Georgia Defense Lawyer©

Advancing the Civil Defense Bar©

Fall 2011

The Devil in the Details: Hidden Costs in "Traditional" Witness Preparation

By George Speckart, Ph.D.
and Bill Kanasky, Jr., Ph.D.
Courtroom Sciences, Inc.

The scenario of "nervous hoping" that a witness will perform well at deposition or trial has become all too familiar in litigation, with the pervasive sentiment that a certain degree of feeling helpless is an inevitable part of witness testimony. Jokes connected with kicking the deponent under the table or resorting to other surreptitious means to send messages are often humorous on the surface, but in reality are terrifying at the core.

As a result of 30 years of refinement in witness preparation techniques, this scenario is unnecessary—and unnecessarily costly. Ironically, the expense involved in preventing poor witness performance is dwarfed by the cost of its consequences. Moreover, it's not as though litigation managers are *unwilling* to take measures to ameliorate the problem; it seems more that, even after 30 years, many are still not quite sure *how*.

Legal teams in today's "trial by hurry" atmosphere make assumptions that do not comport with the realities of how witnesses must be trained to ensure a credible demeanor at critical junctures in litigation. In particular, most trial teams seem to assume that witness training requires a transfer of *knowledge* or *awareness* to the witness. To a greater extent, however, the witness needs an accumulation of *skill* that can only be instilled by adequate instruction and *practice*. Counsel assume that "sitting down and talking" is enough, when usually it is not—any more than "sitting down and talking" would help a mediocre golfer become a good one, or transform a naïve student into a good, safe driver on the road.

Hidden Messages

Jurors often start with a "presumption of validity" in a case ("If the defendant is here, testifying in court, he or she probably did something wrong"). When jurors are operating under this presumption, witness mannerisms under pressure in a deposition that would otherwise be construed as shyness, nervousness, impatience, or simple

Continued on page 20

Inside This Issue

GDLA Elects Officers & Board

The GDLA held its 44th Annual Meeting at Amelia Island Plantation, Florida, June 9-12, 2011, where members and guests enjoyed networking, golf, tennis, CLE, an exhibit hall of practice resources, and more.

During the business meeting, GDLA members unanimously accepted the report of the Nominating Committee, chaired by Past President Salty Forbes, thereby electing the 2011-12 officers and Board of Directors, including President Mel Haas of Constangy Brooks & Smith in Macon. See pages 32-35 for highlights.

Outgoing President Bubba Hughes (left) is presented a commemorative gavel plaque and mint julep cup by incoming President Mel Haas during the GDLA Annual Meeting in Amelia Island.

Georgia Defense Lawyer
Volume VIII Issue II

Editor: Evelyn Fletcher Davis

Georgia Defense Lawyer, the official publication of the Georgia Defense Lawyers Association, is published three times annually. For editorial information, please contact the editor at edavis@hpty-law.com. The editor acknowledges the invaluable assistance of her associate, Jason Groch, in the editing process.

GDLA Offices

Jennifer M. Davis, Executive Director
P.O. Box 8558
Atlanta, Georgia 31106
Tel: 404.816.9455
E-mail: jdavis@gdla.org

WINNER 2011 APEX® AWARDS FOR PUBLICATION EXCELLENCE

President's Message

The GDLA has remained unique because of the unselfish nature of my predecessors in their stewardship of the association and their dedication to supporting the GDLA.

We are also very fortunate now to have had Jennifer Davis as our Executive Director for over two years, and she has made significant contributions to the association by keeping us on track to serve our members.

But, on a personal note, I have observed that, after decades of devoting our energies to advancing the civil defense bar, a fortuitous by-product has been the creation of an unmatched camaraderie. We all have many friends within the GDLA and, in many cases, "old friends."

At our recent Annual Meeting, I heard many comments from the younger lawyers there, noting how much fun it was to be at the meeting and recognizing the special relationships that people have.

One of our goals this year is to focus on enhancing our younger lawyers section and increasing their involvement. To that end, the Board recently voted to waive the $100 application fee for prospective members admitted after July 2, 2005.

