goodman McGuffey Lindsey & Johnson* in Atlanta, At-Large.

Cases of Note

Richard A. Brown of *Brown Readdick Bumgartner Carter Strickland & Watkins* in Brunswick received a defense verdict in a wrongful death case. Plaintiffs sought damages for the death of their mother against a trucking company and a general contractor as the result of a collision between a vehicle operated by Plaintiffs' decedent and a dump truck in a construction zone on I-95. Plaintiffs alleged that the dump truck was traveling too slowly after entering the left lane of I-95 from the median, and that the contractor had not properly warned motorists of the presence of such trucks. Plaintiffs' experts were Archie Burnham on the signage/warnings issues and Kelly Kinnett on accident reconstruction. The defendants contended that all applicable standards had been met and that Plaintiffs' decedent failed to observe and avoid the truck. After a three-day trial, the jury returned a verdict for all of the defendants. *Peter Lacy, et al. v Wallace, Flo Jo Trucking, and Plant Improvement d/b/a Seaboard, et al.*, Case No. CV211-067.

Scott Masterson and **Brantley Rowlen**, partners in the Atlanta office of *Lewis Brisbois Bisgaard & Smith*, obtained a defense verdict on behalf of Union Carbide Corporation on February 29, 2012, in the Cuyahoga County, Ohio Court of Common Pleas. Plaintiff Christina Nardo, as Executrix of the Estate of her late husband Rudolph Nardo, alleged Union Carbide Corporation mined and subsequently sold raw asbestos fiber to the Olin Mathieson Aluminum Plant in Hannibal, Ohio, where her husband was employed as a laborer from 1969 to 1974. Plaintiff further alleged Mr. Nardo was exposed to Union Carbide asbestos when he would clean up in and around areas where the asbestos was being used in high heat furnace applications and that those exposures were a substantial factor in the development of his mesothelioma. Plaintiff asked the jury to return a verdict of \$50 mil-

lion during closing argument. The jury deliberated for approximately six hours before returning a unanimous verdict in favor of Union Carbide. The trial lasted 15 days with Judge Leo Spellacy presiding. Case No. 10-723695.

John E. Hall, Jr. of *Hall Booth Smith & Slover* in Atlanta received a defense verdict in a case in Fulton County. The case involved allegations of a missed rectal cancer on a CT scan. Mr. Hall's defendant radiologist read the scan as normal in November 2005. The patient had another CT scan for additional symptoms in September of 2006 and cancer was found in the rectum and chest. Plaintiff contends it was visible in the November 2005 scan. Plaintiffs brought in Dr. Arnold Friedman of California as their expert. The defense had Dr. Leslie Quint of Michigan. The defense used a "Where's Waldo" cartoon to show once you know where Waldo

is, then it is easy to see him. The defense contended Dr. Friedman did a retrospective review, knowing where the cancer was from a later colonoscopy and called it on the CT scan, even though the standard of care suspicious factors were not there. The defense contended that there are certain factors that must be present to report a suspicious mass. Using an aspirational safety rule, Plaintiff contended that if you cannot completely rule out cancer as a radiologist you must suggest a follow-up test. We noted that cancer can never be completely ruled out in the rectum in a CT scan and this was a ridiculous standard unrelated to the standard of care. Plaintiff asked the jury for \$7 million at closing. The jury was out under two hours and indicated that it was 12-0 for the defense on standard of care from the start, they just wanted to be thorough in reviewing the records. ❖

GDLA Committee Leadership 2012-13

The GDLA announces the following committee leaders as appointed or reappointed by President **Lynn M. Roberson**:

- ♦ Admissions: Past President **Warner S. Fox**, Chair, *Hawkins Parnell Thackston & Young*, Atlanta
- ♦ Amicus: **Robert R. "Rusty" Gunn, II**, Co-chair, *Martin Snow*, Macon; and **Jeffrey S. Ward**, Co-chair, *Drew Eckl & Farnham*, Brunswick
- ♦ Education: **Wayne S. Melnick**, Chair, *Gray Rust St. Amand Moffett & Brieske*, Atlanta; and **Brett Miller**, Vice-chair, *Mabry & McClelland*, Atlanta
- ♦ Judicial Relations: Past President **Robert M. Travis**, Chair, *Bryan Cave*, Atlanta
- ♦ Law Journal: **Peter D. Muller**, Editor, *Goodman McGuffey Lindsey & Johnson*, Savannah
- ♦ Meetings: Past President **N. Staten Bitting, Jr.**, Chair, *Fulcher Hagler*, Augusta

- ♦ Membership: **Christopher E. Parker**, Chair, *Miller & Martin*, Atlanta; and **James D. "Dart" Meadows**, Vice-chair, *Balch & Bingham*, Atlanta
- ♦ Newsletter: **Sarah B. "Sally" Akins**, Editor, *Ellis Painter Ratterree & Adams*, Savannah
- ♦ Pre-Trial Discovery/Deposition Boot Camp: **C. Jason Willcox**, Chair, *Moore Clarke DuVall & Rodgers*, Albany
- ♦ Sponsorships: **Craig C. Avery**, Chair, *Cowsert & Avery*, Athens
- ♦ Substantive Law Committees: **Brian T. Moore**, Chair, *Drew Eckl & Farnham*, Atlanta
- ♦ Trial Academy: **Matthew G. Moffett**, Chair, *Gray Rust St. Amand Moffett & Brieske*, Atlanta, and **Douglas K. Burrell**, Vice-chair, *Drew Eckl & Farnham*, Atlanta
- ♦ Young Lawyers: **Andy Holliday**, Chair, *Fulcher Hagler*, Augusta; **Pamela N. Lee**, *Swift Currie McGhee & Hiers*, Atlanta, Vice-chair for Education; and

Jason C. Logan, Vice-chair, *Constangy Brooks & Smith*, Macon

♦ Website: **David N. Nelson**, Chair, *Chambless Higdon Richardson Katz & Griggs*, Macon; and **Troy Lance Greene**, Vice-chair, *McNatt Greene & Peterson*, Vidalia

In addition, GDLA Executive Vice President **Ted Freeman**, *Freeman Mathis & Gary*, Atlanta, completed his term of service as the GDLA's representative on the State Bar of Georgia's Formal Advisory Opinion Board (FAOB). At the recommendation of Ms. Roberson, State Bar President Robin Frazer Clark appointed **Evelyn Fletcher Davis**, *Hawkins Parnell Thackston & Young*, Atlanta, to succeed Mr. Freeman. The FAOB is authorized to draft Formal Advisory Opinions concerning a proper interpretation of the Rules of Professional Conduct or any of the grounds for disciplinary action as applied to a given state of facts, as set forth in Bar Rule 4-403. ❖

Welcome New GDLA Members

The following were admitted to membership at the Annual Meeting.

As part of our RecruitOne membership drive, we are pleased to recognize the GDLA members who were listed as a referring party on a prospective member's application. **New members' names are in bold**; recruiting *GDLA members' names are in italics*.

We also congratulate the RecruitOne winners, named at right.

Eve Appelbaum

Appelbaum & Associates, Atlanta
Brian Mohs
Nall & Miller, Atlanta

Steven P. Bristol

Hall Booth Smith & Slover,
Brunswick
Beth Boone
Hall Booth Smith & Slover,
Brunswick

Kathleen Sullivan Dod

Freeman Mathis & Gary, Atlanta
Jake Daly
Freeman Mathis & Gary, Atlanta

Elizabeth L. Ford

Chambless Higdon Richardson
Katz & Griggs, Macon
Joseph Stephens
Chambless Higdon Richardson
Katz & Griggs, Macon

Richard C. Foster

Hicks Casey & Foster, Marietta
Erica L. Morton
Hicks Casey & Foster, Marietta

Rebecca Gabelman

Harper Waldon & Craig, Atlanta
Ashley Rice & Rakhi McNeill
Harper Waldon & Craig, Atlanta

Ashley Gowder

Vernis & Bowling of Atlanta
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Stephen Graham

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Keith M. Hayasaka

Hall Bloch Garland & Meyer,
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Brian Mohs
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Michael A. Holcomb

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Gunn & Dial, Atlanta
Charles L. Clay, Jr.
Weinberg Wheeler Hudgins
Gunn & Dial, Atlanta

Mary Claire Jagor

Vernis & Bowling of Atlanta
George Duncan, Duncan & Adair,
Atlanta, and
Jo Jagor, Hall Booth Smith &
Slover, Atlanta

Daniel Kingsley

Dennis Corey Porter & Smith,
Atlanta
Jan Seanor
Dennis Corey Porter & Smith,
Atlanta

Ryan Klee

Drew Eckl & Farnham, Atlanta
Karisa Kopaczewski
Carlock Copeland & Stair, Atlanta

Sean Martin

Leitner Williams Dooley &
Napolitan, Roswell
Tom Sippel
Leitner Williams Dooley &
Napolitan, Roswell

Zach Matthews

Hicks Casey & Foster, Marietta
Erica L. Morton
Hicks Casey & Foster, Marietta

Matthew P. Ramsey

Drew Eckl & Farnham, Atlanta
Barbara Marschalk
Drew Eckl & Farnham, Atlanta

Brantley C. Rowlen

Lewis Brisbois Bisgaard & Smith,
Atlanta
Scott Masterson
Lewis Brisbois Bisgaard & Smith,
Atlanta



Thanks to all of the GDLA members who recruited new members as part of the RecruitOne membership drive.

Membership Committee Chair Chris Parker of Miller & Martin and Vice-chair Dart Meadows of Balch & Bingham developed the recruitment campaign with inspiration from the *Atlanta Business Chronicle's* successful challenge to metro businesses to "Hire One" new employee; that program was the brainchild of *Atlanta Business Chronicle* Publisher Ed Baker.

Every GDLA member was encouraged to recruit at least one new member. For every one new member recruited, GDLA members received one entry into a grand prize drawing for an iPad2. Plus, each new recruit's name went into a drawing for a free GDLA Annual Meeting registration.

We are pleased to announce that **Beth Boone** of *Hall Booth Smith & Slover* in Brunswick is the winner of the iPad2; and new member **Josceyln M. Kaup** of *Allen McCain & O'Mahony* in Atlanta is the winner of the GDLA Annual Meeting registration.

The program ran from December 1, 2011 to May 1, 2012, and, in that time, we tripled the usual number of applications received.

We hope you will continue to recruit your colleagues in the civil defense bar to join the GDLA's ranks and enjoy the many benefits of participation. ❖

GDLA Files Two Amicus Briefs

The Amicus Curiae Committee, co-chaired by Rusty Gunn of Martin Snow in Macon and Jeff Ward of Drew Eckl & Farnham in Brunswick, recently accepted a request from member Phil Savrin of Freeman Mathis & Gary in Atlanta, to file an amicus brief in support of the defendant's motion for reconsideration to the Georgia Supreme Court in a case involving the question of whether an insurer may reserve its rights to assert additional contract defenses in the context of a denial of coverage and, additionally, whether all defenses not raised in the initial disclaimer are waived.

The Supreme Court apparently so held in the case of *Hoover v. Maxum Indemnity Co.*, Nos. S11G1681, S11G1683 (Ga. June 18, 2012) — a ruling that represents a wholesale change in the law of this State and is contrary to industry practice in this and other states.

David Leonard and Chris Freeman of Carlton Fields in Atlanta volunteered to write the

brief on behalf of the GDLA and did a wonderful job.

The majority holding in *Hoover* effectively finds waiver or estoppel whenever policy defenses are omitted as grounds for the disclaimer, regardless of whether the insurer has expressly indicated its intent *not* to waive any additional defenses. Moreover, as a practical matter, the new rule announced by the majority in *Hoover* could be interpreted to require any insurer — including one that believes reasonably and in good faith that no coverage is afforded by the insurance contract for at least one reason — to defend its insured under a reservation of rights while filing a separate declaratory judgment action. This new rule is not only inconsistent with industry practice, but also is contrary to the well-settled law of this State concerning waiver and estoppel and the right to contract. It places Georgia far out of line with the jurisprudence of its sister states.

The Committee accepted the request due to the dilemma *Hoover* presents for defense counsel advising insurers and the fact that the practical implication of the Court's broad pronouncements in *Hoover* will be an increase in unnecessary coverage litigation. It is hoped that the Supreme Court will revisit its opinion in light of existing precedent and industry practice or, at a minimum, limit its ruling to the specific facts of the case.

The Committee also accepted a request from Charles L. Clay, Jr. of Weinberg Wheeler Hudgins Gunn & Dial in Atlanta to submit an amicus brief in *Coro Realty Advisors v. Ana Julia Maya Salinas* (No. A12A0796), which was filed with the Court of Appeals of Georgia on June 6, 2012.

To read either brief, as well as any past briefs, visit the Members Only area of our website and click on "Amicus Policy & Briefs" in the left navigation. ❖

GDLA Newsletter Again Wins State Bar Award

The GDLA was once again honored to receive the Newsletter Award presented by the State Bar of Georgia, recognizing excellence in local and voluntary bar communication.

The GDLA first entered, and won, the competition in 2011. Following the presentation of that award, then-Supreme Court Justice George Carley suggested we add the appellate bench to the mailing list. We did so, and have recently expanded our circulation to include all state and federal judges in Georgia. We believe this will enhance the GDLA's visibility with the bench, while also giving our author members a great opportunity to showcase their acumen to judges across the state.

Evelyn Fletcher Davis of Hawkins Parnell Thackston & Young in Atlanta, who served as Editor for this year's award-winning publication, said, "I'm so pleased we were honored again this year with such a prestigious award. I have to thank my associate, Jason Groch, who assisted me with editing, as well as all the GDLA members and sponsors whose great articles made this an invaluable resource for those in the civil defense trenches."

Sarah B. "Sally" Akins of Ellis Painter Ratterree & Adams in Savannah takes over as Editor this year.



GDLA Executive Director Jennifer Davis (above left) accepted the award from outgoing State Bar President Ken Shigley at the State Bar Annual Meeting in Savannah in June. ❖

President's Message

Continued from page 3

I also stand on the shoulders of my partners and others at Swift Currie McGhee & Hiers. They are among the most ethical and professional lawyers I know, and they have supported me in forging my own path (in spite of my lack of billable hours!).

Many years ago I was encouraged to become more active in the GDLA and to serve on its Board of Directors. Board members helped me find my place and get involved. My involvement with the GDLA has provided me with opportunities for making some good friends and networking with some great lawyers in whom I have great faith and trust. I am confident that the best lawyers are active in bar associations like ours!

Although the GDLA is a statewide organization, it feels like a congenial group of friends from the first day you get involved. The

GDLA always has opportunities for young (and not-so-young) attorneys to contribute through writing, speaking, or other work. Those who are willing to work and prove to be reliable move up in the organization, regardless of their race, gender, sexual orientation or ethnicity. In fact, I believe the GDLA has great opportunities for women and minorities as it seeks to broaden its appeal and service.

I always encourage the younger attorneys in my office to join and get involved with the GDLA, since I believe it can really enhance your legal education and greatly assist with your leadership skills, marketing efforts and networking. Membership alone, however, will not provide all of these benefits to you. You must be actively involved in order to reap the most rewards. Active membership in the GDLA through publishing articles in this

newsletter and *Law Journal*; speaking opportunities at various CLEs, including Pre-Trial Discovery/Deposition Boot Camp and Trial Academy; as well as leadership positions with the Substantive Law Committees and other activities can also greatly enhance your legal reputation.

All in all, I cannot imagine why any lawyer would pass on the opportunity to actively associate with this great organization which has given so much to me.

For the defense,



Lynn M. Roberson
Swift Currie McGhee & Hiers
GDLA President

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Assumption of the Risk: Alive and Well in Premises Liability Actions in Georgia

By Martin A. Levinson and
Alex M. Barfield, *Hawkins Parnell
Thackston & Young, Atlanta*

Those who own or manage real property in the state of Georgia received good news with the recent Supreme Court of Georgia case *Landings Association, Inc. v. Williams*, S11G1263, S11G1277 (June 18, 2012).

In *Williams*, the Supreme Court reversed a trial court's order denying summary judgment and held that an 83-year old woman, allegedly killed in an alligator attack while house-sitting at a residential golf community, had equal knowledge of the threat of alligators within the community.

This holding reiterates the long-standing defense in Georgia that, in certain situations of obvious danger, a person can be deemed, as a matter of law, to have assumed the risk of any injury or harm that results from his decision to voluntarily expose himself to that danger.

Additionally, and of significant value to premises liability defendants looking to argue an assumption of the risk defense, the Supreme Court arrived at its holding without requiring evidence that the decedent knew that alligators in general, or the specific alligator that attacked the decedent, posed a risk of injury. *Williams* supports the proposition that at a certain level of danger, a plaintiff cannot defeat summary judgment by arguing that he or she did not subjectively appreciate the danger or some highly discrete and specific element of that danger. Rather, the Supreme Court of Georgia has made a clear pronouncement that where a person of normal intelligence and faculties can perceive a risk of injury, a plaintiff's failure to do so equates to assumption of the risk and can support summary judgment in favor of the defendant.

While assumption of the risk is typically judged according to a *subjective* standard of what the plaintiff actually knew or appreciated, that is not always the case.



Assumption of the Risk, Generally

Assumption of the risk is a long-standing principle of Georgia law, having been recognized by the Supreme Court of Georgia as a bar to a plaintiff's recovery over a century ago. *See, e.g., Griffith v. Lexington Term. R. Co.*, 124 Ga. 553 (1905). "Assumption of risk in its simplest and primary sense means that the plaintiff has given his express consent to relieve the defendant of an obligation of conduct toward him and to take his chance of injury from a known risk." *Hackel v. Bartell*, 207 Ga. App. 563, 564 (1993); *Lundy v. Stuhr*, 185 Ga. App. 72, 75, *citing* Prosser, *Law of Torts* at 303 (2nd ed.). "The result is that the defendant is simply under no legal duty to protect the plaintiff." *Id.*

In order to prevail on a defense of assumption of the risk, the defendant must show that the plaintiff (i) had actual knowledge of the danger in question, (ii) understood and appreciated the risks associated with such danger, and (iii) voluntarily exposed himself to those risks. *Liles v. Innerwork, Inc.*, 279 Ga. App. 352 (2006). Successful proof of assumption of the risk will bar the plaintiff's claims even where the defendant acted willfully and wantonly or was grossly negligent. *Id.*; *Muldovan v. McEachern*, 271 Ga. 805 (1999).

Assumption of the risk differs from the affirmative defense of con-

tributory negligence in that the court will apply a subjective standard in considering an assumption of the risk defense, looking to the particular plaintiff and his situation in order to determine whether "the plaintiff subjectively comprehended the specific hazard posed, and affirmatively or impliedly assumed the risk of harm that could be inflicted therefrom." *Muldovan*, 271 Ga. at 808 (2); *Garner v. Rite Aid of Ga., Inc.*, 265 Ga. App. 737, 739-40 (2004) (physical precedent only). Moreover, unlike contributory negligence, assumption of the risk can serve as the basis for summary judgment where "the facts are so plain and palpable that they demand a finding by the court as a matter of law." *Pearson v. Small World Day Care Ctr.*, 234 Ga. App. 843, 845 (1998); *see also O'Neal v. Sikes*, 271 Ga. App. 391, 392 (2005); *Spooner v. City of Camilla*, 256 Ga. App. 179, 181-82 (2) (2002).

While assumption of the risk is typically judged according to a *subjective* standard of what the plaintiff actually knew or appreciated, that is not always the case. Rather, the Georgia Court of Appeals has held that there are some cases where the plaintiff's assumption of the risk is so "plain and palpable," and the danger in question so obvious, that an *objective* standard applies instead:

Every adult is presumed to be endowed with normal facul-

ties, both mental and physical. No person should conduct [himself] in an irresponsible manner when even ordinary prudence would protect [him] from the likelihood of possible injury. ***At some point the danger and likelihood of injury becomes so obvious that actual knowledge by the plaintiff is unnecessary.***

Hackel, 207 Ga. App. at 564 (emphasis supplied); *Lundy*, 185 Ga. App. at 75.