We plan to focus on growing not only our younger population, but also increasing our overall membership numbers.

Our Membership Committee, led by Chris Parker of Miller & Martin and Dart Meadows of Balch & Bingham, will be spearheading a campaign to showcase the GDLA as *the* statewide organization of attorneys who defend the interests of businesses—not just insurance companies—and individuals in civil litigation.

We also want to maintain and improve upon the existing activities, particularly our educational seminars, judicial receptions, our *Law Journal*, our website, and our newsletter—which recently won the State Bar Newsletter Award (see page 5).

You will see our committee leaders listed on page 36, and I thank them in advance for their year of service.

One way we plan to better serve our statewide membership is hosting more webinars, which are not only cost-effective, but also reach all four corners of the state.

We have built a great network of sponsors who are loyal partners in our association, and offer our members a variety of tools to excel (see page 37). We encourage our members to utilize their services, and let them know their GDLA sponsorship was a factor.

Finally, we welcome suggestions and ideas from our membership and Board members to help us make the GDLA the best it can be. We solicit your involvement, particularly on our substantive law committees.

We also invite you to help us with recruitment. In particular, please reach out to our younger lawyers to encourage their participation in the activities of the GDLA so that we can build a firm foundation for the future.

Yours for the defense,

Mel Haas

W. Melvin Haas, III
Constangy Brooks & Smith

We plan to focus on growing not only our younger population, but also increasing our overall membership numbers.

Member & Legal News

Member News

The GDLA congratulates former member **D. Todd Markle**, who was appointed by Governor Deal to the *Superior Court, Atlanta Judicial Circuit*. He had previously served as the Governor's Executive Counsel, and was with Mabry & McClelland prior to that.

The *State Board of Workers' Compensation* announced the appointment of former member **Andrea R. Mitchell** as an Administrative Law Judge, hearing cases in Savannah. The GDLA congratulates Judge Mitchell on her elevation to the bench.

W. Melvin Haas, III, GDLA President and partner at *Constangy Brooks & Smith* in Macon, has been elected as a Fellow in The College of Labor and Employment Lawyers. The College was founded in 1995 on the 60th anniversary of the National Labor Relations Board and the 30th anniversary of Title VII and Executive Order 11246.

Lynn M. Roberson, GDLA Executive Vice President and partner with *Swift Currie McGhee & Hiers* in Atlanta, was installed as the Atlanta Bar Association's Vice President/President-elect at its Annual Meeting in May. She was also appointed by State Bar President Ken Shigley to the Statewide Judicial Evaluation Committee to assist the Governor's Judicial Nominating Committee in vetting candidates for appointment to judgeships statewide.

Jamie Weston, a GDLA Board of Directors member, has joined *Trotter Jones* in Augusta, where he will continue his practice in professional negligence defense, premises liability, commercial litigation and general civil litigation.

J. Robert Persons, of *Smith Moore Leatherwood* in Atlanta, was named to the 2011 list of Georgia Super Lawyers® for his work in the field of insurance coverage and bad faith, areas in which he mediates as a panelist for BAY Mediation & Arbitration Services, a GDLA Platinum Sponsor.

Taylor English Duma in Atlanta announces **Deborah A. Ausburn** has joined the firm, and will focus her practice on commercial litigation and personal injury defense. She was formerly with FSB Legal.

The Weathington Firm in Atlanta is pleased to announce that **Mike Hannan**, formerly of Thompson Slagle & Hannan, has joined the firm as a partner, and will resume

Continued on next page

GDLA Newsletter Garners State Bar Award

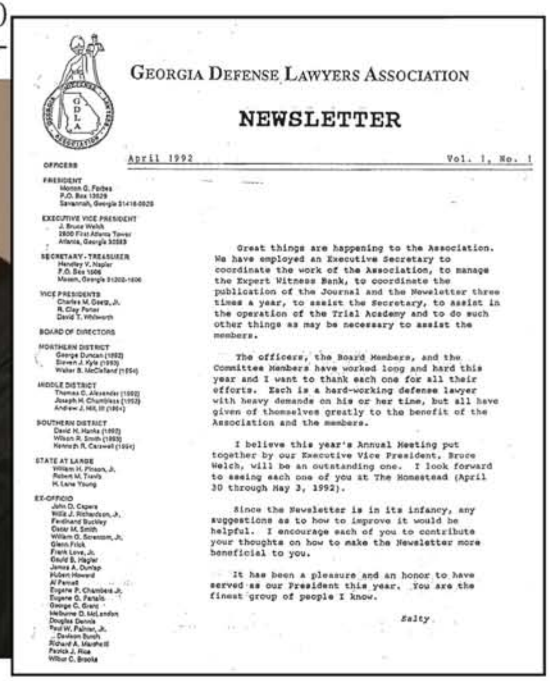
The GDLA was honored to receive the 2011 Newsletter Award presented by the State Bar of Georgia, recognizing excellence in local and voluntary bar activities.

This award represents a significant milestone in the evolution of this publication. The first issue of the *Georgia Defense Lawyer* was published in April 1992 (see cover at right), during Salty Forbes' tenure as GDLA President.

Peter D. Muller, who served the past three years as newsletter editor, said, "This accolade belongs to the many contributors, both GDLA members and sponsors, whose articles and input have made this a truly valuable resource for the civil defense lawyer. Kudos also to our Executive Director, Jennifer Davis, who pulls every issue together. It's great to see these combined efforts recognized by the State Bar."

Evelyn Davis Fletcher takes over as editor this year.

Jennifer Davis (below left) accepted the award from outgoing State Bar President Lester Tate at the State Bar Annual Meeting in Myrtle Beach in June. ❖



GEORGIA DEFENSE LAWYERS ASSOCIATION

NEWSLETTER

April 1992 — Vol. 1, No. 1

OFFICERS

PRESIDENT
Morton G. Forbes

EXECUTIVE VICE PRESIDENT
J. Bruce Welch

SECRETARY-TREASURER
Hendley V. Napier

VICE PRESIDENTS
Charles M. Goetz, Jr.
R. Clay Porter
David T. Whitworth

BOARD OF DIRECTORS

NORTHERN DISTRICT
George Duncan (1992)
Steven J. Kyle (1993)
Walter B. McClelland (1994)

MIDDLE DISTRICT
Thomas C. Alexander (1992)
Joseph H. Chambless (1993)
Andrew J. Hill, III (1994)

SOUTHERN DISTRICT
David H. Hanks (1992)
Wilson R. Smith (1993)
Kenneth R. Carswell (1994)

STATE AT LARGE
William H. Pinson, Jr.
Robert M. Travis
H. Lane Young

EX-OFFICIO
John D. Capers
Willis J. Richardson, Jr.
Ferdinand Buckley
Oscar M. Smith
William G. Scrantom, Jr.
Glenn Frick
Frank Love, Jr.
David B. Hagler
James A. Dunlap
Hubert Howard
Al Parrott
Eugene P. Chambers, Jr.
Eugene G. Partain
George C. Grant
Melburne D. McLendon
Douglas Dennis
Paul W. Painter, Jr.
Davison Burch
Richard A. Marchetti
Patrick J. Rice
Wilbur C. Brooks

Great things are happening to the Association. We have employed an Executive Secretary to coordinate the work of the Association, to manage the Expert Witness Bank, to coordinate the publication of the Journal and the Newsletter three times a year, to assist the Secretary, to assist in the operation of the Trial Academy and to do such other things as may be necessary to assist the members.

The officers, the Board Members, and the Committee Members have worked long and hard this year and I want to thank each one for all their efforts. Each is a hard-working defense lawyer with heavy demands on his or her time, but all have given of themselves greatly to the benefit of the Association and the members.

I believe this year's Annual Meeting put together by our Executive Vice President, Bruce Welch, will be an outstanding one. I look forward to seeing each one of you at The Homestead (April 30 through May 3, 1992).

Since the Newsletter is in its infancy, any suggestions as to how to improve it would be helpful. I encourage each of you to contribute your thoughts on how to make the Newsletter more beneficial to you.