Georgia's appellate courts have previously applied this reasoning to hold that summary judgment was appropriate on the basis of the plaintiff's assumption of the risk of injury in several contexts. For example, in *Liles v. Innerwork, Inc.*, the Court of Appeals affirmed the trial court's grant of summary judgment to the defendant where the plaintiff "had actual knowledge of the danger associated with the activity and appreciated the risk involved, as any reasonable person would understand the danger inherent in allowing oneself to be dropped from a height of eight to ten feet." 279 Ga. App. at 354 (2). Similarly, in *White v. Georgia Power Co.*, 265 Ga. App. 664 (2004), the Court of Appeals held that "the danger of drowning in a body of water is an apparent, open danger, the knowledge of which is common to all," and affirmed the trial court's grant of summary judgment to the defendant in that case. *Id.* at 666 (1). In *Muldovan v. McEachern*, the Supreme Court held that the decedent assumed the risk of death as a matter of law by loading a single bullet into a handgun, giving the gun to another individual, and instructing the individual to point the gun at the decedent's head and pull the trigger. 271 Ga. at 810 (2). In *Hackel v. Bartel*, 207 Ga. App. 563 (1993), the Court of Appeals reversed the trial court's denial of summary judgment in favor of a defendant where the plaintiff was struck by a car after she reached into its open door, while it was parked on a slope, and

released the emergency brake without checking to see whether the car was in gear. *Id.* at 563-64 (1). And in *Lundy v. Stuhr*, 185 Ga. App. 72 (1987), a full Court of Appeals held that a part-time kennel attendant assumed the risk of being bitten when he entered the kennel of an Akita breed dog weighing over 100 pounds that he had been warned was an "escape artist" and "will bite," failed to exit the dog's kennel when it began to walk toward him, and, instead, suddenly stood and extended his arm to the dog as it approached him. *Id.* at 72-74.

But with the defense of assumption of the risk having fallen into disfavor in many other states, and with the Georgia Court of Appeals having issued several unfavorable decisions in the premises liability context in recent years, it was unclear how long defendants would be able to rely on assumption of the risk as a complete defense to liability, particularly in premises liability cases.

More importantly, prior to its opinion in *Williams*, the Supreme Court of Georgia had not recently addressed the issue of when an *objective* standard might apply in premises liability cases.

The Georgia Supreme Court's Decision in *Williams*

In *Williams*, the Plaintiffs sued two entities that owned and managed the planned residential and golf community where the Plaintiffs lived on Skidaway Island, Georgia, after Gwyneth Williams, the 83-year-old mother of one of the Plaintiffs, died allegedly as a result of an alligator attack within the community.

Before the community was developed, the area consisted primarily of marshlands and had a thriving native alligator population. In the 1970s, the defendants installed a system of lagoons to allow sufficient drainage to make the area suitable for residential development. Thereafter, alligators moved into and out of the community through those lagoons.

On the evening of October 5, 2007, Ms. Williams, who was "house-sitting" for the Plaintiffs,

decided to go for a walk near one of the lagoons close to Plaintiffs' home. The next morning, her body was found floating in the lagoon, her right foot and both forearms having been bitten off. An alligator eight feet in length was subsequently located and caught in that lagoon. The alligator was killed, and "parts of Williams' body" were found in the alligator's stomach.

This incident represented the first known alligator attack within the community. It was undisputed, however, that Williams knew prior to the incident that alligators inhabited the premises. Indeed, Williams' son-in-law testified that on one occasion, Williams was riding with him through the community when he stopped the car to allow Williams to observe an alligator. He recalled Williams telling him on that occasion that she did not want to be anywhere near alligators. Williams' son-in-law also testified that "there was never any reason to" discuss with Williams how to behave around wild alligators, because Williams "was an intelligent person" who did not need to be told to "stay away from alligators."

The Supreme Court reversed the Court of Appeals' decision, and held that summary judgment should have been entered in favor of the defendants, because the Plaintiffs' decedent "had equal knowledge of the threat of alligators within the community." *Id.* at 2. The Court went on to hold that since Williams knew that wild alligators were dangerous, by choosing "to go for a walk at night near a lagoon in a community in which she knew wild alligators were present . . . Williams either knowingly assumed the risks of walking in areas inhabited by wild alligators or failed to exercise ordinary care by doing so." *Id.* at 5-6.

In both the trial court and the Court of Appeals, the Plaintiffs successfully defeated the defendants' motions for summary judgment by arguing that (1) the defendants failed to follow a purported policy of removing alligators greater than seven feet in length from lagoons on the subject premises, and (2) no evidence existed that the decedent

had seen or had knowledge of any alligators greater than seven feet in length on the premises or *any* alligators in the specific lagoon where her body was found. See *Landings Ass'n, Inc. v. Williams*, 309 Ga. App. 321, 323-24 (2011).

The Plaintiffs' arguments in this case followed a recent trend of many plaintiffs in Georgia attempting to avoid the entry of summary judgment in premises liability cases, notwithstanding the equal knowledge and/or assumption of the risk by the plaintiff or his decedent. Specifically, it has become commonplace for plaintiffs in such cases to oppose motions for summary judgment by alleging lack of knowledge by the plaintiff or his decedent of some very specific detail which, in reality, would not be necessary for a person of normal intelligence and faculties to have assumed the risk according to the standard by which assumption of the risk is applied in Georgia.

In its opinion in *Williams*, the Supreme Court specifically rejected the Plaintiffs' arguments in that regard:

A reasonable adult who is not disabled understands that small alligators have large parents and are capable of moving from one lagoon to another, and such an adult, therefore, assumes the risk of an alligator attack when, knowing that wild alligators are present in a community, walks near a lagoon in that community after dark.

Williams, S11G1263, at 6.

The Effect of the Supreme Court's Decision in *Williams*

Although the Supreme Court also relied on *Williams*' equal knowledge in reaching its conclusion, perhaps the most significant part of the Court's opinion for precedential purposes is the Court's holding that the decedent assumed the risk of her injuries. With the significant erosion of available legal defenses in premises liability actions in recent years, the Supreme Court's re-affirmance of

assumption of the risk as a viable defense in the premises liability context, specifically, must be viewed as a positive development.

The Supreme Court's opinion in *Williams* represents the first time that the Supreme Court has considered the applicability of the doctrine of assumption of the risk since *Muldovan*, a case involving one of the most obviously dangerous activities imaginable — a game of "Russian roulette" in which one of the participants, predictably, perished. Prior to *Williams*, the Supreme Court had not considered the applicability of an assumption of the risk defense in the premises liability context since *Thompson v. Crownover*, 259 Ga. 126 (1989), and the Court's opinion in that case is bereft of any analysis on the subject but, rather, simply stated that issues relating to assumption of the risk "are ordinarily not susceptible of summary adjudication." *Id.* at 129 (5) (emphasis in original). The most recent case in which the Supreme Court held that summary judgment was appropriate based on an objectively obvious danger appears to be *Abee v. Stone Mountain Memorial Ass'n.*, 252 Ga. 465 (1984), in which the Court held that the risk of flipping over and hitting one's mouth on a waterslide "was a danger which was patent and obvious to anyone familiar with the ride" and that the plaintiff had assumed the risk of his injury by choosing to ride the waterslide. *Id.* at 465-66.

Moreover, The Supreme Court's opinion in *Williams* appears to represent an endorsement and affirmance of the above-quoted principle from the *Hackel* and *Lundy* cases, as well as other Georgia Court of Appeals decisions. That is, where a particular hazard and its attendant risks are blatantly obvious, assumption of the risk can be established as a matter of law at the summary judgment stage based on an *objective* standard of reasonableness. By rejecting the plaintiffs' argument that summary judgment was inappropriate in *Williams*, the Supreme Court reaffirmed that assumption of the risk is a viable defense in 2012 and beyond,

regardless of how severe the injury. Even in cases of death or serious injury, if the risk of injury is objectively obvious to a person of normal faculties, a plaintiff who voluntarily exposes himself to that risk will be barred from recovering when he is injured.

Ultimately, the high court's decision in *Williams* is significant in that it reaffirms that a plaintiff cannot avoid summary judgment in a case where the plaintiff or his decedent assumed the risk of an injury due to an obvious potential hazard, simply by contending that he did not subjectively appreciate the obvious hazard. Essentially, the Supreme Court in *Williams* held that the risk of being attacked by an alligator when alligators are known to live in the vicinity — much like the risk of falling from a significant height, drowning in a body of water, or being killed by another pointing a loaded gun at one's head and pulling the trigger — is plain, palpable, and obvious to anyone of normal intelligence. In so doing, the Supreme Court also reaffirmed the principle that summary judgment is appropriate in a premises liability case where the Plaintiff or his decedent had equal knowledge or assumed the risk of his injuries, without regard to the nature of the defendant's alleged negligence. As plaintiffs and some courts attempt to chip away at the defenses available to defendants in tort cases — particularly those involving premises liability — it is important and somewhat reassuring to know that the defense of assumption of the risk remains alive and well in those cases. ♦



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Mediation Has Become *A New Day In Court*

By John K. Miles
Miles Mediation

The following is an excerpt from John K. Miles' new book, *A New Day In Court*.

Introduction

Early in my career as a mediator, I believed that participants in mediation were motivated by money. The defendant wanted to settle for as little as possible, and the plaintiff wanted to get as much as he could. Certainly lawsuits involved emotional issues, primarily for plaintiffs. However, if the defendant offered enough money, the emotional issues vanished or were at least greatly minimized.

As mediator, my role was to create uncertainty on both sides. Juries are unpredictable. They may award more than the defendant wants to pay and less than the plaintiff is willing to accept. Better to compromise at mediation than to receive a disappointing verdict. While this strategy was often successful in assisting parties to settle their disputes, it failed to offer many participants what they really needed: the opportunity to be heard.

Before court dockets became clogged and litigation became too expensive, parties were heard at trial. Jury trials were a cost-effective way to resolve disputes. Trials not only resulted in closure but allowed parties to have their say. The purpose of this book is to demonstrate that mediation has become a superior method for allowing parties to present their claims and reach closure. Mediation has become *A New Day in Court*.

Mediation is most effective when it meets needs formerly met in court. Specifically, the mediation session must allow for what most litigants desire: a fair and serious process resulting in a just resolution of their case. I believe that mediation is better than trial at

meeting all parties' needs. Over 11 years of mediation experience have led me to conclude that this fair and serious process involves far more than resolution.

I have learned that most litigants have an inherent desire to be heard, and their desire to be heard can be every bit as important as their desire for resolution.

A personal experience taught me the importance of being heard. Nine years ago my wife and I went through our second adoption

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process. With our first adoption we learned that while there are professionals in place to advocate for the baby and the birth mother, adoptive parents can be victims who are led through twists and turns and heartaches.

In an effort to avoid being blindsided again, my wife and I retained a professional consultant to advocate for us, to shepherd us

through our second adoption. Our primary focus was on being selected by the birth mother and being ensured that she didn't change her mind and decide to keep the baby. Our consultant recommended an adoption agency, and a birth mother selected us. When the due date arrived, we traveled to Oklahoma City.

After the baby arrived, things got difficult. Only when the baby was born did we learn of a potentially dangerous condition in the medical history. This issue could have a significant impact on the baby's future. We were faced with a decision: Did we want this baby?

My wife and I were angry, frustrated, and confused. Why hadn't this condition been identified earlier? What were the chances the baby's health would be affected? What were we supposed to do? Should we take the baby home or begin the process all over again?

The attorney for the agency and our consultant were long on information but short on advice. The decision was ours, and the decision had to be made quickly. We wanted someone to take responsibility for the mistake. We needed someone to acknowledge that we had been wronged, and most importantly we wanted to make the right decision.

Plaintiffs who participate in mediation may feel the way I did in Oklahoma City. Like me, they are participating in an unfamiliar process. The professional who is supposed to be advocating for them seems surprisingly detached and emotionally distant. Like me, they may feel anger — and that anger needs to be acknowledged.

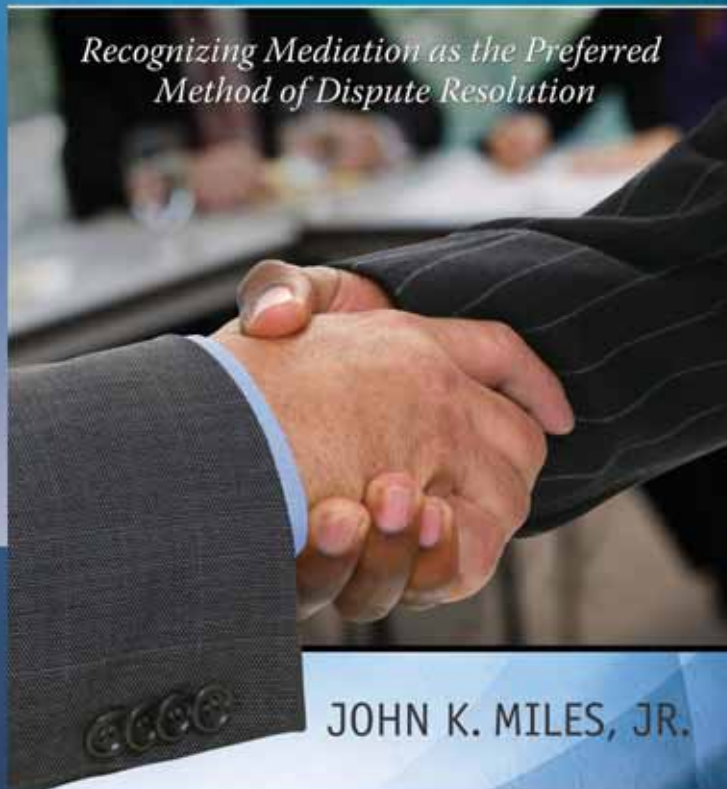
My wife and I needed three things. First, we needed to be treated with respect. We needed someone to acknowledge the importance of this decision and that our questions and concerns were valid. Second, we needed to be heard. We were angry and believed we had every right to feel

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that way. We wanted to express our anger. We didn't need to hear about the feelings and needs of the birth mother, nor did we need to be told not to be upset because "this type of thing happens all the time." Finally, we needed someone to give us the information we lacked, someone to give us good advice.

I have come to understand that many plaintiffs who participate in mediation need these same three things: to be treated with respect, to be heard, and to receive good information and advice. For my wife and me, the person who provided what we needed was Daffney. Daffney was a nurse who sat patiently with us and listened while we vented. No doubt much of what we had to say was not relevant to the medical issues that Daffney was there to address, but she listened until we had our say. She gently guided our focus to the important issues. She provided the scientific information we needed and also gave us counsel.

I remember my wife asking,

"What should we do?"

Daffney responded, "Take your Joe home."

Our son's name was to be Charles Joseph. We would call him "Joe." Up until that point I didn't want to use his name for fear he wouldn't be ours. When Daffney used his name, I knew what we would do — what we wanted to do all along. We took Joe home.

Daffney didn't give us information that was different from the others. While she showed compassion, she was not overly emotional. She confirmed the decision we wanted to make. Daffney understood we needed to reach a certain comfort level before we could make that decision.

Successful mediations are ones where all parties, particularly plaintiffs, are allowed to reach a comfort level. What makes any given plaintiff comfortable can depend on more than one motivational factor. This book is designed to help attorneys, insurance claims adjusters, and mediators develop

better mediation advocacy skills. It will help the reader identify what motivates plaintiffs to settle and how to effectively negotiate the case to a successful conclusion. ❖



John K. Miles founded Miles Mediation and Arbitration Services, LLC, a practice devoted exclusively to mediation and arbitration where he continues today as a full time mediator. He is a published author as well as a frequent speaker on dispute resolution at conferences and CLE seminars. He is a member of the State Bar of Georgia and is registered as a neutral with the Georgia Office of Dispute Resolution. Mr. Miles is also a member of the Georgia Academy of Mediators and Arbitrators. Miles Mediation is a Platinum sponsor of the GDLA.

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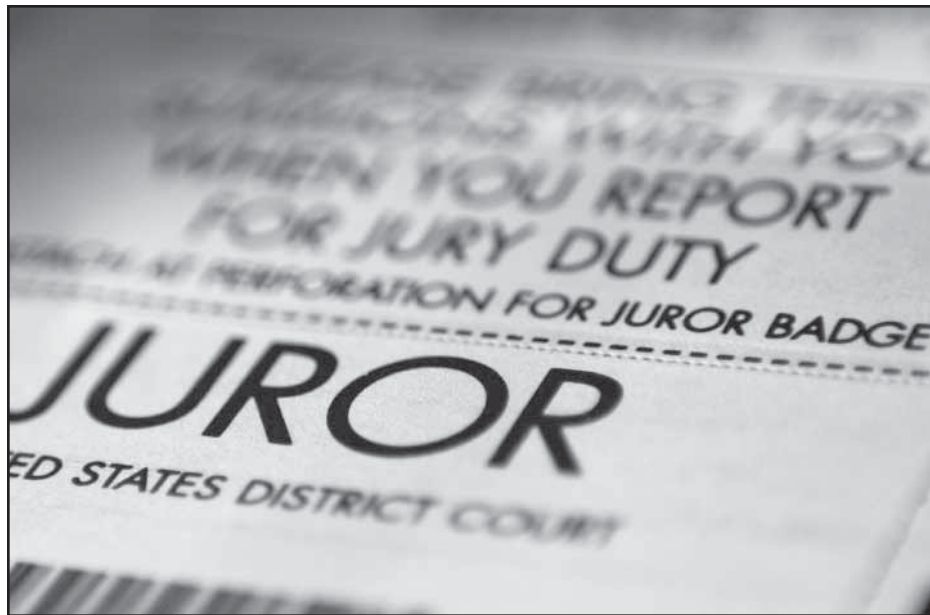
How Plaintiff Attorneys Pick Juries: Five Case Studies

By Robert F. Bettler, Jr., Ph.D.
DecisionQuest

Some attorneys follow what trial consultants call “folklore” in their peremptory strike decisions. Clarence Darrow, the famous criminal defense attorney, provides a prime example. He always struck Presbyterians in death-penalty cases because, as Calvinist predestinarians, they believe everyone but themselves is bound for Hell anyway, so what did it matter if a jury hastened the departure?

A more contemporary example may be the fear many plaintiffs’ attorneys evince towards engineers, presumably because they are less susceptible to sympathy appeals. But decades of research prove such selections are best made by 1) devising an empirically-based scoring system, and 2) applying it rigorously. In other words, machines may make such decisions better than humans because humans get distracted by one or two characteristics, neglecting others that may be statistically more reliable predictors. Jury consultants see this tendency when a client nixes their strike recommendations with, “But that *other* juror gave me a funny look!”

Funny looks aside, two empirical selection criteria can be found in the peer-reviewed literature on jury decision making — attitudes that are reliable predictors of verdict and damages tendencies across a wide variety of cases: Attitudes about civil litigation and attitudes about large corporations. Plaintiff attorneys probe the former when they ask prospective jurors, “Is there any figure, beyond which you could not award damages, even if the evidence supported it?” Attitudes about large corporations (a perennial concern for defense counsel) fall on the “Michael Moore — Dick Cheney” continuum. On the “Michael Moore” end of the scale are jurors



who feel big corporations are the root of all evil. On the “Dick Cheney” end are jurors like one in a case reviewed below who said, “Big corporations are the backbone of the economy.” Of course, other criteria can come into play in any given case and the leadership potential of prospective jurors is always a consideration.

As a study in attorney decision making, this article reviews the author’s last five jury selections, all in 2012, all in state courts, and all with corporations as defendants. All five courts allowed a liberal oral *voir dire* and three of them, a supplemental juror questionnaire. Reviewed here are two different case types in four different states, which differences had implications for jury selection strategy—but those are beyond the present article’s scope. Instead, this article attempts to elucidate patterns in the *voir dire* practices of plaintiff attorneys, but as case studies, of course, can only provide preliminary conclusions.

Case 1. Product liability, Illinois. The judge allowed much latitude in oral *voir dire*, but no questionnaire. Plaintiff’s counsel, well known locally and very successful, began *voir dire* asking

about lawsuits and damages. Next, he moved to indoctrination, asking the jurors, Wouldn’t they want a product manufacturer to put a warning label on its product if there were even the slightest suspicion of a health hazard? In the end five of the plaintiff’s six strikes voiced defense-favorable opinions about lawsuits and damages, i.e., there are too many lawsuits and damages are too high. As a result, only four seated jurors held pro-defense opinions on these questions. But his successes in eliminating two adverse opinions left others unassessed and couldn’t compensate for an inherently weak case. The jury ultimately rendered a defense verdict.

Case 2. Product liability, California. This court allowed a written questionnaire and extensive oral *voir dire*. The lead plaintiff’s counsel enjoys a national reputation, but devoted little time to identifying pro-defense jurors. Instead, he gave what amounted to a preview of his closing arguments, thinly disguised as *voir dire* questions. He relied on the questionnaire for his strike decisions and out of his six peremptories, five jurors expressed skepticism about lawsuits and damages. Of the 16

jurors and alternates, only one made it into the box having expressed negative views of both lawsuits and damages. Interestingly, plaintiff's counsel gave little attention to leadership potential. He passed on four high-leadership, defense-leaning jurors; two, perhaps, because they were African-American, and one because he was a retired blue-collar worker. But the sad (for him) fact is, he simply ran out of strikes with what, by California standards, was a conservative panel. For example, he had to "burn" one peremptory on a juror who was in-house counsel for a corporation that was, itself, the target of "frivolous" lawsuits, but who artfully avoided a cause motion. The end result for our corporate client was also favorable: The plaintiffs settled this and a bundle of other cases soon after the defendant called its first witness and for a very reasonable sum.

Case 3. Professional negligence, Kentucky. No questionnaire was administered in this jury selection, but again, much leeway was given for *voir dire*. As with Case 2, plaintiff's counsel focused entirely on trying to win his case before openings. Two objectives guided this attorney's peremptories: Striking educated White conservatives and striking the few African-Americans in the venire.

The former strategy is common among plaintiff attorneys, but striking all minorities is unusual. In the present instance though, his tactic was transparent: One key defense witnesses was an African-American professional whose competence and integrity were targets in this professional negligence suit. A successful Batson challenge kept one of the three black panelists on the otherwise all-white jury, but in the end, it was a defense verdict.

Case 4. Another California products case. A 10-page questionnaire was administered to all prospective jurors and plaintiff's counsel relied on it heavily. This attorney, wisely, made no attempt to indoctrinate the venire. His *voir dire* concentrated on verdicts and damages. In the end, all 10 of his

strikes were against panelists who opined that there are too many lawsuits these days and that damages are too high. The judge kept a tight rein on cause strikes, personally "rehabilitating" several jurors. But one defense cause motion met little resistance. Instructed by the judge to set aside his preexisting opinions and decide the case solely on the facts, one juror responded (a direct quote): "I'm not going to give up my *right* to jury nullification." The judge (apparently not a fan of jury nullification) sent this fellow packing within minutes.

**CASE STUDIES,
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Case 5. Product liability, Delaware. Potential jurors filled out a two-page questionnaire and were individually interviewed. In this case, plaintiffs struck three jurors who held pro-defense views about lawsuits and damages, but other considerations guided their remaining strikes. Plaintiffs' counsel largely neglected leadership potential in their strikes and as a result, although much of the jury

was plaintiff-leaning in their attitudes, the more defense-oriented ones had shown themselves to be more articulate in *voir dire*. After just a few hours of deliberating, the jury reported itself hung and the judge called a mistrial.

Case studies, even five of them, may only allow tentative generalizations about plaintiff attorneys, but the negative examples are nonetheless noteworthy. First, damages are important, but you have to get past liability first and that is influenced by a range of pre-existing opinions, not just one or two. Second, neglecting jurors' leadership potential can be a fatal error. And finally, if plaintiff's counsel focuses solely on arguing his case in *voir dire*, count it as a blessing, but don't succumb to that temptation yourself! You have the whole trial to make your case but only one chance to strike "bad" jurors. ♦



Robert F. Bettler, Jr., Ph.D., a senior trial consultant in the Atlanta office of DecisionQuest, has more than a dozen years of experience in trial consulting, along with three decades in fields spanning the military, engineering, business, education, medicine and neuropsychology. His trial consulting engagements have brought him into a wide array of case types, from capital to white collar criminal cases, from intentional tort to contract cases, from product liability to toxic tort cases, from intellectual property to medical malpractice and beyond. Drawing upon his experience as a statistician whose research has been published in a peer-reviewed literature, he has implemented methodological and analytical innovations in juror profiling that have contributed to the success of cases. DecisionQuest is a GDLA Platinum Sponsor.



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Materials Analysis in Forensic Engineering Investigations

Paul Eason, Ph.D., P.E., CFEI
FORCON International

Introduction

Cases involving alleged product malfunction or design defects can take many forms. From simple mechanical failures to complex industrial process accidents, the materials that make up every product often contain subtle clues to the events that led to the accident or injury. In many instances that evidence can be used to show what didn't happen, as easily as it can show what did. The use of advanced materials analysis through various techniques can uncover evidence that investigators without materials education might overlook, or simply are not aware of.

What is Materials Science and Engineering?

The field of Materials Science and Engineering, as a distinct discipline of Engineering, is not very well known, and is not even offered as a major in many engineering institutions. The concepts of manufacturing, materials processing, metallurgy and biomaterials are terms that evoke some recognition among the general population, but few people realize that all of these concepts, and many others fall under the umbrella of Materials Science. Formerly known as just "Metallurgy," Materials Science is the study of the matter used in the realization of any engineering design. In short, it is the study of the "stuff" everything is made of. The metals, plastics, ceramics, biomaterials, semiconductors, liquids and gasses that are used in any engineering process must be defined by known properties, processes and structures. Materials engineers learn the relationships between the structure (atomic scale up to macro scale), processing and properties of the materials used to make every product, from aircraft parts to hip implants. Since many product liability litigation matters

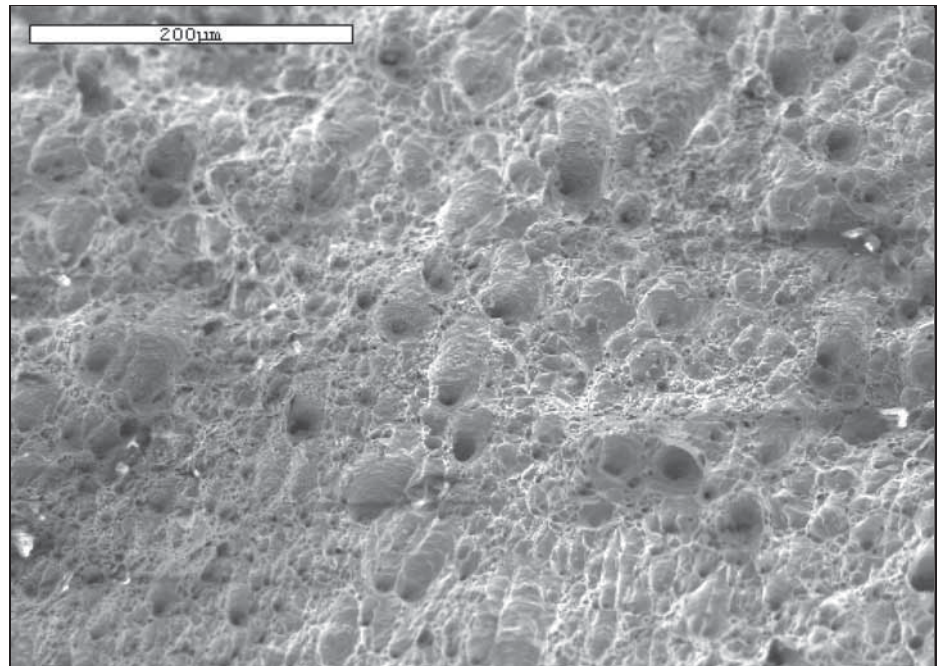


Figure 1. SEM fractograph of a failed aluminum pin. Note the scale marker bar indicates the size of 200 micrometers (roughly 1000X depending on the size of the photo at publication)

center on the performance and possible failure of materials, Materials Engineers are often best qualified to serve as experts.

Optical and Electron Microscopy

A standard optical microscope is often the first place any materials investigation begins. In the event of mechanical failure, the technique of fractography allows a materials engineer to examine the fracture surface of a part, and determine the types of stresses and loads the part experienced prior to failure. It can also help determine the point of origin of the failure, which may provide more clues to why the part failed in the first place. Optical microscopy is usually the first method applied, because it is inexpensive and typically nondestructive. However, the gold standard for fractography is performed in the Scanning Electron Microscope (SEM). As you can see in Figure 1, the SEM allows experts to examine materials at magnifications far greater than optical microscopy will permit. The scale marker bar at the

top left of Figure 1 indicates a distance of 200 micrometers (or 10^{-6} meters), far beyond the image quality of traditional optical microscopy. Dimples in this photo indicate that the metal failed in a ductile shear, which helps prove that the aluminum pin used to hold two components together was not sufficiently strong enough for the design load. The added level of detail provided by electron microscopy can refine the fractographic analysis and provide much greater insight into the failure mode of materials.

EDS and X-ray Analysis

Possibly one of the most useful tools in the realm of forensic materials analysis is Energy Dispersive Spectroscopy, or EDS. This technique is performed in the SEM, and can be coupled with fractography and other visual analyses to create a very clear picture of the chemistry and chemical identity of different materials. The electron beam used in the SEM creates X-rays when it strikes a material. These x-rays can be collected, and used to deter-

mine what elements are present in the material. The results of this technique can be used in many different types of forensic matters. EDS can help determine if a material is the correct composition, if the material corroded due to exposure with certain elements, how the material reacted in the course of a fire or explosion, or whether the product was even made by the alleged manufacturer.

Case Study: Rubber Recycling Factory Explosion

A rubber recycling facility processed used tires to produce rubber dust, a filler additive in asphalt and concrete and other various industrial applications. The facility employed wet grinding of the rubber, followed by water removal, and drying in a flash dryer. A flash dryer is essentially a cyclone of hot air used to dry the product while propelling it through the conveyor system for silo storage and/or loading into bags. On an almost daily basis, the facility would experience “backfires” in the flash dryer, which was a term used

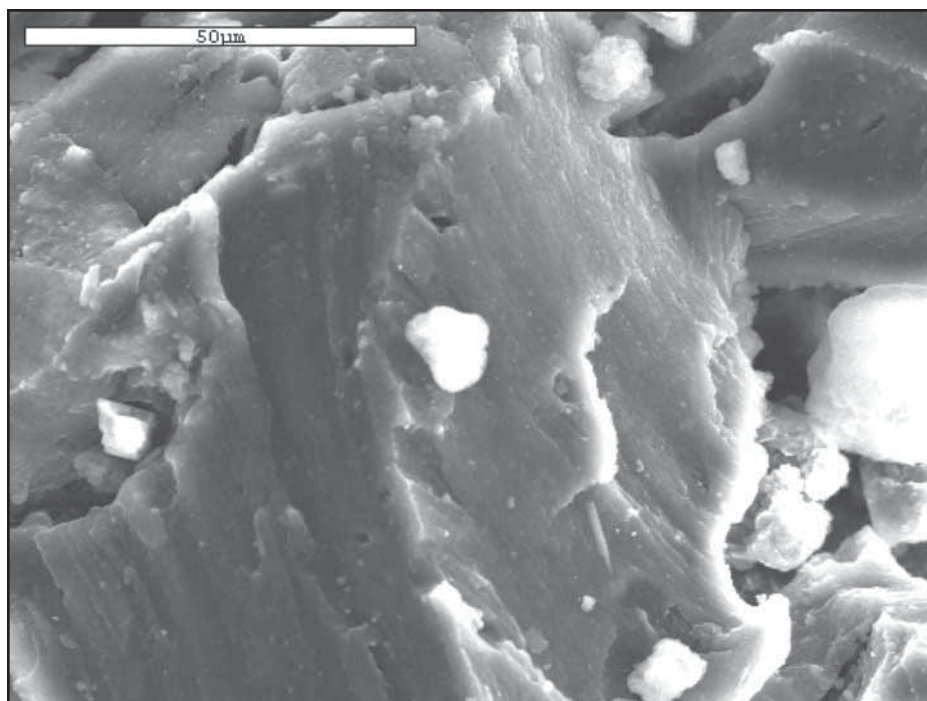


Figure 2. SEM micrograph of rubber dust samples removed from the factory. Note: The small white particle in the center of the photograph is a piece of the silica powder used as an anti-clumping agent.

to describe small dust explosions which occurred when the dried product would accidentally ignite. The backfires were the result of

operating the flash dryer at a temperature above the ignition temperature of the rubber dust. By running the dryer at an excessively high

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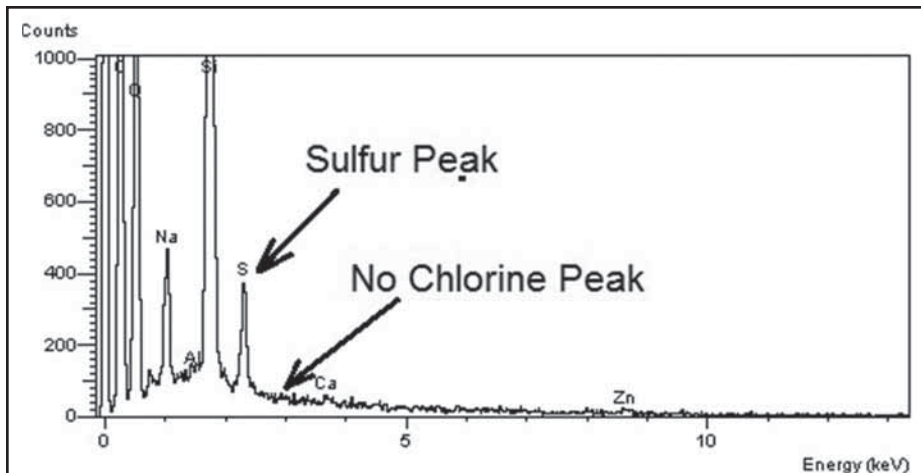


Figure 3. EDS Spectrum obtained from silica particles in a randomly selected rubber dust sample removed from the exploded factory. The absence of a chlorine peak indicates a different product supplier than the one named in the lawsuit.

temperature, more product could be pushed through the dryer, thus increasing production capacity. The risk associated with this practice was the likelihood that if the rubber dried completely before leaving the dryer, the heat of the drier would ignite the rubber. The plant operated continually under this model until one day, the backfires resulted in the escape of burning embers, resulting in a plant wide dust explosion.

Since rubber dust can clump together, the process engineers at the plant employed a product called amorphous colloidal silica powder, to keep the rubber dust from clumping together and clogging up the conveyor system. In this matter, the manufacturer alleged to have supplied the silica powder represented the “deepest pocket.” Among the many issues of cause and origin, explosion analysis and process faults, one primary issue became the identity of the manufacturer of the silica powder, as there was evidence that another brand of silica powder had been used for the year preceding the big explosion. In short, it became critical to determine what brand of silica powder was being used. Through the course of discovery, it was learned that one producer of the silica powder used sodium chloride in its solution, while the other used sodium sulfate. While these two processes produced silica powder for the same industrial purpose, the process dif-

ferences resulted in minute chemical traces that would allow one to be distinguished from the other. EDS analysis was employed to verify that one brand of silica powder contained trace amounts sulfur, while the other brand, the one produced by the defendant in the case, contained chlorine.

Rubber dust and explosion debris were collected from hundreds of locations throughout the plant during the initial OSHA investigation. The dust samples were marked and stored in unlined metal cans, which helped the forensic investigation immensely. By examining the dust from these various locations, the colloidal silica could be easily distinguished from the rubber dust, as seen in figure 2. Random samples of rubber dust were taken from locations all over the plant, and hundreds of EDS scans were performed on the silica particles found on the dust particles. Not one piece of silica observed in this process contained chlorine. Figure 3 shows one of the hundreds of EDS spectra that exhibited direct evidence of sulfur in the silica powders, and no evidence of chlorine.

The conclusion drawn from the statistically valid sampling methods, combined with the sheer number of silica particles analyzed was that the silica powder being used by the rubber factory at the time of the explosion was not the product produced by the defendant. This scien-

tific finding was supported by inventory records of the plant, showing that the other brand of silica powder had been continually delivered for almost one year prior to the explosion, with no deliveries made by the defendant. The drive to keep the defendant in the case stemmed from the fact that the other silica supplier was a foreign corporation, and had gone bankrupt. The judge dismissed the defendant from the case based on a pretrial motion.

Conclusions

Forensic engineering experts are being held to an increasing level of scrutiny with respect to their qualifications to testify. As long as the more specialized branches of engineering study remain unknown to attorneys, the details and facts that can be elicited by advanced investigation techniques may never be brought to light. Facts that can make or break a product liability case or industrial explosion investigation may simply be ignored by investigators who are unaware of the potential of materials analysis to tell the story of what happened. It is incumbent upon the attorneys managing these cases to become aware of the variety and breadth of expertise within engineering and the sciences. Finally, it is the responsibility of the engineers and scientists to remain current in their fields, utilizing accepted science and sound methodology to reach valid conclusions to assist in the legal process. ♦



Paul Eason, Ph.D., P.E., CFEI, a forensic consultant with **FORCON International**, is versed in multiple forms of materials analysis, teaches undergraduate courses in materials engineering and mechanical design, and has worked on projects involving product design and manufacturing, product defects, failure analysis, corrosion, fire and explosion origin and cause, and industrial accidents. **FORCON** is a **GDLA Platinum Sponsor**.

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Tornado Rating Methodology: Why “The Structure Was Hit By an EF4” Doesn’t Necessarily Mean Anything

By David C. Jones, B.S., P.E.
and Matthew L. Breidenthal, M.S.,
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The reported information about what happened during a tornado event can be confusing and sometimes contradictory. When dealing with a case involving potential tornado damage, it is important to understand how tornado data is collected and reported and the methodology by which tornadoes are rated.

The First Tornado Rating System: The Fujita Scale

Because of the inherent difficulties in obtaining actual wind speed measurements for a tornado, tornado intensity is generally described using a scale that estimates the maximum wind speeds within the tornado based on the damage it caused. The Fujita Scale of Tornado Intensity (F-Scale) was the first such rating system, introduced in 1971 by Dr. “Ted” Fujita.

The F-Scale provided brief descriptions for damage associated with tornadoes from Fo (“Light

damage”) to F5 (“Incredible damage”). Although useful, it had two primary flaws:

- Because the scale’s descriptions were not very detailed and did not take into account the construction quality of what was damaged, the rating methodology was often applied in an inconsistent manner.
- Because the wind speeds associated with a given tornado designation were essentially just educated guesses, the rating methodology was some-

Table 1 –Enhanced Fujita Scale Damage Indicators

#	Damage Indicator and Abbreviation	#	Damage Indicator and Abbreviation
1	Small Barns or Farm Outbuildings (SBO)	15	Elementary School [Single Story; Interior or Exterior Hallways] (ES)
2	One- or Two-Family Residences (FR12)	16	Junior or Senior High School (JHSH)
3	Manufactured Home – Single Wide (MHSW)	17	Low-Rise Building [1–4 Stories] (LRB)
4	Manufactured Home – Double Wide (MHDW)	18	Mid-Rise Building [5–20 Stories] (MRB)
5	Apartments, Condos, Townhouses [3 stories or less] (ACT)	19	High-Rise Building [More than 20 Stories] (HRB)
6	Motel (M)	20	Institutional Building [Hospital, Government or University Building] (IB)
7	Masonry Apartment or Motel Building (MAM)	21	Metal Building System (MBS)
8	Small Retail Building [Fast Food Restaurants] (SRB)	22	Service Station Canopy (SSC)
9	Small Professional Building [Doctor’s Office, Branch Banks] (SPB)	23	Warehouse Building [Tilt-up Walls or Heavy-Timber Construction] (WHB)
10	Strip Mall (SM)	24	Electrical Transmission Lines (ETL)
11	Large Shopping Mall (LSM)	25	Free-Standing Towers (FST)
12	Large, Isolated Retail Building [K-Mart, Wal-Mart] (LIRB)	26	Free-Standing Light Poles, Luminary Poles, Flag Poles (FSP)
13	Automobile Showroom (ASR)	27	Trees: Hardwood (TH)
14	Automobile Service Building (ASB)	28	Trees: Softwood (TS)

what inaccurate. In general, the F-Scale was found to over-estimate wind speeds, especially for greater levels of damage.