It has been a pleasure and an honor to have served as our President this year. You are the finest group of people I know.

Salty

his defense of medical professionals, as well as continue his defense of first party insurance, ERISA, products liability, class action and commercial cases.

Carrie L. Christie, of *Rutherford & Christie* in Atlanta, has been invited to join the Council on Litigation Management, a nonpartisan alliance of insurance companies, corporations, corporate counsel, litigation and risk managers, claims professionals and attorneys.

Stephanie F. Brown has joined *McMickle Kurey & Branch* in Alpharetta, where she will continue to practice in the areas of premises liability, motor carrier liability and insurance coverage litigation.

Carlock Copeland & Stair announces the relocation of its Atlanta office to One Ninety One Peachtree Tower. The firm's new address is 191 Peachtree Street NE, Suite 3600, Atlanta, GA 30303.

Jennifer M. Davis, *GDLA Executive Director*, was appointed by then President Lester Tate to serve on the President's Advisory Council of the State Bar of Georgia. The council was established to increase statewide public awareness of issues in the judicial branch and solicit feedback from a broad spectrum of community leaders and citizens outside the legal profession.

Cases of Note

Timothy H. Bendin and **Kristin L. Hiscutt**, of *Bendin Sumrall & Ladner* in Atlanta, obtained a defense verdict on behalf of a local hospital and its labor & delivery nurses in a birth trauma, medical malpractice trial lasting two weeks in March. The case involved a primigravida patient in her 38th week of gestation who arrived as a "walk in" patient at the hospital in labor. The labor lasted approximately 13 hours, resulting in the vaginal delivery of a hypotonic male requiring resuscitation, with APGARS of 2 and 5, and with a cord pH of 7.16 and a base excess of -12. The child, now 6 years old, is diagnosed with athetoid cerebral palsy, epilepsy and severe developmental delay. Plaintiff's parents claimed that the labor & delivery nurses failed to insist that the on-call obstetricians during both night and day shifts come to the bedside to evaluate the patient; failed to notify the night on-call obstetrician when, pursuant to an order for Pitocin, the nurse stopped and restarted Pitocin following a deceleration that responded favorably to intrauterine resuscitative measures; and failed to communicate with the on-call obstetricians regarding the potential need for a change in the plan of delivery to Cesarean section. Defense verdicts were also obtained by both obstetricians. The defense presented testimony by labor & delivery nurse Karen McBeath, RN from Bethesda Memorial Hospital in Florida; maternal-fetal medicine specialists Michael Katz, MD from the University of California at San Francisco and Washington Hill, MD from Sarasota Memorial Hospital; obstetrician Stephen Weiss, MD from Emory University Hospital; the child's own treating pediatric neurologist Barbara Weissman, MD from Emory Children's Center; pediatric geneticist Barbara Burton from Children's Memorial Hospital in Chicago; and pediatric neuro-ophthalmologist Ed Buckley, MD from Duke University Medical Center.

Philippa V. Ellis, of *Owen Gleaton Egan Jones & Sweeney* in Atlanta, teamed up with an Orlando law firm to win a unanimous defense verdict for Ford Motor Company in a rollover case wherein the plaintiffs alleged they sustained severe spinal cord injuries.

Representing an equipment manufacturer being sued in a wrongful death product liability matter, **Tim Buckley**, of *Buckley Brown* in Atlanta, secured summary judgment in the U.S. District Court, Northern District of Georgia. The plaintiffs asserted the equipment manufacturer was liable for the fatal injuries received by a factory employee who crawled beneath the equipment while it was energized. Plaintiffs asserted claims of negligent design, manufacture, sale, installation and maintenance of the equipment, along with negligent placement in the market, and negligent approval of design and installation. Plaintiffs also asserted strict liability claims. Judge Horace T. Ward agreed with the defendant that available facts could lead to but one conclusion: The decedent proximately caused his own injuries and/or assumed the risk of injury when he voluntarily entered below the energized equipment. The court emphasized that the decedent's use of the equipment was not a normal or probable consequence, and he failed to exercise reasonable care and diligence for his own safety. The plaintiffs did not appeal.

Wayne D. Taylor, a partner with *Mozley Finlayson & Loggins* in Atlanta, teamed up with a colleague to secure two defense wins recently. In the first case, defense counsel successfully obtained an order in the U.S. District Court, Northern District of Georgia, dismissing a complaint filed against ACE American Insurance Company. The plaintiff RaceTrac Petroleum, Inc. sought a judicial declaration of liability insurance coverage for RaceTrac under ACE's excess liability insurance policies for allegations of personal injury arising out of exposure to benzene vapors in gasoline. ❖

NEVER (SEE) YOUR ~~CASE~~ LIFE THE SAME WAY AGAIN

ANGELA ABEL

All of us at DecisionQuest are saddened by the passing of our friend and esteemed colleague, Angela Abel. Angela was a Senior Vice President and our senior executive in the South, located in Atlanta.

Angela epitomized all we strive for at DecisionQuest. She was foremost dedicated to the success of her clients. Angela faced the toughest challenges as a consultant and consistently created innovative, effective and thoughtful strategies.

Personally, she was a wonderful friend and role model for all of us. She was graceful, engaging, funny and always the life of any DecisionQuest event. We all recognized what a devoted mother she was as well. Angela is survived by the pride of her life, her daughter Ashley. An educational fund has been created for Ashley.

Donations may be sent to:
Ashley Rose Abel Testamentary Trust
c/o DecisionQuest
1349 West Peachtree Street, NE
Suite 1420
Atlanta, GA 30309

DECISIONQUEST®

WWW.DECISIONQUEST.COM T: 404.876.4080

GDLA Files *Amicus* Brief in *Penn v. Muktar*

By Robert R. Gunn, II
Martin Snow, Macon

The *Amicus Curiae* Committee recently accepted a request from member Jonathan Adelman, of Harper Walden and Craig in Atlanta, to file an amicus brief in support of the defendant's petition for certiorari to the Georgia Supreme Court in a case involving attempted enforcement of a settlement agreement reached when the tortfeasor's insurance company accepted the plaintiff's time limited settlement demand.

Bill Dallas and Janice Wallace, of Beck Owen and Murray in Griffin, volunteered to write the brief on behalf of the GDLA and did an outstanding job.

The case is styled *Penn v. Muktar* and involves issues relating to an insurance company's attempted acceptance of a vaguely worded time limited demand for the policy limits without running afoul of the state Supreme Court's ruling in *Frickey v. Jones*, 280 Ga. 573 (2006), which used a "mirror image" analysis to say "no deal" when an insurer agreed to pay its limits in response to a time limited settlement demand but, per the court, imposed a condition not covered by the demand which gave the plaintiff's counsel cause to say that the insurer had made a counter-offer and, this rejected the demand.

Although it was not a "Bad Faith" case, the *Frickey* decision has led to numerous other cases wherein time limited settlement demands are submitted with little or no description of what the insurers and insureds will receive in return for payment of the insurance limits and any attempted response is met with a claim that the response is a counter-offer and, therefore, a rejection. Following said "rejection" there is frequently a trial resulting in a verdict in excess of the policy limits, Next stop—Bad Faith claim a la *Southern General v. Holt*. (A cynical mind would think there might be a set-up involved.)

The Committee agreed with the petitioner in *Penn v. Muktar* that the Supreme Court should take a step toward abolishing "Gotcha!" litigation and put some restriction on settlement demands so insurers who want to pay their limits for the protection of their insureds will not inadvertently stumble into a Bad Faith trap.