The Enhanced Fujita Scale

The Enhanced Fujita Scale (EF-Scale) was implemented by the National Weather Service (NWS) on February 1, 2007, as a more accurate and consistent refinement of the previous methodology. The EF-Scale defines 28 “Damage Indicators,” or DIs (see Table 1), each of which has a set of “Degree of Damage” (DOD) descriptors specific to that DI (see Table 2).

The DOD descriptors directly correlate visible damage to approximate wind speeds via an expected (EXP), lower bound (LB), and upper bound (UB) wind speed value for the observed damage.

For example, if the greatest degree of observed damage to a large, isolated retail building consists of complete destruction of all or a large section of the building (DOD 7 – see Figure 1), then the estimated maximum experienced 3-second gust speed would be between 110 and 201 mph.

Based on other factors at the site, the surveyor would assign an estimated maximum wind speed corresponding to an EF rating for the tornado at that site (see Table 3). The estimated wind speeds and tornado rating in a given area must be corroborated by other DIs and DODs in that area within a reasonable distance.

A tornado is assigned a single overall rating based on the highest estimated wind speed within its lifecycle.

Even if a tornado caused EF0-level damage over 95 percent of its length and EF4-level damage at only one or two areas, it is still officially designated as an EF4 tornado.

Limitations and Implications of the EF-Scale

Although the EF-Scale is a substantial improvement, it still has limitations. In order for a structure or tree to qualify as a DI under the EF-Scale methodology, it must

Table 2 – Enhanced Fujita Scale, Degree of Damage descriptors for Damage Indicator #12, “Large, Isolated Retail Building (LIRB)”

#	Degree of Damage (DOD) Descriptor	EXP (mph)	LB (mph)	UB (mph)
1	Threshold of visible damage	54	57	83
2	Loss of roof covering (<20%)	65	68	103
3	Uplift of some roof decking; significant loss of roofing material (>20%); loss of rooftop HVAC	71	87	123
4	Long roof spans collapsed downward	83	103	144
5	Uplift and removal of roof structure	85	114	157
6	Inward or outward collapse of exterior walls	98	118	158
7	Complete destruction of all or a large section of the building	110	147	201

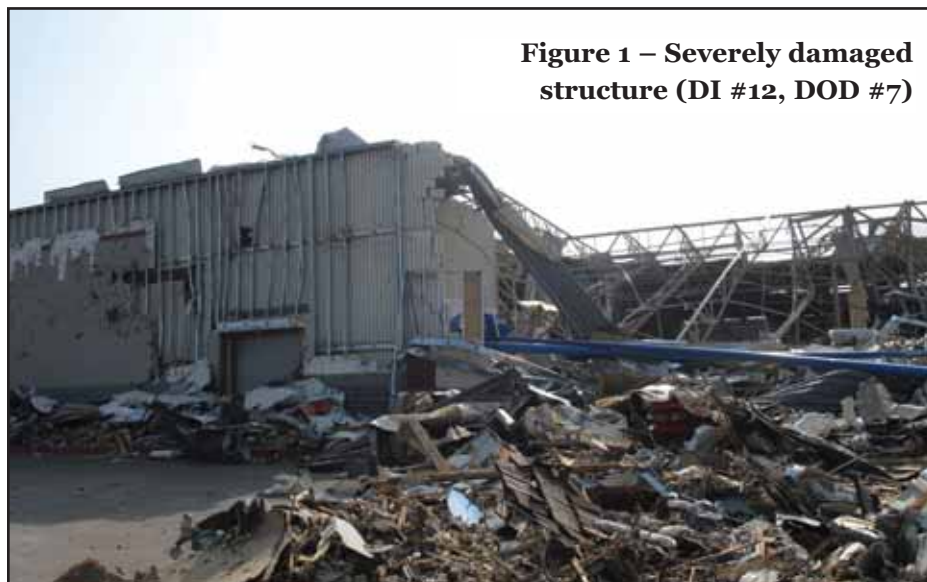


Figure 1 – Severely damaged structure (DI #12, DOD #7)

Table 3 – Enhanced Fujita Scale Tornado Designations Based on Estimated Wind Speeds	Tornado Designation	Estimated 3-Second Gust Wind Speed
	EF0	65-85 mph
	EF1	86-110 mph
	EF2	111-135 mph
	EF3	136-165 mph
	EF4	166-200 mph
	EF5	200+ mph

match the description of that DI. For example, a motel building with 12"-thick reinforced concrete walls would not count as DI #6, "Motel," because the only framing construction description of DI #6 is "Wood or metal stud walls."

The EF-Scale rating system is not designed for use in the estimation of expected damage at a site based upon the rating of a tornado that occurred at or near that site; it works the other way around. The wind speeds and associated forces of a tornado vary significantly along the length and across the width of its path. A tornado's path as reported by the NWS is based on a finite number of individual site ratings and the definition of the path therefore requires some estimation and interpolation. The amount of tornado-related damage at a specific site may vary significantly from the amount of damage at nearby sites, and may be less than the damage associated with the overall tornado rating or the maximum site rating for that area.

Figure 2 presents a map of the path of an EF4 tornado that occurred in Alabama on April 27, 2011. The red areas indicate EF4-level damage. The blue areas indicate EF0-level damage. Although the structures in Figures 3 and 4 were both in the center of the path of an EF4 tornado per the NWS, the structure in Figure 3 was located close to an area of high wind speeds that caused severe damage and the structure in Figure 4 was located several miles from such damage.

Summary

It's not this: *The property was within the path of an EF4 tornado, therefore it sustained EF4-level damage.* It's this: *The property sustained EF4-level damage, therefore it was within the path of an EF4 tornado.*

The method by which tornadoes are rated and reported can be confusing and, if misunderstood, provide an inaccurate picture of what occurred at a particular site.

Understanding the methodology of the current rating system can mitigate unnecessary confu-

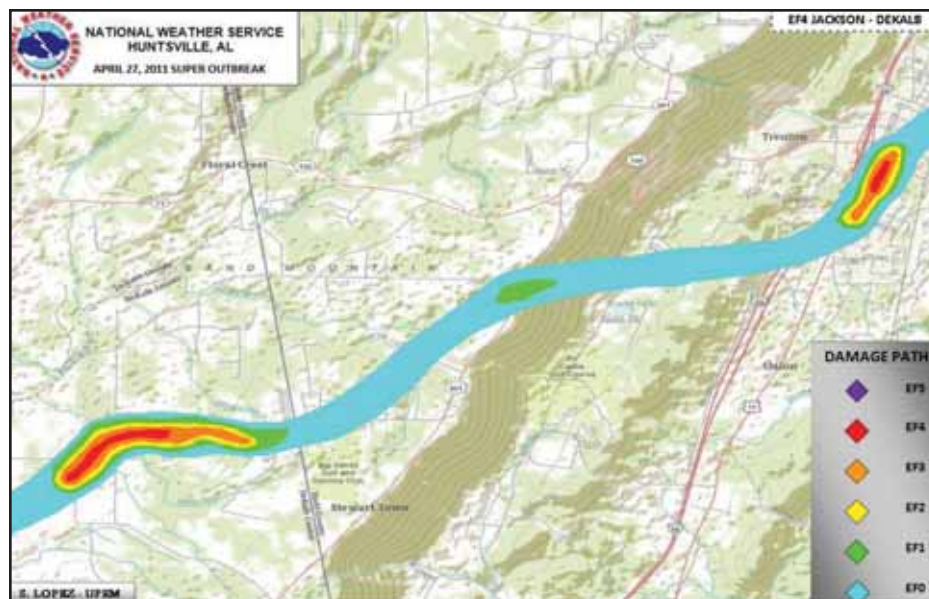


Figure 2 – Tornado path (NWS-HUN 2011)



Figure 3 – Severely damaged structure (DI #2, DOD #9)



Figure 4 – Minimally damaged structure (DI #2, DOD #4)

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Appellate Case Law Update

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THE RECORD MATTERS!

***Village Lake Lanier, LLC v.
State Bank & Trust Company***
Georgia Court of Appeals
March 1, 2012
Case No. A11A2128

This appeal followed denial of confirmation of a foreclosure sale because the property did not sell for market value. The trial court did grant the bank some relief by ordering a resale.

Village appealed arguing the Judge erred by entering a resale order. In particular, Village claimed the wrong standard was applied regarding the bank's burden of showing good cause to support resale. The Court of Appeals found the trial court's ruling was subject to the abuse of discretion standard. There was no evidence for the Court of Appeals to review to support Village's argument. The Court of Appeals will generally presume the trial court performed its duties in accordance with the law.

Village also argued that the trial court improperly denied its motion to exclude expert witness testimony. That ruling was also subject to review under the abuse of discretion standard. A hearing on the motion to exclude was held at Village's request. However, there was no transcript of the hearing in the record. Without a record of the arguments, supporting facts, and the basis for the ruling, "we must assume that the evidence supported the ruling." Citing *Harper v. Barge Air Conditioning*, 300 Ga. App. 901, 906 (2009).

Village also argued that the trial court erred when it denied its motion seeking a hearing to specifically address the competency of the expert, separate and apart from the motion to exclude the expert's testimony. The trial court may hold the pretrial hearing to determine the expert's qualifications. After hearing arguments of counsel

regarding whether or not to exclude the expert witness' testimony, the trial court determined that a *Daubert* hearing was not necessary. The court was not obligated to hold a separate *Daubert* hearing and the Court of Appeals presumed that the trial court had performed its duties in accordance with the law. As noted earlier in the opinion, without a transcript of the hearing in which the trial court denied the motion, the Court of Appeals must assume the evidence supported the trial court's decision.

Bowerman v. Bowerman
Georgia Court of Appeals
March 1, 2012
Case No. A11A1895

This case involved the trial court's holding a former wife in contempt and subsequent orders related to custody rights and visitation. A trial court's ruling on the motion for contempt is to be affirmed if there is any evidence to support it.

The visitation and custody rights were initially resolved by a settlement agreement between the parties. The Court of Appeals noted that when the parties agree to resolve a dispute and enter a written agreement specifying the terms in cases of this type, the trial court should make the settlement the judgment of the court.

The Court of Appeals noted that resolution of the alleged enumerations of error required review of the hearing transcript. The party seeking reversal must show not only error, but also harm. The failure to show any harm vitiates any possible error. Because there was no transcript of the hearing to review, it was impossible to show harm arising from any alleged error.

The Court of Appeals also noted that it could not consider the affidavit of the couple's daughter because the daughter did not appear and testify at the hearing,

which denied the father the right to cross-examine her. As a result, the Court of Appeals would not consider the affidavit even though it appeared in the record.

Trotter v. Ayers
Georgia Court of Appeals
March 5, 2012
Case No. A12A0702

A mother appealed the trial court's award of custody of her two children to their paternal grandparents. The *pro se* appellate brief contained many pages with no citations to the record or transcript that were essential for consideration of the alleged errors. The Court of Appeals noted that its requirements with respect to the form of appellate briefs are created not to provide an obstacle, but to assist the parties in presenting arguments in a manner "most likely to be fully and efficiently comprehended by this Court." Given the appellant's *pro se* status, the court did attempt to address the arguments raised.

The enumeration of errors complained of, in particular, sufficiency of the evidence, required review of the transcript of the evidentiary hearing. However, no transcript of the hearing was included in the record. Furthermore, there was no statutorily authorized substitute for the transcript submitted to the Court of Appeals. Without a transcript, the Court of Appeals must presume the trial court's ruling was correct and affirm. Citing *Charlot v. Goldwire*, 310 Ga. App. 463, 465 (2011). The record was devoid of evidence necessary to show that the appellant was harmed by any alleged errors. Therefore, she failed to carry her burden of showing that appellate relief was warranted.

**Standard Building Company,
Inc. v. Schoffield Anterior
Contractors, Inc.,
Georgia Court of Appeals
March 29, 2012
Case No. A11A1869**

The appellants/defendants complained that the trial court failed to comply with Uniform Superior Court Rule 46 in appointing a special master to hear post-trial motions. In addition, the appellants sought reversal of the court's denial of the post-trial motion based on the special master's proposed findings of fact and conclusions of law.

A plaintiff's verdict for \$294,458.66 was entered on March 11, 2009. The defendants filed a motion for new trial and JNOV on April 10, 2009 and then wrote a letter to the trial court requesting the court consider the motions without the trial transcript because of the trial court's familiarity with the evidence and issues.

On December 17, 2009, the trial judge referred the motions to a special master, but did not notify the defendants. On March 18, 2010, the special master recommended dismissal of the post-trial motions because of the defendants' failure to file a transcript, even though the judgment was entered a year earlier. The special master found the transcript was essential to determining the issues raised in the defendants' motions. On April 1, 2010, the defendants notified the special master and the trial court the trial transcript had been ordered.

On April 13, 2010, the trial court referred determination of the transcript issue to the special master. The plaintiffs then filed a motion to dismiss, or in the alternative, a motion to enter an order adopting the special master's recommendations. The plaintiffs argued that the defendants had failed to make reasonable efforts to obtain the transcript. The plaintiffs argued the special master's recommendation became final twenty days after its issuance because the defendants did not object.

On August 10, 2010, the special master issued a second recommen-

dation finding that the defendants' April 1 letter constituted an objection to the initial recommendation. In addition, the special master recommended the court either enter the March 18, 2010 recommendation as an order or refer the matter back to the special master to consider the post-trial motions after the parties had provided citations to the transcript to support their arguments. The special master never made any recommendation on the merits of the motions.

The trial court ruled that the special master's first recommendation became final effective April 7, 2010. Moreover, the special master's March 18, 2010 findings of fact and conclusions of law constituted a final order.

The defendants pursued a proper direct appeal. The defendants raised two enumerations of error: (1) the March 18, 2010 report was not filed in accordance with the rules; and, (2) the court failed to provide the proper notice to the parties of the appointment of a special master. The Court of Appeals rejected the defendants' arguments on these issues because they were not raised in the trial court and could not now be raised for the first time on appeal.

The defendants also argued the grounds why they were entitled to new trial and JNOV. However, the trial court never made any substantive rulings on those motions. As a result, the Court of Appeals had nothing to substantively review in relation to the arguments raised in those motions.

**Waters Edge Plantation
Homeowners' Association,
Inc. v. Ralliford
Georgia Court of Appeals
May 12, 2012
Case No. A12A0054**

This case is one in which the failure to provide an inadequate record proved fatal. The plaintiff/appellant obtained a default judgment but appealed the trial court's refusal to award attorney's fees and expenses of litigation. The ruling on attorney's fees was reviewed under the deferential "any evidence" standard.

The trial court sat as a finder of fact and determined that the defendants had not caused the plaintiff unreasonable trouble and expense and, therefore, declined to award any attorney's fees and expenses of litigation under O.C.G.A. § 13-6-11. There was no transcript of the trial court's hearing, and no substitute was included in the record. A review of the trial court's finding and any evidence standard "is precluded by the state of the record before us."

The appellant had the burden to affirmatively establish by the record, not only error but also harm. In this instance, the proof necessary for a determination of the issues on appeal was omitted from the record. Therefore, the Court of Appeals must assume the judgment below was correct and affirm. The appellant cannot satisfy its duty to show error with factual assertions contained in parties' brief which do not constitute evidence in the lower court. The Court of Appeals was obligated to affirm the trial court's ruling because there was no record to support reversal.

**WHICH APPEAL IS
RIGHT FOR YOU?**

**Sotter v. Stephens
Georgia Supreme Court
May 7, 2012
Case No. S12A0520**

This case involved a trial court's refusal to issue a writ of mandamus allowing a proper direct appeal. This case arose following the appointment of a trustee for the sale of property to determine how proceeds from the sale should be distributed. The judge ordered the trustee be paid attorney's fees for stubborn litigiousness. Two of the parties involved, Robert White and Myron White, were not to receive any proceeds of the sale.

The last order entered by the trial court was the order awarding attorney's fees on June 7, 2011. Myron and Robert White filed separate notices of appeal on June 24 and 30, 2011, respectively. The notices stated their intent to appeal

the June 7 and all prior orders under O.C.G.A. § 5-6-34(d).

On September 14, 2011, the trial court dismissed both appeals and issued a bill of peace and perpetual injunction to prevent any future filings by the Whites without the court's permission. The Whites requested permission to appeal that order on September 20th. On September 26, 2011, The Whites' attorney filed a petition for a writ of mandamus to compel the judge to permit an appeal of the September 14th order. Another judge heard the writ of mandamus action and refused to grant the writ on October 20, 2011.

The Whites appealed arguing that the June 7, 2011 order was a final order and that they filed timely notices of appeal. The Court of Appeals noted that a trial court's dismissal of a properly filed direct appeal is itself subject to direct appeal.

Regardless of how the orders were titled by the trial court, the June 7, 2011 order is a final order as contemplated by O.C.G.A. § 5-6-34. Therefore, a direct appeal of that order was appropriate. In addition, any other judgments, rulings or orders which could affect the proceedings below could be properly raised on direct appeal. Therefore, the notices of appeal were timely filed and should not have been dismissed.

As a result, the Court of Appeals found the trial court should have entered a writ of mandamus compelling the original judge to allow the appellants permission to file the notices of appeal from his September 14, 2011 order.

Brabant v. Patton
Georgia Court of Appeals
April 27, 2012
Case No. A12A0294

The trial court dismissed this appeal after ordering the domestic relations matter be transferred from McIntosh County to Muscogee County. The appellant filed a timely notice of appeal of the McIntosh County Superior Court's order. The trial court then granted the appellee's motion to dismiss the appeal because it was a domes-

tic relations case subject to discretionary appeal under O.C.G.A. § 5-6-35, or in the alternative, interlocutory appeal which required certificate of immediate review.

Regardless of the grounds raised in the motion to dismiss the appeal, Georgia law authorizes a direct appeal of the order entered by the McIntosh County Superior Court. O.C.G.A. § 5-6-34 allows for direct appeals of child custody rulings regarding which parent has custody regardless of the finality of the order. In this instance, the trial court's refusal to change child custody was directly appealable.

Patel v. Epps
Georgia Court of Appeals
May 31, 2012
Case No. A12A0480

This case arose from a property line dispute between neighbors in a residential subdivision. The parties consented to the Superior Court's appointment of a special master under the auditor's statute, O.C.G.A. § 9-7-1 *et seq.* The special master conducted a survey, inspected the area and issued a report containing the findings of fact and conclusions of law. The matter was recommitted to the special master that resulted in a supplemental report that included findings of fact and additional conclusions of law. The Superior Court entered the reports as a final order and judgment. The appellant filed a direct appeal.

The Georgia Supreme Court has held that a judgment in which the Superior Court reviews an auditor's final report which contains findings of fact and conclusions of law is subject to discretionary appeal. The trial court noted that it was appointing a special master in accordance with the auditor's statute and that its use of the term special master was synonymous with the term auditor as used in O.C.G.A. § 9-7-1. The court then reviewed and adopted as its own the special master's report, which contained findings of fact and conclusions of law.

The appeal was dismissed because the appellant failed to

adhere to the discretionary appeal procedure.

Reeves v. Upson Regional Medical Center
Georgia Court of Appeals
March 21, 2012
Case No. A11A2194

This matter arose from service of a subpoena on a nonparty in a medical malpractice action. The trial court entered an award of attorney's fees to the nonparty in July 2010 and amended that award eight months later. The sanctioned party filed a petition for discretionary review within 30 days of entry of the amended award and the Court of Appeals granted that petition.

The appellant attempted to take a direct appeal of the original attorney's fee award. That appeal was dismissed because that award was not a final order that was directly appealable. The appellant petitioned for discretionary appeal of the amended awarded in a timely manner. Therefore, the court could hear the properly filed discretionary appeal. The improperly filed and dismissed first appeal had no bearing on the subsequent discretionary appeal.

The appellees also questioned the propriety of a lawyer signing the notice of appeal with express permission. The Court of Appeals rules bar signing submissions with express permission. However, the Court of Appeals noted that notices of appeal are submitted to the trial court. The rule regarding original signatures only applies to documents directed to the Court of Appeals. Therefore, the notice of appeal was properly executed.