It is hoped the state's highest court will take steps to stem the proliferation of cases where a so-called Bad Faith claim arises, not from an insurance company's decision to reject a demand and risk the insured's assets, but from an unwary attempt to accept the demand only to be ensnared by an insincere claim of "Rejection!" ❖

Robert R. "Rusty" Gunn, II, of Martin Snow in Macon, co-chairs the GDLA Amicus Curiae *Committee with Jeff Ward, of Gilbert Harrell Sumerford & Martin in Brunswick.*

Welcome New GDLA Members

Marc H. Bardack
Freeman Mathis & Gary
Atlanta

Stephen M. Brooks
Nelson Mullins
Riley & Scarborough
Atlanta

Joshua Joseph Campbell
Hall Booth Smith & Slover
Atlanta

Lauren King Dimitri
Hall Booth Smith & Slover
Columbus

Julia Fenwick
Bryan Cave
Atlanta

Paul D. Ivey, Jr.
Hall Booth Smith & Slover
Columbus

Nola Jackson
Cruser & Mitchell
Norcross

Nicole Christine Leet
Gray Rust St. Amand
Moffett & Brieske
Atlanta

Lawrence J."Lance" LoRusso
LoRusso Law Firm
Atlanta

Mark D. Maholick
Hall Booth Smith & Slover
Columbus

Allison M. McDonald
Tavis L. Knighten PC
Atlanta

Joseph Chandler Sharp
Ashe Rafuse & Hill
Atlanta

David A. Siegel
Page Scrantom Sprouse
Tucker & Ford
Columbus

Edgar Murray Smith
Hunter Maclean Exley & Dunn
Savannah

Russell Cotter Wallace
Wallace & Scott
Valdosta

Joseph Benson Ward
Drew Eckl & Farnham
Atlanta

C. Hansell Watt
Coleman Talley
Valdosta

3D Laser Scanners

By Jason Anderson
SEA, Ltd.

In recent years, 3D laser scanning and data collection technology has evolved greatly beyond its infancy in the 1990s. With advancements in portability, collection efficiency, and accuracy, 3D laser scanning is on pace to become a common tool in the field of forensic and investigative sciences. While these enhancements have greatly improved the scanners' functionality, arguably the most significant progressions are those in the post-processing of data.

These improvements in data processing answer the question, "Now that we have all this data, what can we do with it?" As post-processing technology develops in response to the evolution of the laser scanning industry, the answer now is simply, "More and more."

In its simplest form, 3D scanners utilize lasers to generate three-dimensional copies of complex objects and environments to the point of millimeter-accuracy. The end result of a single scan is a "point cloud," a collection of millions of data points that each has a relative x, y, z location. A series of point clouds are then stitched together to create an exact copy, color included, of the as-built condition.

Essentially anything that is visible can be collected as part of the point cloud. The 3D scanners capture everything from the irregularity of a hairline crack in a plaster wall to the vastness of the interior of an industrial warehouse still smoldering from a fire the night before; from the length, depth, and curvature of a tire mark left on an asphalt street to the compaction depth of a vehicle's hood following a collision; and from the tread and risers of a staircase to the slope and paint stripe location of a crosswalk leading to a big-box retailer's front door. The scanner's applications are limited only by the creativity of the equipment's certified operator.

This tool is built for evidence and scene preservation—not only after a catastrophic event, but before as well. It is ideal for pre-event, large-loss use. Imagine the possibility of comparing a multi-family high rise in South Florida after a hurricane to the pre-storm condition. Think of cataloging a warehouse stocked with cat walks, heavy-duty equipment, and millions of dollars of inventory before the fire sparks. The 3D scanner captures the present in preparation for the unforeseen future.

Today's 3D scanners create exact copies of the as-built condition, but it's the post-processing of the data that assists forensic engineering consultants to reveal the cause of a catastrophic event. As the 3D Laser Scanning sector has grown, the scope of measurement tools has developed in kind. Simple measurements such as lengths and offsets are just a few clicks away and returned with millimeter accuracy.

Computer aided drafting (CAD) tools when applied to the point clouds make it possible to generate an infinite number of cross sections illustrating vertical dimensions, depths and widths of cracks, slopes of ramps and pedestrian access ways, the post-accident crush profile of a vehicle and diameters of mechanical piping. Similar drafting tools can be used to colorize these point clouds with various shades and gradients to demonstrate relative height or depth based on the intensity of the color. This technique is highly effective in illustrating slab irregularities and settlement, or the lack there of, as well as bows in lengths of installed drywall or structural members. The list of measurement tool options are plentiful, but more importantly, the scope of what can be measured is infinite. Anything that can be seen can be captured and anything that can be captured can be measured.

As scanning technology and investigative creativity come together, the application of 3D scanners to fire investigations, vehicle and industrial accident reconstructions, mechanical failures, and structural evaluations, to name a few, are endless. In the same way that a digital camera, a tape measure and graph paper are tools of the forensic investigator, 3D laser scanners belong in the same toolbox. ❖

Jason Anderson is a certified 3D laser scanner operator in the Tampa, Florida, office of GDLA Platinum Sponsor SEA, Ltd., a multi-disciplined forensic engineering and fire investigation firm. He has performed investigations that relate to civil site design and development. He has specialized knowledge in 3D laser scanning techniques and technology that he applies to collecting and processing an array of 3D laser surveys that transcend multiple disciplines, including accident reconstruction, civil site and vertical structures, and mechanical applications. He is a Licensed Civil Engineer in the State of Florida and has a B.S. degree from North Carolina State University.

Is the Trend Toward Mediation a Flaw in the Legal System?

By W. Bruce Barrickman
BAY Mediation & Arbitration Services LLC

For many years, plaintiff and defense attorneys settled most cases by negotiating between themselves, without their clients being present and without mediation.

The fact that most cases are no longer settled in this manner is viewed by some attorneys as a flaw in the legal profession or in the legal system. Is this change bad and is it really a sign of some flaw?

As a practicing attorney for 33 years and as a mediator for 12 years, I believe the answer to both questions is *no*.

The Way It Used to Be

At one time, many cases were filed shortly after plaintiff's counsel received the case, and the claims representative would immediately forward the case to defense counsel to be defended. This method of handling cases has changed significantly on the part of both plaintiff's counsel and insurance carriers.

The plaintiffs' bar has become much more proactive in providing to insurance carriers the necessary liability and damages information and documentation before filing a lawsuit, in an effort to obtain an early, less time-consuming and less expensive settlement.

The insurance companies have employed significant numbers of pre-suit claims adjusters to evaluate the information provided by plaintiffs' counsel and to arrive at a settlement that avoids the time and expense of a lawsuit that has to be defended by defense counsel.

Today's Reality

In reality, the vast majority of lawsuits are still settled without mediation, but the settlement negotiations now typically occur between plaintiffs' counsel and pre-suit claims adjusters, rather than defense attorneys. Those cases that do not settle in this manner usually are more complex; have significant unclear liability, damages and/or legal issues; have issues of miscommunication between plaintiffs' counsel and the pre-suit adjusters; and/or have client-control issues on one or both sides. These are the types of cases that are difficult to resolve by settlement negotiations between plaintiff and defense counsel and are well suited for mediation.

What is it about the mediation process that makes it well suited for these types of cases? What needs to be taken into consideration when deciding whether to submit a case to mediation and in selecting the mediator?

Mediation provides the opportunity for plaintiff, counsel for plaintiff and defendant, and, ideally, the insurance claims representative to meet face-to-face for the first time to discuss the case and to get personal insight into the parties involved and what hurdles have to be overcome to get the case resolved.

Mediation provides the opportunity for plaintiff's counsel to make arguments directly to the claims representative either in person, by telephone or through a video connection.

The mediation process provides the opportunity for defense counsel to present their case directly and unfiltered to plaintiff.

Preparing as Though the Case Is Going to Trial

Plaintiff and defense counsel must be prepared to take advantage of this opportunity to present their positions directly to the decision makers. This is an opportunity that will never present itself again, because if the case goes to trial, the ability to present unfettered positions will be significantly impacted by the presiding judge and the rules of civil procedure and evidence.

Counsel should be as well prepared for this opportunity as they would be for trial, because with the extremely high percentage of cases that settle before trial, this will be the best opportunity counsel has to "win" the client's case.

The Advantage of Visual Aids

If properly done, PowerPoint presentations, even in smaller cases, can be very effective in presenting arguments in a way that can be heard, seen and understood by the other side. Care must be

Continued on page 14

Is the Trend Toward Mediation a Flaw in the Legal System?