While not necessarily relevant to appellate practice, the Court of Appeals did conclude that attorneys' fees and expenses under O.C.G.A. § 9-15-14(b) generally cannot be awarded to a nonparty.

❖



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Mass Torts

Case Law Update

By Todd E. Schwartz, SLC Chair
Lewis Brisbois Bisgaard & Smith, Atlanta



Parker v. Schmiede Machine and Tool Corporation

**2011 U.S. App. Lexis 21404
11th Cir. 2011**

This appeal was a consolidation of two separate actions, with multiple plaintiffs in each, involving alleged exposure to beryllium at the Lockheed Martin plant in Marietta, Georgia. The Plaintiffs had different types of job responsibilities over different time periods and work areas within the plant. After discovery in the cases, the defendants filed a motion for summary judgment based on lack of direct causation of the Plaintiffs' disease and a sophisticated user defense.

The district court originally denied the motions, but later reversed and granted them finding that Plaintiffs' employer Lockheed Martin was a sophisticated user of beryllium.

The Court of Appeals for the Eleventh Circuit held that after reviewing all the evidence, Lockheed Martin was a learned and sophisticated user of beryllium. The Court based its decision on the Plaintiffs' failure to present evidence that Lockheed Martin lacked actual knowledge of the hazards of beryllium, and that the defendants possessed greater knowledge of the hazards than Lockheed Martin.

The evidence presented showed Lockheed Martin designed a safety program to reduce beryllium exposure below OSHA standards and conducted air sampling at various times for beryllium exposure during different plant activities.

When compared with the limited evidence regarding the defendants' knowledge, the evidence was clear that Lockheed Martin was a sophisticated user.

Upon such a finding, the Court of Appeals affirmed the granting of summary judgment to the defendants.



***Union Carbide Corporation v. Fields* Georgia Court of Appeals March 20, 2012**

In the Fields case, the Georgia Court of Appeals upheld the trial court's granting of partial summary judgment to the Plaintiffs, Rhonda and Gary Fields, on the issue of non-party fault notices filed in an asbestos exposure case. Mrs. Fields sued numerous defendants claiming exposure to their asbestos-containing products caused her to develop mesothelioma. Several defendants filed Notices of Non-Party Fault listing various non-party entities that might also be responsible for Mrs. Fields' exposure and several settled defendants. The Plaintiffs filed a motion for partial summary judgment seeking to preclude the defendants from introducing evidence of the potential fault and apportionment of fault among those entities.

The trial court held that the defendants had not provided any evidence to show exposure to various entities listed in their Notices and granted summary judgment with respect to those entities. The defendants had failed to meet their burden of presenting evidence of exposure to the entities listed and further failed to present any evidence of causation between the alleged exposures and Mrs. Fields' mesothelioma. All this took place prior to any presentation of evi-

dence at trial.

The Court of Appeals upheld the trial court's granting of partial summary judgment excluding the entities from the non-party fault notice. While stating that the defendants have the burden at trial to prove the defense of nonparty fault, the Court of Appeals upheld the trial court's requirement that defendants present evidence of exposure at this pre-trial stage. With respect to Georgia Power, the employer of Mrs. Fields' father, the Court of Appeals held that since Georgia law does not provide Georgia Power with a duty to protect Mrs. Fields from exposure to asbestos, it could not be at fault for purposes of apportioning fault under O.C.G.A. § 51-12-33.

As for the other parties, including two settling defendants, the Court of Appeals held that the defendants failed to present sufficient evidence of exposure to those entities' asbestos containing products using the standard set forth in *Hoffman v. AC&S, Inc.* Further the Court concluded that the defendants failed to present any evidence that exposure to those asbestos-containing products caused Mrs. Fields' mesothelioma. Without such evidence, defendants failed to establish Mrs. Fields' exposure was a contributing factor to her disease and defendants could not survive summary judgment. ♦

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Premises Liability Case Law Update

By Martin A. Levinson, (left) SLC Vice-chair,
Hawkins Parnell Thackston & Young, Atlanta
and Philip W. Lorenz, *Goodman*
McGuffey Lindsey & Johnson, Atlanta



PRIOR TRAVERSAL; EQUAL KNOWLEDGE: Restaurant was entitled to summary judgment because Plaintiff had traversed same floor moments prior to her fall and had observed the area was slippery on prior occasions, and defendant did not have constructive knowledge of alleged hazard.

El Ranchero Mexican Rest., No. 10, Inc. v. Hiner, A12A0107, 2012 Fulton County D. Rep. 1828 (Ga. App. June 6, 2012)

Plaintiff Rosemary Hiner slipped, fell, and broke her leg as she walked across a tile floor in front of the kitchen door in Defendant's restaurant. Hiner had noticed the area was slippery and almost lost her footing on her way to the restroom, but she did not notify any restaurant employee that the floor was slippery at that time, nor did she look down to determine why the floor was slippery. On her way out of the restroom, Hiner took "very small steps" and looked down at her feet as she walked, but she fell anyway.

Hiner did not look at the floor after she fell to see what had made her fall, and she did not know whether there was any substance on her clothes after she fell. She also did not notice any defect in or any substance on the floor. Hiner claimed that there was a "film" on the tile, although she admitted that she did not know what had caused her to fall.

Hiner had been to the restaurant many times previously and had "slipped a little bit" on prior occasions because the ceramic tile floor had a "film" on it. She had reported to a waiter that the floor was slippery about three to seven months before her fall.

The restaurant's busboys mopped the tile floor each morning with a degreaser to prevent the floor from becoming greasy and to

remove any build-up of grease from employees tracking grease onto the floor from the kitchen. The restaurant's manager inspected the restaurant each morning, including the day of Hiner's fall. Employees of the restaurant also were required to be on the lookout for problems arising during the day and were charged with fixing or reporting any such problems.

The restaurant manager went to the back of the restaurant upon hearing Hiner fall and saw that "the floor was clean" where Hiner had fallen. Hiner's fall was the first accident on the premises in the ten years the manager had worked there.

Hiner contended the restaurant had constructive knowledge that the floor was slippery and hazardous. In this regard, Hiner relied on the testimony that busboys degreased and mopped the floor each morning and her own prior observations of a "film" on the floor.

The trial court denied the restaurant's motion for summary judgment, and the restaurant appealed.

The Court of Appeals reversed, holding that even if Hiner could establish that the subject floor was hazardous and that the alleged hazard was known to Defendant, Plaintiff's claim failed due to her equal knowledge of the hazard. The court cited Hiner's testimony that she had noticed the floor was slippery on prior visits and her successful traversal of the area moments before her fall. The court held that Hiner had actual knowledge of the condition of the floor at the time of her fall and failed to exercise due care for her own safety.

Relying on *Hudson v. Quisc, Inc.*, 205 Ga. App. 840 (1992), the court also held the restaurant did not have constructive knowledge of any slippery condition of the floor.

Rather, since the restaurant followed a reasonable cleaning and inspection procedure, "no constructive knowledge of the floors' condition at the time of Hiner's fall can be imputed to the Restaurant."

DOG BITE PREMISES LIABILITY: Plaintiff's failure to show premises owner's superior knowledge of dog's alleged vicious propensities fatal to claim.

Abundant Animal Care, LLC a/k/a Animal Kingdom Veterinary Hosp. v. Gray, A12A0571, 2012 Ga. App. LEXIS 516 (Ga. App. June 13, 2012)

Plaintiff Gray was injured when she was bitten by a dog being boarded at Defendant Animal Kingdom Veterinary Hospital (the "Clinic").

Gray sued the Clinic, alleging claims of negligence, negligence *per se* under various statutes and ordinances, premises liability, and nuisance.

At the time of the incident, Gray was spending the day at the Clinic with her aunt, who worked at the clinic. Gray contended that she was an employee of the Clinic, while the Clinic contended that Gray was "shadowing" her aunt and had not been hired by the Clinic. The Workers' Compensation Board determined, however, that Gray was not an employee at the time of her injury.

On the morning of the incident Gray's aunt showed her how to perform certain tasks such as cleaning cages, feeding and watering animals, and taking certain animals into a fenced yard outside to relieve themselves. Gray took a dog named "Drago" outside to a fenced-in exercise yard and left him there while she ate lunch. After lunch, Gray went outside with her aunt to smoke a cigarette and, according to Gray, as soon as she walked out-

side, Drago bit her. Gray's aunt knocked the dog off her, but Drago jumped back up and bit Gray two more times.

According to Gray, her aunt told her several days after the incident that she would not have told Gray to go outside if she had known that Drago was outside.

At the time of the incident, Drago had been boarded with the Clinic for at least four months, and there was no evidence that Drago had ever bitten anyone else. Gray's aunt believed that Drago might have mistaken Gray's hair for a "tug-of-war" toy when he jumped on her.

The Clinic moved for summary judgment. The trial court denied the clinic's motion based on a general conclusion that there were disputed issues of material fact. The Clinic applied for interlocutory appeal, and the Georgia Court of Appeals reversed.

On appeal, the court held that the Clinic was entitled to summary judgment on Gray's premises liability, negligence *per se*, and nui-

sance claims because there was no evidence that Drago had a vicious or dangerous propensity. The court rejected Gray's contention that her aunt's purported statement after the incident or her aunt's knowledge that Drago could jump on people supported a finding of superior knowledge on the part of the Clinic that Drago had a vicious or dangerous propensity.

The court also found that Gray's negligence claim failed because she was not aware of any voluntary internal procedures of the Clinic, and, thus, could not have relied on them. Similarly, Gray's claim that the Clinic negligently failed to supervise her failed as a matter of law because there was no evidence that her injuries were caused by any such failure.

ADMISSIBILITY OF EXPERT TESTIMONY: Expert's opinions excluded under Fed. R. Evid. 702 and Daubert because expert did not show reliable methodology or acceptance of theory in spe-

cific context of facts of case at hand, nor was expert qualified to render opinion on reasonableness of Plaintiff's conduct.

***Jacquillard v. The Home Depot U.S.A., Inc.*, 2012 WL 5275421 (S.D. Ga. Feb. 16, 2012)**

Plaintiff was injured in a slip-and-fall incident that occurred in the outdoor garden center of Home Depot's store. Plaintiff filed suit, alleging negligence on the part of Home Depot and claiming the area where she fell was wet because a vendor had been watering plants nearby.

Both parties identified expert witnesses. Plaintiff's expert, James Steven Hunt, opined that watering during business hours created an unreasonable risk of harm and therefore should only be done at night. Hunt also opined that Home Depot's warnings were inadequate and that Plaintiff did nothing unreasonable to prevent her from

Continued on page 60



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Product Liability Case Law Update



By Philip W. Lorenz
Goodman McGuffey Lindsey & Johnson, Atlanta

FEDERAL PREEMPTION: National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-1 et seq. preempts all design-defect claims for injury or death caused by vaccine side effects.

***American Home Products Corp. v. Ferrari*, 289 Ga. 184 (2011)**

Parents of a child who suffered neurological injury allegedly as a result of mercury in a vaccine preservative brought design defects claims against vaccine manufacturer.

The trial court granted partial summary judgment to the vaccine manufacturers, but was reversed by the Georgia Court of Appeals and affirmed by the Supreme Court of Georgia.

In affirming the Court of Appeals reversal of the trial court, the Supreme Court of Georgia held the Ferrari's design defect claims were not preempted by the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-1 et seq. as a full examination of the Act and the Congressional intent behind its enactment did not preempt all design defect claims against a vaccine manufacturer, but instead provided that a vaccine manufacturer cannot be held liable for a design defect if, on a case-by-case basis, it is determined that the injurious side effect was unavoidable.

On writ of certiorari, the United States Supreme Court vacated and remanded the case to the Georgia Supreme Court for further consideration in light of *Bruesewitz v. Wyeth*, 526 U.S. ___, 179 L.Ed.2d 1 (2011), in which the Court held the Vaccine Act "preempts all design-defect claims against a vaccine manufacturer which seek compensation for injury or death caused by vaccine side effects.

FAILURE TO WARN CLAIM PRECLUDED BY SOPHISTICATED USER OR LEARNED INTERMEDIARY DOCTRINE.

***Parker v. Schmiede Machine and Tool Corp.*, 445 Fed. Appx. 231 (C.A.11. (GA.))**

See Mass Torts Case Law Update on page 32.

MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6): Knee replacement device manufacturers move to dismiss Plaintiff's Complaint under Rule 12(b)(6) or in the alternative, for a more definite statement.

***Parker v. Howmedica Osteonics Corp.*, 2012 WL 1571514 (M.D. Ga. May 3, 2012)**

In November 2007, Plaintiff underwent a knee revision in which a knee replacement device manufactured by Defendant Howmedica allegedly failed post-surgery. In June 2009, Plaintiff underwent a "total knee re-revision surgery," which once again allegedly failed. Plaintiff did not name Howmedica as the manufacturer of the June 2009 device, but rather alleged that one of three defendants manufactured the defective device. Defendants subsequently moved to dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

To survive a 12(b)(6) motion to dismiss, a complaint must contain sufficient factual matter which, accepted as true, states a claim for relief that is plausible on its face. A mere formulaic recitation of the elements of a cause of action no longer suffices. Rule 12(b)(6), however, does not allow the dismissal of well-pled complaint simply because it strikes a trial judge that actual proof of those facts is improbable.

With respect to the June 2009 total knee re-revision surgery, Plaintiff alleged that Defendants Howmedica, Smith & Nephew, and DePuy Orthopaedics had "designed, manufactured, produced, marketed, packaged, distributed, labeled, sold and otherwise placed into the stream of commerce" the allegedly defective knee replacement device.

To successfully plead a product liability claim under either strict liability or negligence in Georgia, a plaintiff must prove a defect in the product as well as a causal connection between the alleged design or manufacturing defect and the resulting injury. A critical element of this claim is that the Plaintiff must identify the manufacturer of the allegedly defective product.

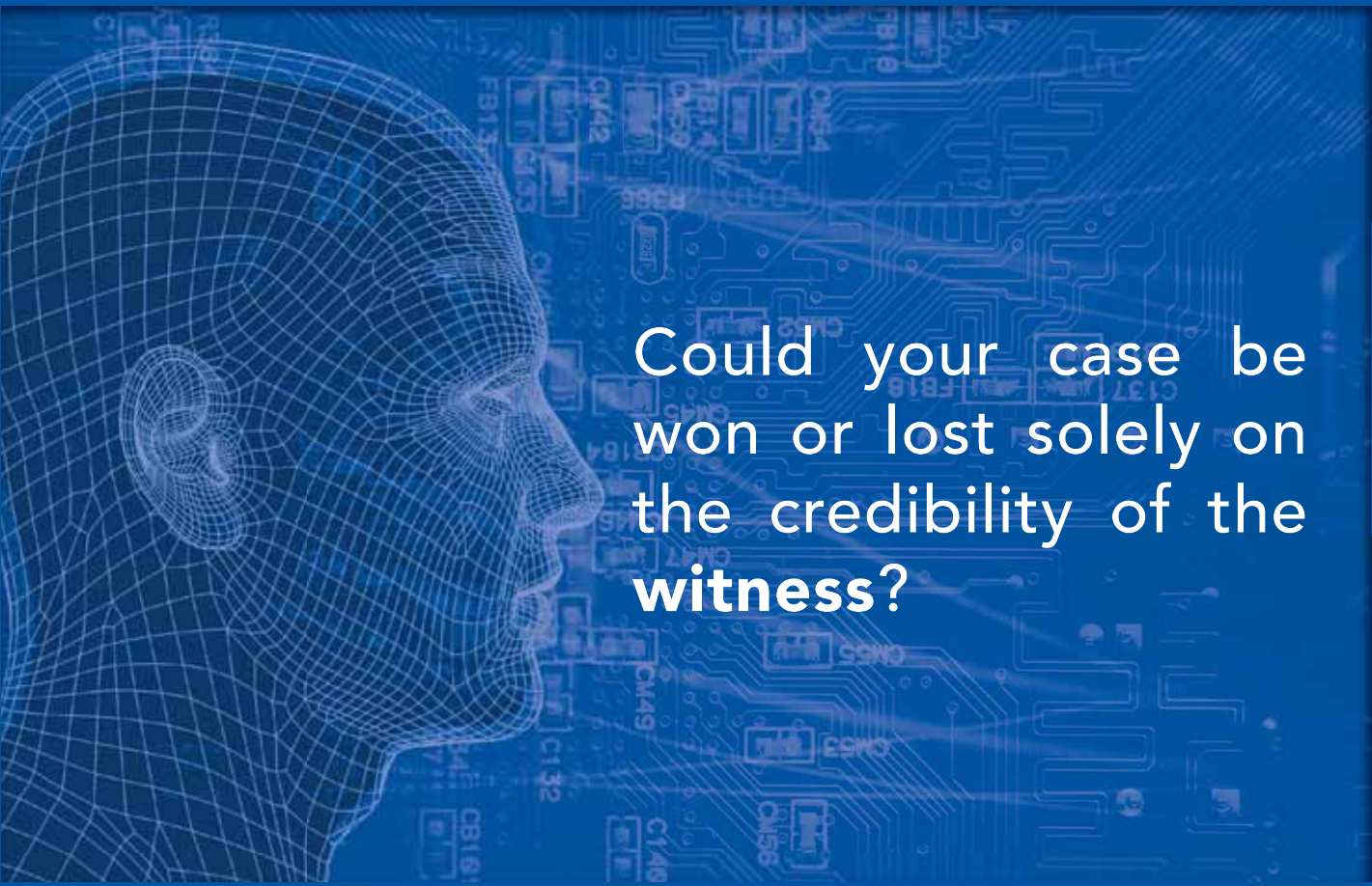
Despite the fact the Plaintiff's Complaint failed to identify the product (and its manufacturer) that allegedly injured her, the District Court declined to dismiss her Complaint and instead granted Smith & Nephew's motion for a more definite statement, requiring Plaintiff to amend her complaint within 30 days to identify the manufacturer.

BREACH OF WARRANTY AND CHOICE OF LAW: Requirement of Privity. Plaintiff suffered injury as a result of the implantation of counterfeit surgical mesh used to repair a hernia. Georgia choice of law rules hold that breach of warranty claims may sound in tort or contract, and choice of law must be decided on the facts of the case.

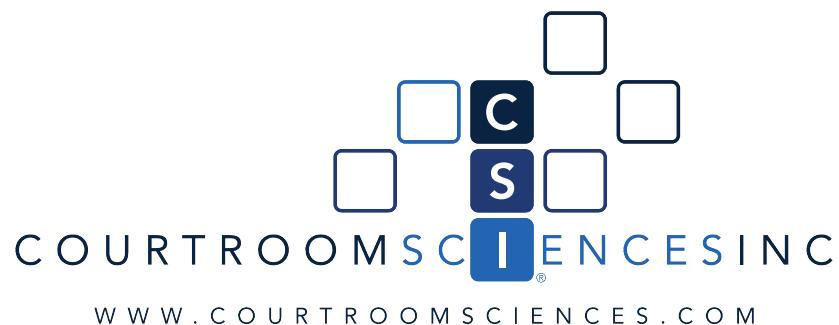
***Andrews v. RAM Medical, Inc.*, 2012 WL 1358495 (M.D. Ga. April 19, 2012)**

Defendant RAM Medical, Inc. sold surgical mesh, which it believed to be authentic Bard

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Trucking Case Law Update

By Matthew P. Stone, (left) SLC Chair, and
Shawn N. Kalfus, *Freeman Mathis & Gary, Atlanta*



***Sawyer v. Marjon Enterprises, Inc.*, 312 Ga. App. 619 (2011)**

Plaintiffs were traveling on I-85 when a tractor-trailer driven by Crumpacker struck their vehicle. At trial, Crumpacker testified that he was traveling 50-55 mph in the rain when he hydroplaned, causing his drive axle to lose traction and slip to the right while the front of his tractor unexpectedly moved to the left. Over Plaintiffs' objection, the trial court charged the jury on the sudden emergency doctrine. The jury returned a defense verdict, and Plaintiffs appealed.

Plaintiffs argued that it was error to charge on sudden emergency because there was no evidence that Crumpacker, either before or after he lost control, faced several choices and took one course over another. The Court of Appeals agreed, noting that, before striking Plaintiffs' vehicle, Crumpacker was faced with two sequential dangers: First, he came upon standing water in the road, which posed a risk of hydroplaning and losing control; second, as he drove through the water, he did in fact hydroplane and lose control of his vehicle, which posed a danger of colliding with another vehicle.

The court noted the standard for application of the sudden emergency doctrine is as follows: "When the evidence shows that a claim of negligence is premised on an act or omission of the defendant that immediately followed his sudden apprehension of an imminent danger not of his own making and that the exigencies of the circumstances did not permit the defendant to fully consider, or even to consider at all, what course of action he should take to avoid the danger, a charge on the doctrine of sudden emergency is appropriate." 312 Ga. App. at 621.

It then held that the doctrine did not apply. As to the first danger, there was no evidence that Crumpacker saw the standing

water until he was upon it; therefore, he could not have known he was confronted with that danger.

As to the second danger, Crumpacker may have been immediately aware that he had lost control, but there was no evidence that he could have done anything about it; therefore, his failure to regain control after starting to hydroplane could not form the basis of negligence, which requires a finding that he should have done something different under the circumstances.

Accordingly, the court concluded that it was error to charge on sudden emergency because there was no evidence that "Crumpacker took any action, or that he could have taken any action to avoid the collision once his tractor-trailer rig started hydroplaning and he lost control of the vehicle." 312 Ga. App. at 622.

***Lindsey v. Clinch County Glass, Inc.*, 312 Ga. App. 534 (2011)**

Plaintiffs were stopped at a red light when Holtzclaw rear-ended them. At the time, Holtzclaw was searching for a telephone number on his cell phone and failed to notice that traffic ahead of him had stopped. In addition to compensatory damages, Plaintiffs sought punitive damages based on Holtzclaw's admission that he was using his cell phone and was not paying attention. Defendants admitted liability for the collision and filed a motion for partial summary judgment on the punitive damages claim. The trial court granted the motion and Plaintiffs appealed.

The Court of Appeals affirmed, first noting that, "[i]n cases involving automobile collisions, punitive damages are authorized when the accident results from a pattern or policy of dangerous driving, such as excessive speeding or driving while intoxicated, but not when a

driver simply violates a rule of the road." 312 Ga. App. at 535.

The court rejected Plaintiffs' argument that Holtzclaw's frequent use of his mobile phone despite knowledge that it was dangerous and his own instructions to other employees not to talk on their mobile phones while driving, authorized a jury to find the requisite pattern or policy of driving dangerously. *Id.* at 535-36.

It then held that the proper use of a mobile phone under O.C.G.A. § 40-6-241 does not violate the duty to exercise due care while driving and, without more, is not enough to support a claim of punitive damages. *Id.* at 536.

The court cautioned that "this case should not be read for the proposition that punitive damages are never available in a case where a driver causes an accident because he or she was distracted while talking on a wireless communication device." *Id.*

***Hook v. Harmon*, A11A1855, 2012 WL 1034907 (Ga. Ct. App., Mar. 29, 2012)**

Wade Harmon and Thomas Hook were driving from Florida to North Carolina in a vehicle owned by Hook's father. Hook, who was sleep-deprived and wanted to get home, asked Harmon to drive. Harmon was killed when he lost control, ran off the right shoulder of the interstate, and then came back across the center median and struck an oncoming tractor-trailer.

The investigating trooper concluded that Harmon was solely to blame. Harmon's parents sued Hook, contending that Hook negligently entrusted the vehicle to their son in light of their son's driving record and suspended license.

Hook moved for summary judgment, arguing that Wade Harmon's negligence was the sole proximate cause of his own injuries. The trial court denied the motion, and Hook appealed.

The Court of Appeals reversed, holding that, “where the injured party is the entrustee, his own contributory negligence generally will bar him from recovery against the negligent entrustor.” *Slip op.* Here, the court found that the Harmons failed to put forth any evidence to contradict the trooper’s conclusions, meaning that Wade Harmon failed to exercise care for his own safety when he got behind the wheel with full knowledge of his own driving record and suspended license and that Harmon had the last opportunity to avoid his own negligence by refusing to drive. *Slip op.* Further, although Hook asked Harmon to drive, there was no evidence that Harmon was forced or pressured to do so or that Harmon was incompetent or impaired. In fact, Harmon had recently driven to Florida and had been driving to and from South Carolina for his job.

***Littlefield Construction Co. v. Bozeman*, 314 Ga. App. 601 (2012)**

Plaintiff sustained injuries when Lewis collided with his truck while operating a company vehicle. Plaintiff sued Lewis and his employer, Littlefield, based on *respondeat superior*. Littlefield filed a motion for summary judgment, arguing that Lewis was not acting in the course and scope of his employment when the accident occurred. The trial court denied the motion and the Georgia Court of Appeals affirmed.

The court first noted that a presumption arises that an employee is acting in the course and scope of his employment at the time of the collision where he is driving his employer’s vehicle; and the employer has the burden of proving otherwise by coming forward with uncontradicted evidence showing that the employee was not acting in the course and scope of his employment. 314 Ga. App. 603-04.

It then affirmed the denial of summary judgment because Littlefield had failed to produce uncontradicted evidence that Lewis was not acting in the scope of his employment. *Id.* at 604-05. Rather, there was conflicting evidence about Lewis’ main objective in driving the vehicle at the time of the collision.

Specifically, Lewis testified that he took the vehicle home to wash it over the weekend, as Littlefield required its vehicles to be kept clean, but that he also planned to use the vehicle to take a utility trailer and lawn mower from and to his father-in-law’s house.

The collision occurred after Lewis picked up the trailer (a personal errand) and was on his way home (to wash the vehicle). Accordingly, the court held that a jury might find that Lewis was acting within the scope of his employment when the collision occurred. *Id.* at 605. ❖



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Workers' Compensation Case Law Update

By Charles G. Hoey
The Hoey Firm, Fayetteville



***Brewer v. Wellstar Health System, et al.*, 314 Ga. App. 234 (2012)**

The Court of Appeals ruled that a 20 percent late penalty was due for the late payment of a liability stipulation pursuant to O.C.G.A. § 34-9-221(f) but could not address the Employer/Insurer's constitutional due process appeal. The Georgia Supreme Court has exclusive appellate jurisdiction to decide the constitutionality of a statute. The Supreme Court granted certiorari.

Joseph Brewer had a compensable back injury while working for Wellstar Health System. The parties agreed to a liability settlement which was approved by the Board on July 7, 2009. Neither the employer, the insurer, nor Wellstar's counsel received notice of the approval of the settlement. There was no discussion between any of the parties or anyone at the Board until plaintiff's counsel requested a 20 percent late penalty.

The Administrative Law Judge awarded the 20 percent penalty after deciding that Wellstar's obligation to timely pay a settlement was not contingent upon notification of approval. Wellstar had the responsibility to inform itself of the approval.

The Appellate Division reversed. O.C.G.A. § 34-9-15(b) reads that the Board "may" assess a penalty if a settlement is not timely paid. Because Wellstar had not been notified, no penalty should have been assessed. The Superior Court affirmed the denial of a penalty, but the Court of Appeals reversed. O.C.G.A. § 34-9-15(b) applies only to *no-liability settlements*. This settlement was a liability settlement within the purview of O.C.G.A. § 34-9-15(a). That statute mandates the 20 percent penalty.

The Supreme Court will likely address the due process violation argument raised by the

employer/insurer.

There have been two recent cases interpreting the exclusive remedy provision. In each case, the decision hinged upon whether the party raising the exclusive remedy defense was *potentially* liable for workers' compensation benefits.

There have been two recent cases interpreting the **exclusive remedy provision**.

In each case, the decision hinged upon whether the party raising the exclusive remedy defense was *potentially* liable for workers' compensation benefits.

In *Vratsinas Construction Co. v. Chitwood*, 314 Ga. App. 357 (2012), Mr. Chitwood suffered what would have been compensable injuries. Rather than filing a workers compensation claim against his immediate or statutory employer, Mr. Chitwood filed a tort suit against the statutory employer. He argued that since no workers compensation benefits had been paid, the exclusive remedy doctrine did not apply.

The Court of Appeals rejected

that argument since it was "wholly without merit." The statutory employer was potentially liable for workers compensation benefits and therefore entitled to the protection of the exclusive remedy doctrine.

The exclusive remedy defense was unsuccessful in *PHF II Buckhead, LLC v. Dingu*, Court of Appeals Case Number A11A2033 (2012). Mr. Dingu was a parking lot attendant for LAZ Parking/Georgia which contracted with PHF II Buckhead, LLC to provide parking services for guests at PHF II's hotel. Mr. Dingu fell from a skywalk while attempting to escape an attack from a guest's dog and filed suit. PHF II did not file any timely responsive pleadings. The trial court entered a default judgment of over \$3,000,000.00. PHF II was found to be an owner and operator of the property rather than a contractor and statutory employer. The exclusive remedy defense was rejected because there was no potential liability for workers compensation benefits.

***Flores v. Dependable Tire Co., Inc.*, Court of Appeals Case No. A11A2199 (2012)**

Mr. Flores received medical treatment and TTD after he injured his neck and back on February 12, 2008. The employer provided transportation to a medical appointment on November 18, 2008. On the way home from the appointment, Mr. Flores suffered multiple injuries when the vehicle in which he was riding was rear ended. The employer/insurer continued paying TTD, but stopped providing medical care claiming that this accident broke the chain of causation pursuant to O.C.G.A. § 34-9-204(a). Mr. Flores argued that the injuries, to body parts other than his neck and back, were compensable.

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cle accident, Mr. Flores was evaluated for surgery. He complained that his pain was an eight on a scale of one to ten. After the car accident, the pain complaints and diagnoses to the neck and back were unchanged. The ALJ found that the chain of causation was not broken and also held that the new injuries in the car accident were compensable. The Appellate Division affirmed. The Superior Court reversed on both points. On the chain of causation issue, the Court of Appeals reversed the Superior Court. The any evidence rule mandated an affirmance of the Board's finding that there was no break in the chain of causation.

With respect to the new injuries from the car accident, the Court of Appeals affirmed the Superior Court's reversal of the Board. It was legal error to make the employer/insurer responsible for injuries resulting solely from the car accident. The issue of compensability turned on whether the appointment was "voluntary" as opposed to mandated by the employer/insurer. Although the claimant was provided transportation and receiving authorized treatment for his injuries, the appointment was deemed voluntary. Mr. Flores was not going to or from work and was not required to attend this appointment by the employer/insurer.

The outcome would likely have been different if the claimant had been attending an IME scheduled by the employer/insurer.

***Howard v. Peachbelt Health and Rehabilitation Center, LLC et al*, 314 Ga App 319 (2012)**

The Court of Appeals concluded that the ALJ erred by not accepting stipulations of fact made at the ALJ hearing. Ms. Howard suffered neck injuries on June 12, 2009, and July 16, 2009. She continued working until after the July injury. At the hearing, Peachbelt stipulated that Ms. Howard suffered injuries to her neck on both dates that arose out of and in the course of her employment, but it did not stipulate that there was a

"compensable" injury. It appears that Peachbelt was disputing entitlement to TTD given that their stipulations technically made the case "compensable." Despite the stipulations, the ALJ considered evidence that there was no neck injury in July and denied the claim for TTD because Ms. Howard did not have a neck injury in July; she only suffered a worsening of symptoms from the original June injury.

The Appellate Division and Superior Court affirmed. The Court of Appeals reversed and remanded the case with direction for the Board to take action in accordance with the findings in their opinion. In light of the parties' stipulations, it was legal error to consider evidence that there was no injury on July 16, 2009.

***Ready Mix USA, Inc. v. Ross*, Court of Appeals Case No. A11A2173 (2012)**

Mr. Ross injured his back while working for Ready Mix, but no TTD was initially paid. A hearing was requested, and discovery was served. The Employer/Insurer did not answer the discovery or appear at the hearing. Mr. Ross was awarded TTD, medical benefits and assessed attorney's fees. The Appellate Division and Superior Court affirmed.

The Employer/Insurer appealed on multiple grounds which were all denied. There was evidence to support all of the Board's findings. The opinion contains two points worth noting. The Board may exclude medical evidence which is not provided to the other side at least 10 days before the hearing, but the Board is not required to exclude that evidence. Secondly, a disability slip signed by a physician's assistant, rather than a doctor, can constitute some evidence of disability.

***Harris v. Eastman Youth Development Center*, Court of Appeals, Case No. A12A058 (2012)**

The Court of Appeals reversed the Board's decision that the claimant's case was not catastrophic and that her low back

problems were not related to the on-the-job injury. The *Harris* case has a lengthy history. The original injury was to the knee in 2002, and it was accepted. The Board subsequently held that the claimant's low back problems were related to the original injury. The Employer/Insurer had also agreed to pay for a weight loss program during the years before the most recent hearing request.

During 2010, the Claimant requested a catastrophic designation and an order requiring the Employer/Insurer to continue paying for weight loss treatment. The ALJ denied the catastrophic designation, the request for ongoing weight loss treatment, and determined further that the low back problems were no longer compensable. *Neither party requested a hearing about the compensability of the low back problems.*

The Appellate Division reversed the ALJ with instructions to decide the catastrophic issue without considering whether the low back condition was related. Without conducting a hearing or taking more evidence, the ALJ issued a second award denying the catastrophic designation and the weight loss program. The ALJ also held that the back condition was not compensable. The Appellate Division affirmed the second ALJ award. The Superior Court affirmed.

The Court of Appeals reversed. Since no WC-14 was filed regarding the compensability of the low back problems, the Claimant did not have the opportunity to be heard on that issue. The case was remanded with directions to decide the catastrophic designation without considering the compensability of the low back problems. ❖

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45th GDLA Annual Meeting

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While rain forced the Welcome Back, Y'all! Reception to be moved from the oceanfront terrace to the Great Hall, everyone still had a wonderful time reconnecting with old friends and meeting new ones.

Following are scenes: 1. (l-r) Jeff and Greer Ward with Platinum Sponsor BAY Mediation's Scott and Michaela Young, the reception's sponsor. 2. Then-President Mel Haas (right) with his wife, Linda; daughter, Mary Beth; son-in-law, Craig; and granddaughter, Collier. 3. Past President Staten Bitting (center) with (l-r) his wife, Cindy, Lance Green, Tommy Branch and Libby Bitting. 4. (l-r) Diane and Matt Moffett with Wayne and Laura Melnick. 5. Past President Steve Kyle (left); Past President Walter McClelland (center) and his wife, Kathy (second from right); Ted Freeman and his fiancée, Mary Peironnet. 6. Judge Bobby Chasteen and then-President Mel Haas. 7. Craig Avery with his wife, Resa, and daughters, Ali (left) and Sarah (right). 8. George Hall and Chris Parker. 9. Marty Levinson with his wife, Cathi, and daughter, Lexi. 10. Peter Muller with his sons, Rob (left) and William (right).



Ponte Vedra Inn & Club, June 7-10

Scenes from the two-day CLE program:

1. Then-Executive VP Lynn Roberson, who served as CLE program chair, talks with the first speaker, Bill Kanasky, of GDLA Platinum Sponsor Courtroom Sciences Inc., whose topic was "Preparing Witnesses for Deposition and Trial: The Jury Psychology Approach." 2. Then-President Mel Haas reflects on his year. 3. John Miles of GDLA Platinum Sponsor Miles Mediation discusses "Trying Your Case at Mediation." 4. Chuck Clay reviews "Apportionment: Where We've Been & Where We're Headed." 5. Past President Salty Forbes gives the Nominating Committee report. 6. GDLA Platinum Sponsor ESI sponsored the golf tournament; reps Bob Kenney and Frank Hagan were on-hand to present prizes. 7. Pamela Lee addresses "The Good, the Bad Faith and the Ugly." 8. Jamie Weston makes a point during discussion. 9. GDLA Platinum Sponsor Collision Specialist Inc.'s John Harrison explains "Commercial Motor Vehicle Reconstruction." 10. Andy Holliday and Matt Moffett in the sponsors' exhibit hall. 11. GDLA Platinum Sponsor FORCON's Paul Eason explores "Materials Analysis in Forensic Engineering Investigations." 12. Cordele Superior Court Judge Bobby Chasteen shares his insights during "Professionalism: A View From the Bench."



45th GDLA Annual Meeting

1. Past President Jerry Buchanan (right) and his wife, Carolyn, (pictured on right in photo 2) hosted the **President's Reception** at their home on Friday. Then-Executive Vice President Lynn Roberson enjoys the evening with Jerry and her husband, Judge Henry Newkirk. 2. Bill Buchanan with (l-r) Lea Kilpatrick, Caroline Steedley and Carolyn Buchanan. 3. Past Presidents Salty Forbes (second from left) and Warner Fox with his wife, Pat, and GDLA Executive Director Jennifer Davis (left). 4. Winners of the annual **golf tournament, sponsored by ESI**: Chuck Clay, Past President Steve Kyle, FORCON's Bill Ver Eecke and Esquire's Cindy Brown. Although rained out this year, the **tennis tourney was sponsored by Esquire Deposition Solutions**. 5. Alabama Defense Lawyers Association (ADLA) President David Howard and his wife, Markie, with DRI Southeast Regional Rep Bruce Barze, also with ADLA. 6. Past President Bubba Hughes (right) and his wife, Debbie, with Past President Johnny Foster and his wife, Bobbie (left), at the President's Reception.



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Ponte Vedra Inn & Club, June 7-10

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1. Overlooking the marsh at Walker's Landing. 2. Hall McKinley (right) and Ann Hopkins with Platinum Sponsor FORCON's Bill Ver Eecke, the evening's sponsor. 3. (l-r) Judge Henry Newkirk with his wife, GDLA President Lynn Roberson, Carol and Dart Meadows. 4. Sally and Dale Akins. 5. Doug Wilde with his wife, Allison, and daughter, Kendall. 6. Chris Lee and his son, Jackson. 7. Jason Lewis with his wife, Annie, and sons, Carter, Henry and John David. 8. Shane Keith with his son, Landon. 9. Past President Jimmy Singer with his wife, Patti, and daughter, Meredith.



CLE Explores Bad Faith Claims

On May 10, 2012, lawyers gathered at Gordon Biersch Brewery in midtown Atlanta for a CLE seminar on bad faith — two words you and your clients are constantly reminded of, but never actually want to hear.

Education Committee member Pamela N. Lee of Swift Currie McGhee & Hiers, who also serves as Young Lawyers Committee Vice-chair for Education, planned the two-hour program.

Plaintiff's lawyer Richard E. Dolder of Slappey & Sadd opened the program, offering particular insight from the perspective of insureds and their attorneys regarding bad faith claims and traps one can fall into if not careful. The course materials included an excerpt from his book *Insurance Bad Faith: The Law in Georgia*, co-authored with Jay Sadd and Samantha Johnson.

Next, GDLA Past President Steven J. Kyle of Bovis Kyle & Burch, who has been handling large loss personal injury cases for both insureds and self-insureds for over 40 years, reviewed best practices for responding to time limit policy demands. He noted that, since 1992, the law relating to the insurer's duties on properly responding to time limit policy limit demands has been decidedly in favor of the policy holder.

Jeremy Catlin, who has since moved from Swift Currie McGhee & Hiers to Hiscox, discussed first party bad faith and concluded that, relative to its neighboring states, Georgia has a very reasonable bad faith climate.

Bob Persons of Smith Moore Leatherwood, who has taught the Insurance Law course at the University of Georgia for the past four years and co-authored a treatise for West entitled "Excess Liability," reviewed managing multiple claims in limits cases. He explained, "In an era of *Holt* [*Southern General Ins. Co. v. Holt*, 262 Ga. 267, 416 S.E.2d



Photos highlights:

1. Program chair Pamela Lee is pictured with CLE speakers (l-r) Jeremy Catlin, Bob Persons, Steve Kyle and Rich Dolder. 2. Rich Dolder and Andy Stone enjoy the post-CLE reception. 3. Bill Turnipseed and Bob Persons visit at the reception. 4. Benson Ward and Jeremy Catlin talk before the seminar. 6. (l-r) Erica Morton, Wayne Melnick and Carrie Christie network following the CLE.

274] demands and less than clear appellate court guidance, Georgia remains one of the most challenging jurisdictions for liability insurers often willing to pay policy limits, but constantly confronted by lawyers trying to blow the top off the policy limit with time fused demands."

After a Q&A session, during which the panelists further explored how not only to prevent, but also to defend bad faith claims, everyone enjoyed a beer and wine networking reception. ❖

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Skits & Suds Uncorks Ethics and Professionalism Issues

On June 21, 2012, lawyers both young and old gathered for "Skits & Suds: Ethics & Professionalism Uncorked" at RiRa Irish Pub in midtown Atlanta.

The popular CLE seminar was reprised last summer after several years of hiatus, and features GDLA members performing skits that bring to life everyday ethical and professionalism dilemmas lawyers will likely face. The evening also included a beer and wine reception for networking.

This year's fact pattern was developed by GDLA Education Committee Vice-chair Brett Miller of Mabry & McClelland and committee member Sarah Smith of Drew Eckl & Farnham.

While the 2011 seminar focused on an auto accident in Springfield involving The

Simpsons™ characters, this year attendees were ushered to The Savannah Shore, where the infamous Snooki had slipped and fallen at a nightclub owned by Pauly D, played by Jeffrey M. Wasick of Gray Rust St. Amand Moffett & Brieske. Snooki's lawyer, The Situation, played by Jason D. Darneille of Crim & Bassler subsequently filed suit. Other characters included Junior Associate J. Woww, played by Pamela N. Lee of Swift Currie McGhee & Hiers, and Senior Partner, played by Erica L. Morton of Hicks Casey & Foster. All of the actors are Education Committee members.

We were especially honored to have Fulton State Court Judge Jay Roth on-hand, offering insights from a judicial perspective and even acting in one of the skits. We

were also fortunate to have State Bar General Counsel Paula J. Frederick there to give specific guidance as to how each dilemma relates to the Bar's disciplinary rules.

GDLA Education Committee Chair and Board of Directors member Wayne S. Melnick of Gray Rust St. Amand Moffett & Brieske moderated the seminar.

The Skits & Suds fact pattern will change each year — as will the different dilemmas faced (*i.e.*, discovery debacles, deposition nightmares, summary judgment crises, etc.) — making this an enlightening and entertaining way to earn CLE annually.

See photo highlights from the seminar on next page. ❖

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Program Chair

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

Program Vice-chair

Douglas K. Burrell, Drew Eckl & Farnham, Atlanta

SAVE THE DATE



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Scenes from Skits & Suds:

1. Judge Jay Roth shares his wisdom. 2. Pauly D and The Situation (aka Jeff Wasick and Jason Darneille) role play during a skit. 3. Executive VP Ted Freeman (right) and Past President Grant Smith were on-hand to share experiences from their years in the trenches. 4. Bill Casey (center) makes a point as Lara Percifield (left) and Anne Gowen listen. 5. Brian Williams (left) shares his view alongside Matthew McLaughlin. 6. Myles Levelle discusses the hypothetical alongside Anne Marie du Toit. 7. (l-r) Megan Klein and Program Co-chair Sarah Smith watch a skit. 8. Moses Kim (right) adds a comment as Program Co-chair Brett Miller looks on. 9. (l-r) Zach Matthews and Arthur York enjoy a pint at the reception. 10. State Bar General Counsel Paula Frederick references the applicable ethics rules. 11. Education Committee Chair Wayne Melnick moderates the seminar.

Apportionment of Fault to Non-Parties

Continued from page 1

Supreme Court recognized this doctrine when it held, "The rule is, in an action for a *joint tort* against several defendants, that the Jury are to assess damages against all the defendants *jointly*, according to the amount which in their judgment, the most culpable of the defendants ought to pay."⁶ The common law did not permit apportionment of fault among joint tortfeasors.⁷

At common law, the potential harshness of joint liability was balanced on the opposite extreme by the doctrine of contributory negligence. Under this doctrine, a negligent plaintiff was completely barred from recovering, even if he was responsible for only one percent of his own damages.⁸ The perceived unfairness of this doctrine was ameliorated by the advent of the doctrine of comparative negligence, which permitted a negligent plaintiff to recover but reduced his

recovery by the amount of fault attributable to him,⁹ and Georgia was among the first states in the country to adopt a form of comparative negligence.¹⁰ Logically, comparative negligence and joint liability are incompatible because comparative negligence is based on proportionate fault between the plaintiff and the defendant, but most states that adopted some form of comparative negligence also retained joint liability.¹¹ That meant any one defendant could be liable for all of the damages awarded against the defendants collectively, even if he was less at fault than the plaintiff.¹²

The unfairness of requiring a tortfeasor to pay more than its proportionate share of the plaintiff's damages caused many state legislatures to enact tort reform measures during the 1980s and 1990s.¹³ As a result of this reform movement, "[t]he clear trend has been a move

away from full joint and several liability, and the majority of jurisdictions have now abolished or limited joint and several liability by statute."¹⁴

Although Georgia was a part of this reform movement, the General Assembly had already taken its first step in the arena of tort reform more than a hundred years earlier. In 1863, the General Assembly enacted the predecessor to O.C.G.A. § 51-12-31, which permitted apportionment of damages against joint trespassers who were named as defendants. That statute, however, was limited to property torts and was held not to apply to personal injury torts.¹⁵

In 1987, the General Assembly enacted O.C.G.A. § 51-12-33, which permitted apportionment of damages against joint tortfeasors in both property damage and personal injury cases, but only if the plaintiff was "to some degree

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responsible for the injury or damages claimed.” Apportionment of damages to non-parties still was not permitted under the 1987 version of the statute.¹⁶

No further changes occurred until the General Assembly enacted SB3 in 2005. According to the preamble of SB3, one of its purposes was “to change provisions relating to apportionment of award according to degree of fault,” and the General Assembly accomplished this purpose by amending O.C.G.A. § 51-12-33 in two principal ways. First, while apportionment under the 1987 statute was permissive and could be applied only if the plaintiff was at fault, the 2005 amendments provided that apportionment would be mandatory and would not depend on the plaintiff being at fault. Second, apportionment to non-parties was not permitted under the 1987 statute, but the 2005 amendments provided that fault must be apportioned among all joint tortfeasors, regardless of whether they are named as defendants (assuming that certain requirements are satisfied). Together, these changes to O.C.G.A. § 51-12-33 effectively abolish joint liability in all cases to which the statute applies.¹⁷

As with most of the changes implemented by SB3, the plaintiffs’ bar did not just accept these changes without a fight. Despite the plain language of the 2005 amendments, the plaintiffs’ bar argued that the previous rule allowing apportionment only if the plaintiff was at fault remained unaffected, but the appellate courts have ruled against them on this issue.¹⁸ The plaintiffs’ bar also challenged the provision requiring apportionment to non-parties, primarily in premises liability cases based on third-party criminal conduct. Although apportionment to non-parties can apply in a variety of cases, it applies in a very high percentage of these so-called negligent security cases because the criminal assailant is usually not named as a defendant, either because his identity is unknown, he presumably has no assets with which to satisfy a money judgment

against him, or both. Because of its assumption that juries would apportion all or most of the fault to the non-party criminal, the plaintiffs’ bar asserted a host of arguments challenging the constitutionality of apportionment to non-parties, as well as the applicability of this procedure to negligent security cases. This was a critically important issue because without apportionment to non-parties, property owners would be potentially liable not only for their own alleged negligence in securing the premises, if any, but also for intentional torts (i.e., crimes) committed by others even though there was no agency or employment relationship between them and the criminals.

The challenges to non-party apportionment met with varying degrees of success in the trial courts, with some judges invalidating the statute and some judges upholding it. Both the plaintiffs’ bar and the defense bar, not to mention trial judges, were anxious to have appellate guidance on this issue as quickly as possible, and so several trial judges granted certificates of immediate review so that the issue could be appealed before trial. *Couch*, however, was in federal court, and so the parties in that case were able to bypass the Georgia Court of Appeals by asking the district judge to certify two questions of law to the Georgia Supreme Court. The district judge did so, and *Couch* became the vehicle through which the most important challenges to non-party apportionment would be resolved.

Couch and Its Implications

Couch is a typical negligent security case. It arose out of a third-party criminal attack on a guest of a motel, who subsequently sued the owner and manager of the motel for their alleged negligent failure to maintain the premises in a safe condition. Because the plaintiff did not sue the unknown criminals who attacked him (even as John Doe defendants), the defendants filed a notice pursuant to O.C.G.A. § 51-12-33(d) identifying the unknown criminals as non-par-

ties to whom fault should be apportioned. When the plaintiff challenged the applicability and constitutionality of the statute via a motion in limine, Judge Steve C. Jones of the United States District Court for the Northern District of Georgia certified the following two questions to the Georgia Supreme Court:

1. In a premises liability case in which the jury determines a defendant property owner negligently failed to prevent a foreseeable criminal attack, is the jury allowed to consider the “fault” of the criminal assailant and apportion its award of damages among the property owner and the criminal assailant, pursuant to O.C.G.A. § 51-12-33?
2. In a premises liability case in which the jury determines a defendant property owner negligently failed to prevent a foreseeable criminal attack, would jury instructions or a special verdict form requiring the jury to apportion its award of damages among the property owner and the criminal assailant, pursuant to O.C.G.A. § 51-12-33, result in a violation of the plaintiff’s constitutional rights to a jury trial, due process or equal protection?

The Georgia Supreme Court answered the first question in the affirmative and the second question in the negative.

Justice Harold Melton, writing for a five-justice majority, focused almost exclusively on the plaintiff’s argument that the statute does not permit a jury to compare the negligence of a property owner with the intentional conduct of a criminal. As with any exercise in statutory construction, Justice Melton first looked to the intent of the General Assembly as reflected in the text of the statute, and he found the intent of the statute to be “easily discernible from the straightforward text of the statute.” The statute provides that a jury shall consider the “negligence or fault” of a non-party when the plaintiff settles with the

non-party or when the defendant gives the prescribed notice, and the General Assembly's use of the disjunctive necessarily means that these two terms are not synonymous. Looking to the ordinary meaning of the word "fault," as well as the plain language and context of the statute, Justice Melton concluded that fault includes intentional conduct. The statute "is designed to apportion damages among 'all persons or entities who contributed to the alleged injury or damages,'" regardless of whether the plaintiff chose to sue them, and it would "make[] no sense if persons whose intentional acts that contributed to the damages are excluded." Indeed, the only way to accomplish the statute's purpose of having the jury consider the conduct of all tortfeasors, rather than just the conduct of all defendants, is to include intentional tortfeasors in the calculus. Moreover, had the General Assembly intended to exclude intentional acts from the scope of the statute, it could have done so explicitly as it did in the statute governing the right of contribution, and as other state legislatures have done in their apportionment statutes.

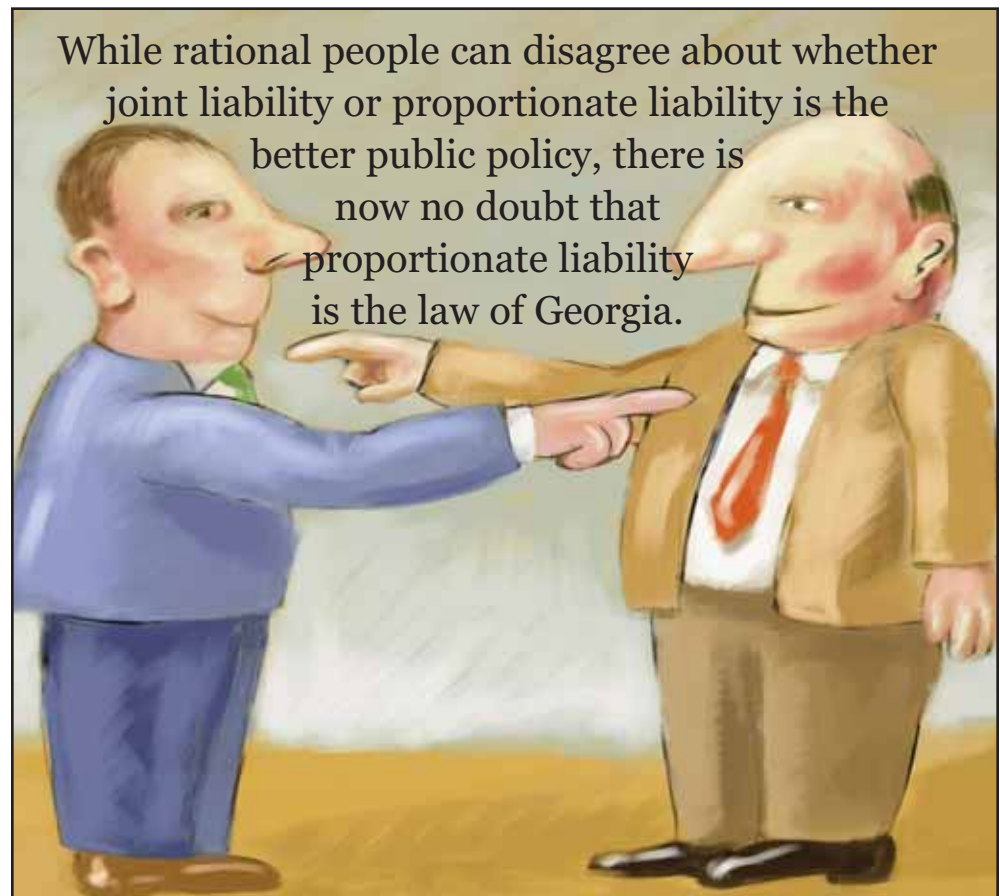
The plaintiff raised six other arguments that Justice Melton disposed of in summary fashion. First, the plaintiff argued that apportionment of fault to non-parties nullifies a property owner's duty to maintain its premises in a safe condition, but Justice Melton noted that a property owner's duty remains "even where damages are apportioned." Second, the plaintiff argued that apportionment of fault to non-parties allows a property owner to avoid the consequences of its actions or inactions. To the contrary, Justice Melton wrote, a property owner remains responsible for its actions or inactions and will have to pay damages in proportion to its percentage of fault as determined by a jury. Third, the plaintiff argued that a property owner must be fully responsible for crimes that occur on its premises because such crimes are derivative of its negligence. Justice Melton rejected this argument because criminal con-

duct is "wholly separate" from any negligence of a property owner and because a property owner cannot be vicariously liable for a third-party criminal's conduct. Fourth, the plaintiff argued that apportionment of fault to non-parties provides a disincentive for a property owner to maintain its property in a safe condition. Again, however, a property owner's duty remains regardless of apportionment, and it will be liable in proportion to its percentage of fault as determined by a jury. Fifth, the plaintiff argued that the injury inflicted by a criminal attack cannot be apportioned because it is single and indivisible, but Justice Melton noted that while the injury itself may be singular, there is no impediment to apportioning the damages flowing from the injury among those who are responsible for it. Finally, the plaintiff argued that the defendants had not established any evidence showing that there is a rational basis for a jury to apportion fault between the criminal assailants and the defendants, but Justice Melton dismissed that argument as raising a question of fact that was

not relevant to the legal questions certified by the federal court.

Turning to the plaintiff's constitutional arguments, Justice Melton briefly explained why the plaintiff had not shown that the statute violates his constitutional rights to a jury trial, due process, or equal protection. The statute does not violate the right to a jury trial because it does not infringe on a jury's ability to assess liability, calculate damages, and identify the tortfeasors who are responsible. The right to due process is not violated because the statute is clear, provides adequate guidance to juries, and preserves a plaintiff's right to pursue a judgment against all tortfeasors. And with respect to equal protection, the statute is supported by a rational purpose of apportioning damages among all tortfeasors, not just those whom a plaintiff elects to sue.

Justice Robert Benham, writing for himself and Presiding Justice Carol Hunstein, dissented based on his view that the statute is inconsistent with the common law and does not include an express statement of intent to preempt the



common law. Specifically, Justice Benham noted that at common law, a defendant who committed an intentional tort could not raise the plaintiff's own negligence as a defense. Although Justice Benham acknowledged the General Assembly's authority to change the common-law rule, he felt that the definition of the word "fault" is not sufficiently clear to accomplish such a change. According to Justice Benham, fault could include intentional conduct, but it does not have to. Without a clear definition of "fault," Justice Benham was unwilling to conclude that the statute preempted the common-law rule barring the plaintiff's negligence as a defense to an intentional tort. Thus, Justice Benham would not apply the statute to cases involving a non-party's intentional tort. Because Justice Benham would have resolved the case on non-constitutional grounds, he declined to address the plaintiff's constitutional arguments.

The principal debate between Justice Melton and Justice Benham was how to define the term "fault." Justice Benham opined that fault does not necessarily encompass intentional conduct and that, consequently, the statute does not preempt the common-law rule prohibiting the plaintiff's negligence from being raised as a defense to an intentional tort. Justice Melton responded to Justice Benham by noting that "statutes trump cases" as long as they are constitutional. Further, contrary to Justice Benham's view, a statute will preempt the common law if the two are inconsistent, even if the statute does not include an express statement of preemption. Because Justice Melton found that the ordinary meaning of "fault" is clear and encompasses intentional conduct, he concluded that the statute overruled the common-law prohibition on apportioning fault between negligent and intentional tortfeasors.

Justice Benham's reasoning is flawed for an additional reason that Justice Melton did not discuss. Justice Benham correctly noted

that under the common law the plaintiff's negligence was not a defense to an intentional tort, but he somehow converted this common-law rule into the more general principle that "intentional conduct is not a part of a comparative analysis of damages in tort." Although this statement is true with respect to a comparative analysis of fault between a plaintiff who acted negligently and a defendant who committed an intentional tort, Justice Benham offered no authority showing that a comparative analysis of fault between two defendants or between a defendant and a non-party tortfeasor is prohibited. A comparative analysis of fault between joint tortfeasors requires an examination of the law of contribution since contribution involves "distributing loss among tortfeasors by requiring others each to pay a proportionate share."¹⁹ At common law, there was no right of contribution between joint tortfeasors,²⁰ and so there was no reason to compare their relative fault, but the General Assembly has statutorily abrogated this common-law rule. Under O.C.G.A. § 51-12-32(a), a negligent tortfeasor may seek contribution from an intentional tortfeasor, but the intentional tortfeasor may not seek contribution from the negligent tortfeasor because "[t]he law [does] not undertake to aid one who ha[s] intentionally done wrong."²¹

In the typical negligent security case, the property owner is the allegedly negligent tortfeasor, and the non-party criminal is the intentional tortfeasor, and so while the property owner's alleged negligence could not be compared with the intentional tort committed by the non-party criminal for purposes of common-law contribution, there is no textual reason why such a comparison cannot be made under O.C.G.A. § 51-12-32(a). Because the non-party criminal is not entitled to contribution under O.C.G.A. § 51-12-32(a), he is not entitled to a comparative analysis of fault with the property owner, but this should not be an issue since the plaintiff usually does not

sue the non-party criminal. Further, the common-law rule discussed by Justice Benham would not be violated by comparing the property owner's alleged negligence with any negligence committed by the plaintiff since that rule applies only "when the party seeking to assert the defense *has himself been accused of an intentional tort*."²² That rule would preclude the non-party criminal from raising the plaintiff's negligence as a defense, but *Couch* and other lawsuits involving apportionment to non-parties are not being litigated by criminals. Thus, Justice Benham's argument approaches the issue from the wrong perspective.

Regardless of the merits of the majority and dissenting opinions, *Couch* means that the apportionment statute is constitutional and that it applies in negligent security cases despite the presence of an intentional tortfeasor. The significance of this decision to property owners and their insurers cannot be overstated since, as the defense bar has already seen, some jurors will apportion almost all of the fault to the non-party criminal who attacked the plaintiff. Indeed, the jury in a DeKalb County case apportioned 95 percent of the fault to the non-party criminals. Most immediately, *Couch* likely governs several other cases currently pending in the Georgia Supreme Court and the Georgia Court of Appeals:

1. In *GFI Management Services, Inc. v. Medina*, the Supreme Court is considering whether O.C.G.A. § 51-12-33 unconstitutionally conflicts with O.C.G.A. § 51-12-31, but *Couch* already held that "OCGA § 51-12-33 does not conflict with OCGA § 51-12-31, a statute which expressly does not apply where OCGA § 51-12-33 applies." Even counsel for the plaintiff in *Medina* reluctantly agrees that *Couch* probably determines the outcome of the appeal in *Medina*.²³
2. In *Coro Realty Advisors, LLC v. Salinas* and *Accor North*

America, Inc. v. Todd, the Court of Appeals is considering whether a property owner can be vicariously or derivatively liable for crime that occurs on its property such that fault cannot be apportioned between it and the criminal. (The same trial judge entered a similar order in each case.) However, *Couch* answered this question by holding that “the actions of a criminal assailant are wholly separate from any action or inaction of a property owner and there is no respondeat superior.” Thus, *Couch* seems to require the Court of Appeals to reverse the trial court’s orders striking the defendants’ notices of non-party fault in *Salinas* and *Todd*. In *Salinas*, although the parties have fully briefed the issues and have already presented oral argument, the Court nevertheless issued an order inviting the parties to submit supplemental briefs discussing the impact of *Couch*. The GDLA filed an amicus brief in this case.

3. In *Six Flags Over Georgia II, L.P. v. Martin*, the Court of Appeals is reviewing a trial judge’s order that refused to allow apportionment to non-parties because (1) doing so would allow the property owner to shield itself from liability since the jury would apportion all fault to the criminal; and (2) the apportionment statute does not apply to cases involving intentional torts. Again, *Couch* addressed both of these issues, and so there does not appear to be anything left for the Court of Appeals to decide.
4. In *Hickory Lake, L.P. v. A.W.*, the Court of Appeals is reviewing a trial judge’s order that found a conflict between O.C.G.A. § 51-3-1 and O.C.G.A. § 51-12-33 because it would be absurd for the General Assembly to have intended to relieve property owners of liability for the harm that O.C.G.A. § 51-3-1 is intended to prevent. While *Couch* does not

directly address this issue, it rejected the argument that apportionment of fault to non-parties nullifies the duty of property owners under O.C.G.A. § 51-3-1 and allows property owners to avoid the consequences of their actions or inactions. Thus, *Couch* seems to control this appeal too.

Although the immediate impact of *Couch* on other appeals is relatively clear, its long-term implications remain to be seen. It would be natural to assume that the plaintiffs’ bar will file fewer negligent security cases, and while there may well be a decrease, it would be premature to think that these cases will go away completely. As Justice Melton observed in *Couch*, a property owner still owes a duty and still will be liable for its proportional share of damages, and it is not inconceivable that any given jury could apportion a large percentage of fault to the property owner and a small percentage of fault to the non-party criminal.

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Indeed, this happened in a Newton County case in which the jury apportioned 90 percent of the fault to the property owner and only 10 percent to the non-party criminal.

Moreover, it would be naïve to think that the plaintiffs' bar is just going to roll over and accept defeat. Counsel for the plaintiff in *Couch* has already stated publicly that the next battleground issue will be whether there is sufficient evidence of the non-party's fault to warrant a jury instruction on apportionment and a verdict form that includes a space for the jury to write in a percentage of fault allocated to the non-party.²⁴

Justice Melton alluded to this issue in *Couch* when he wrote that whether the defendants had established sufficient evidence showing that there is a rational basis for a jury to apportion fault between the criminal assailants and the defendants is a question of fact. Because the plaintiff in *Couch* argued that there is no rational basis for a jury to apportion fault between an allegedly negligent property owner and a criminal, it would have been preferable for Justice Melton to have written that there is a rational basis for such apportionment but that the evidentiary sufficiency for apportionment must be determined on a case-by-case basis. Thus, there may be a slight opening for the plaintiffs' bar to mount another challenge to the statute's overall applicability to negligent security cases.

Conclusion

While rational people can disagree about whether joint liability or proportionate liability is the better public policy, there is now no doubt that proportionate liability is the law of Georgia. Unless the plaintiffs' bar can devise an argument that was not asserted in *Couch*, or persuade the General Assembly to repeal O.C.G.A. § 51-12-33(c) and (d), apportionment of fault to non-parties is here to stay. To be sure, apportionment may not apply under the circumstances of a particular case (e.g., if the defendant does not satisfy its burden of proving that the non-party was at

fault, or if the defendant does not file a timely notice), and there are still issues to be decided by the appellate courts (e.g., how the jury should be instructed), but property owners can now rest assured that, for the most part, they can be liable only for the consequences of their own tortious conduct and not for the tortious conduct of others. ♦



Jacob E. Daly is of counsel with Freeman Mathis & Gary in Atlanta. He frequently defends property owners, management companies, and security companies in negligent security cases. Along with his partner, Sun Choy, he authored an amicus curiae brief on behalf of the GDLA for the principal case discussed in this article, and he has litigated the issue of apportionment of fault to non-parties in several other cases in the trial and appellate courts.

ENDNOTES

¹ See, e.g., Jason Crawford et al., *Trial Practice and Procedure, Annual Survey of Georgia Law*, 57 MERCER L. REV. 381, 384-85 (2005).

² See, e.g., Halli D. Cohn & Sarah T. Sloan, *Tort Reform Comes to Georgia: An Overview of Senate Bill 3*, GA. B.J., June 2005, at 41, 47.

³ Crawford et al., *supra* note 1, at 385.

⁴ W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 46, at 322-23 (5th ed. 1984) [hereinafter PROSSER & KEETON] (attributing the doctrine to several seventeenth-century English cases); 3 FOWLER V. HARPER ET AL., HARPER, JAMES & GRAY ON TORTS § 10.1, at 1 (3d ed. 2007) (attributing the doctrine to an English case decided in 1432).

⁵ PROSSER & KEETON, *supra* note 4, §§ 46-47, at 322-30. A good example of this is seen in *Walt Disney World Co. v. Wood*, 515 So. 2d 198 (Fla. 1987), where judgment was entered against Disney for 86 percent of the plaintiff's damages even though the jury found it only 1 percent at fault.

⁶ *Simpson v. Perry*, 9 Ga. 508, 509 (1851).

⁷ PROSSER & KEETON, *supra* note 4, § 46, at 323; *Craven v. Allen*, 118 Ga. App. 462, 462, 164 S.E.2d 358, 359 (1968).

⁸ PROSSER & KEETON, *supra* note 4, § 65, at 451-62.

⁹ *Id.* § 67, at 468-79.

¹⁰ VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE §§ 1.04[b][1], at 13 and 1.05[a][2], at 18-19 (4th ed. 2002).

¹¹ PROSSER & KEETON, *supra* note 4, § 67, at 475.

¹² See, e.g., *Union Camp Corp. v. Helmy*, 258 Ga. 263, 367 S.E.2d 796 (1988) (holding that "a plaintiff whose comparative fault exceeds that of one defendant but does not exceed that of another defendant is entitled to a judgment against both defendants").

¹³ 1 COMPARATIVE NEGLIGENCE MANUAL § 1:24 (3d ed. 2009); Thomas A. Eaton & Susette M. Talarico, *A Profile of Tort Litigation in Georgia and Reflections on Tort Reform*, 30 GA. L. REV. 627, 688 (1996).

¹⁴ 1 COMPARATIVE NEGLIGENCE MANUAL § 1:24.

¹⁵ *McCalla v. Shaw*, 72 Ga. 458, 460 (1884).

¹⁶ *Schriever v. Maddox*, 259 Ga. App. 558, 561, 578 S.E.2d 210, 213-14 (2003).

¹⁷ *Helmy*, 258 Ga. at 268, 367 S.E.2d at 800 (holding that in any case to which O.C.G.A. § 51-12-31 or O.C.G.A. § 51-12-33 applies, "the rule of joint and several liability among joint tortfeasors can be disregarded").

¹⁸ *McReynolds v. Krebs*, 290 Ga. 850, 725 S.E.2d 584, 586-87 (2012); *Cavalier Convenience, Inc. v. Sarvis*, 305 Ga. App. 141, 144-45, 699 S.E.2d 104, 106-07 (2010).

¹⁹ PROSSER & KEETON, *supra* note 4, § 51, at 341.

²⁰ *Marchman & Sons, Inc. v. Nelson*, 251 Ga. 475, 475-76, 306 S.E.2d 290, 291-92 (1983); *Dent v. King*, 1 Ga. 200 (1846).

²¹ *Marchman & Sons, Inc.*, 251 Ga. at 476, 306 S.E.2d at 291.

²² *Gates v. Navy*, 274 Ga. App. 180, 184, 617 S.E.2d 163, 167 (2005).

²³ Alyson M. Palmer, *Justices Uphold Apportionment*, FULTON COUNTY DAILY REP., July 10, 2012, at 1.

²⁴

²⁵ *Id.*



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Premises Liability Case Law Update

Continued from page 35

seeing water on the floor prior to her fall.

Home Depot moved to exclude Hunt as an expert pursuant to Fed. R. Evid. 702 and *Daubert*.

The trial court held Hunt's opinions on watering at the store were unreliable because Hunt failed to perform any relevant tests on the store's walking surface, relying on other case law where an expert witness had performed extensive testing of the walking surface to determine qualities such as its coefficient of friction. Hunt, by contrast, apparently had based his opinions on nothing more than common knowledge that water makes floors more slippery.

Although Hunt purportedly relied upon the "Safety Hierarchy" in forming his opinions, he did not know whether the Safety Hierarchy had been tested in a premises liability context, and none of the articles listed in Hunt's bibliography had applied the Safety Hierarchy in a

premises liability context involving walking surfaces.

Hunt also provided no information regarding the known error rate of the Safety Hierarchy in a premises liability setting, and the only cases he cited in support of general acceptance of the Safety Hierarchy dealt with products liability or heavy machinery. Based on Hunt's failure to satisfy the reliability requirements of Rule 702 and *Daubert*, the court excluded Hunt's opinions involving the Safety Hierarchy.

The court also excluded Hunt's opinion that Plaintiff did nothing unreasonable in failing to notice the standing water, holding that Hunt was unqualified to render such an opinion since he is not a human factors engineer and his experience as a safety consultant did not provide him with sufficient experience and background to determine how a reasonable garden store patron would perceive the site of Plaintiff's

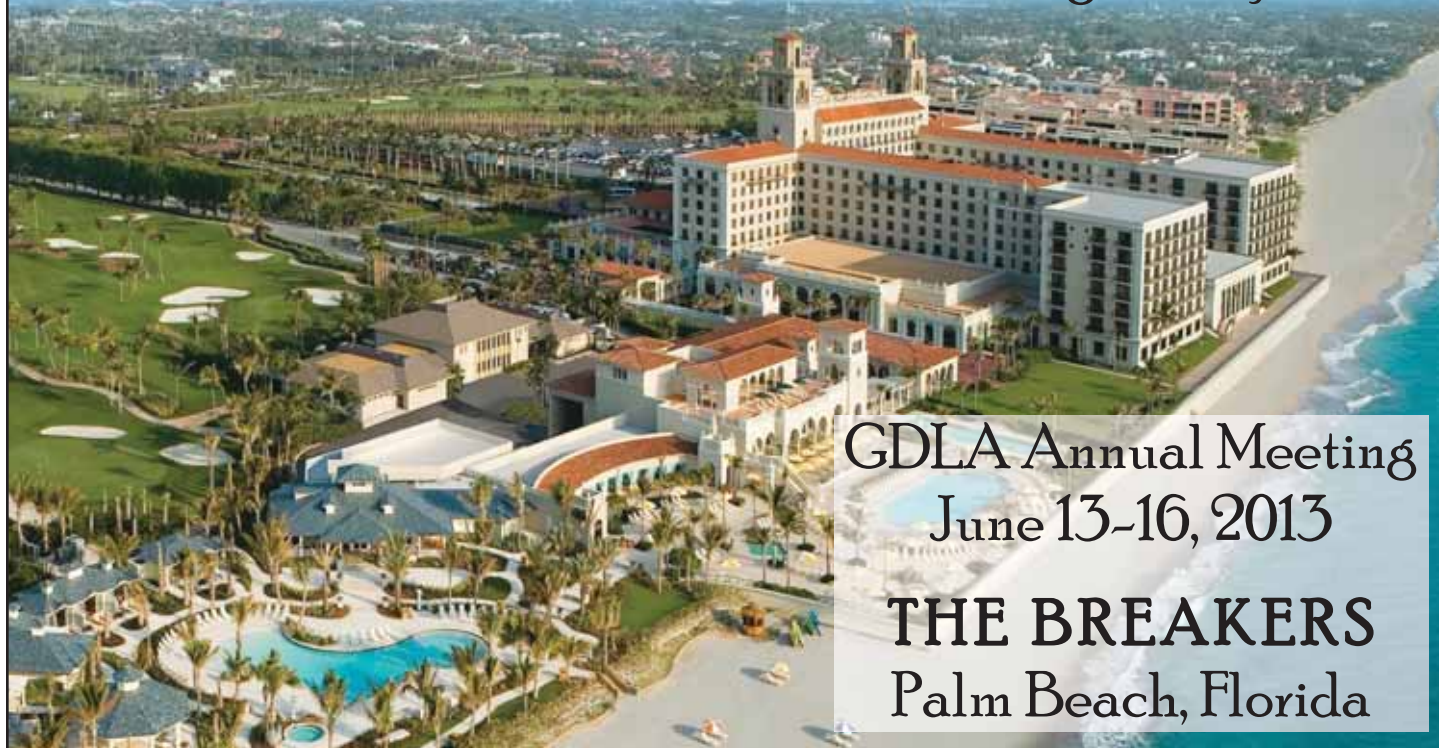
fall. Moreover, Hunt also failed to consider the presence of numerous "wet floor" signs and signs warning of frequent watering in the area of Plaintiff's fall. Finally, Hunt could not say whether water was even present on the floor when Plaintiff slipped.

As Hunt failed to consider these important factors in reaching his opinion, the court held his methodology was not sufficiently reliable to satisfy Fed. R. Evid. 702 and *Daubert*, and the court excluded Hunt's testimony.

REASONABLE FORESEEABILITY; LIABILITY FOR THIRD-PARTY CRIMINAL ACTS: Apartment complex owner/operator's actual knowledge of prior robberies on premises and failure to take proper precautions precluded summary judgment in case brought after taxi driver was murdered on premises.

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***The Bethany Group, LLC. v. Grobman*, A11A2136, 2012 Fulton County D. Rep. 1398 (Ga. App. Mar. 29, 2012)**

Plaintiff's husband, Dean Grobman, was a taxi driver who was dispatched to pick up a passenger at an apartment complex owned and operated by Defendant Bethany during late evening hours. The dispatch resulted from a telephone call from an individual who identified himself as "Jamal" that was made from a disposable cell phone. Grobman later was found at the complex dead of a gunshot to the head. Neither the caller nor the murderer was ever located or identified.

The taxi driver's widow sued Bethany, alleging claims of premises liability and private nuisance.

Two years prior to Grobman's death, Defendant hired a security company to monitor the complex. Bethany subsequently reduced the number and frequency of security officers patrolling the premises and terminated the security company altogether about nine months before Grobman's murder.

The evidence reflected that

prior to Grobman's death, Bethany had knowledge of robberies of persons lured to the premises by fake online advertisements, robberies of persons lured onto the property by prostitutes, incidents of trespassers using vacant apartments on the premises to lure people for robbery, gang violence on the premises, and threats directed at security and courtesy officers on the premises. Eight days before Grobman's murder, Bethany's courtesy officer responded to the robbery of a pizza delivery person at a vacant apartment in the complex, and six days before Grobman's murder, the courtesy officer assisted police in responding to a report of a shooting at the complex.

Bethany moved for summary judgment, which the trial court denied. Bethany filed an application for interlocutory appeal, and the Court of Appeals affirmed.

The Court of Appeals held that summary judgment was not appropriate because Bethany knew that taxi drivers were regularly called to the complex to transport tenants

and guests, and as such, should have reasonably anticipated Grobman's presence on the property. The court further held that given Bethany's undisputed knowledge of extensive criminal activity on the premises before Grobman's murder, there remained genuine issues of material fact on Plaintiff's claims.

With regard to the premises liability claim, the court held that even if Grobman was a mere licensee, Bethany owed a duty to prevent Grobman from being injured by "a dangerous act being done or a hidden peril on [Bethany's] premises." The court also held that the prior armed robberies on the premises were substantially similar, put Bethany on notice that a murder might occur on the premises, and created an issue of fact as to causation.

The court also held that Plaintiff's nuisance claim could proceed to a jury based on the prior armed robberies at the complex.

Bethany has petitioned the Supreme Court of Georgia for *certiorari*, which remains pending (docket no. S12C1300). ❖

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mesh, but in fact was actually a counterfeit product that had been manufactured in India. RAM distributed the counterfeit mesh to Medline, another distributor of medical products, which then provided the mesh to South Georgia Surgical Clinic.

Plaintiff underwent a hernia repair at South Georgia Surgical Clinic using the counterfeit mesh, and suffered various complications and health problems caused by the counterfeit mesh.

Plaintiff alleged a number of causes of action against RAM and Medline, but asserted claims for breach of express and implied warranties against Medline alone. Medline subsequently moved for judgment on the pleadings.

With respect to Plaintiff's claims for breach of warranty, Georgia's choice of law rules did not clearly identify whether breach of warranty should be treated as a tort or contract. As Plaintiff's claims were based on injuries sustained as a result of the allegedly defective surgical mesh, a tort theory was used to determine the applicable choice of law rules.

To recover for breach of warranty, Georgia law requires a plaintiff to show privity between himself and the defendant. If the defendant does not sell the allegedly defective product directly to the plaintiff, the plaintiff, as ultimate purchaser, cannot recover under either express or implied warranty, if any, which arose out of the prior sale to the defendant by the original purchaser. As Medline did not sell the mesh directly to Plaintiff, Plaintiff's claims for breach of express or implied warranty failed as a matter of law.

APPORTIONMENT OF DAMAGES: O.C.G.A. § 51-12-33 allows apportionment of damages among multiple tortfeasors even when Plaintiff is not at fault and added condition of resolution of actual and potential liens in response to

settlement demand was deemed counteroffer rather than acceptance of the demand.

McReynolds v. Krebs, 2012 WL 1034449 (Ga. March 23, 2012)

Plaintiff Krebs was seriously injured in a motor vehicle accident with Defendant McReynolds. Krebs filed suit against McReynolds and GM, and McReynolds cross-claimed against

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the defendant.

GM for contribution and set-off. After Krebs settled with GM, the trial court dismissed McReynolds' cross-claims on grounds O.C.G.A. § 51-12-33 abolished joint and several liability and replaced contribution and set-off with apportionment among multiple tortfeasors.

On appeal, the Georgia Court of Appeals affirmed, and the Georgia Supreme Court granted certiorari to consider two questions: (1) whether the Court of Appeals correctly construed O.C.G.A. § 51-12-33 to require apportionment when the plaintiff bears no fault; and (2) whether the Court of Appeals correctly found McReynolds' insurer made a counteroffer to Krebs' settlement

demand.

While O.C.G.A. § 51-12-33(a) restricts apportionment of damages to cases where the plaintiff is to some degree at fault for her injuries, subsection (b) allows for apportionment without regard to plaintiff's fault. Under O.C.G.A. § 51-12-33(b), damages are apportioned among all tortfeasors according to their percentage of fault regardless of whether the total amount of damages was first reduced under subsection(a) to account for a plaintiff's share of liability, if any.

Section 51-12-33(b) further states that apportioned damages "shall not be subject to any right of contribution," and that damages "shall not be a joint liability among the persons liable." As such, contribution will not lie in the absence of joint or several liability.

Finally, in response to Krebs' settlement demand, McReynolds' insurer responded by offering policy limits and stating "Please call me in order to discuss how the lien(s) will be resolved as part of this settlement." The Georgia Supreme Court held this constituted a counteroffer rather than an unequivocal acceptance as Krebs' demand made no mention of liens nor contained any proposal for the resolution of any such liens.

The Court held this differed from the facts in *Frickey v. Jones*, 280 Ga. 573 (2006), which involved a "mere request for confirmation no liens exist" which did not transform a purported acceptance into a counteroffer.

APPORTIONMENT OF DAMAGES: To successfully apportion damages with a nonparty, there must be some evidence that the nonparty's products contributed to the injury suffered.

Union Carbide Corp. V. Fields, 2012 WL 917601 (Ga. App. March 20, 2012)

See Mass Torts Case Law Update on page 32. ❖



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