Continued from page 12

taken in preparing the PowerPoint presentation, but as a lawyer becomes more proficient in using PowerPoint, the time and effort in preparing the presentation become less and the impact of the presentation becomes greater.

Preparing a PowerPoint presentation makes the attorney review the case in detail before mediation and allows the attorney to pare the case down to its most essential elements. It gives the attorney the opportunity to think of the most effective way to persuade the other side.

This detailed and thorough preparation for mediation not only is the best way to get the case settled, but also shows the other side that if the case does not settle, that attorney is prepared for trial and will be persuasive in his or her presentation and arguments to the jury.

Showing Concern for the Plaintiff

Mediation also provides the defense attorney and claims representative the opportunity to show plaintiff that they are concerned about what happened to plaintiff, no matter the cause; that they are willing to consider the case with an open mind; and that they are human beings and not just some uncaring corporate entity.

It is essential that defense counsel and the claims representative approach this part of mediation with sincerity and credibility. If these efforts come across as insincere and contrived, there is no quicker way to significantly impede the ability to settle the case.

Picking the Right Mediator

Obviously, an essential element for a successful mediation is a knowledgeable, effective and efficient mediator. Even though a mediator cannot force any one at the mediation to do anything, a mediator can often play a significant role in guiding the parties to resolution. Neither side should take the choice of the mediator lightly.

It is in your client's and your best interest to have a mediator that opposing counsel respects and trusts. If opposing counsel respects and trusts the mediator, and you have been effective in convincing the mediator of the important elements of your position, it will be difficult for opposing counsel to disregard what the mediator has to say.

It is important for all sides that the mediator has experience in the type of case that is being mediated, and that the mediator can effectively and in a constructive manner get across to each side the hurdles that will have to be overcome and the factors that the jury will take into consideration in arriving at a verdict.

You and your client may not like what the mediator has to say, but a mediator who does not provide a neutral, impartial perspective of the good, the bad and the ugly of your case is not doing his or her job and is not providing the services your client deserves and should expect.

The importance of a quality mediator for your client—and for your ethical obligations to zealously represent your clients without interference from others—makes it essential that you put forth your best effort to agree upon and utilize the best mediator for the particular case.

Giving the Plaintiff His "Day in Court"

Another significant benefit from mediation is that the plaintiff effectively gets his or her day in court without the stress, strain and risks of a trial. If the process works as it should and the mediator does a good job, the plaintiff should feel that she has been heard and should have a good understanding of why the settlement was in a certain range, even though she may not agree.

It is often easier for a plaintiff to understand and accept a mediated settlement that has been discussed thoroughly before settlement is reached, as opposed to a jury verdict that has been decided upon behind closed doors.

Conclusion

As opposed to being an indication of a flaw in the profession or legal system, mediation is a beneficial progression in the settlement process and can often result in a better informed and more accepting client than when negotiations are carried out with no active involvement by the plaintiff. ❖

W. Bruce Barrickman is a founder of BAY Mediation & Arbitration Services LLC in Atlanta. BAY is a Platinum Sponsor of the GDLA.

Legislative Update 2011

By Rep. Edward H. Lindsey, Jr.
(R-Atlanta) House Majority Whip
Goodman McGuffey
Lindsey & Johnson

Below are some of the bills passed during the 2011 Legislative Session, which are relevant to the civil defense practice, as excerpted from Rep. Lindsey's full report "What Have They Done Now? 2011 Legislative Legal Update."

I. Civil and General Trial Practice

HB 24: Evidence Code Rewrite

HB 24 is an update and rewrite of Georgia's antiquated Evidence Code. The present Code was first adopted in 1868 and has been added to and supplemented over the years through a patchwork of statutory updates and court opinions. As a result, many legal scholars and practitioners believed an update after 140 years or so was well past due.

HB 24 adopts much of the Federal Rules of Evidence to the extent that they are consistent with the Georgia Constitution. As a result, Georgia now joins with 43 other states that have similarly adopted a version of the Federal Rules of Evidence, providing consistency between the states. In addition to modernizing our code, this bill should provide an easier work tool for attorneys and judges, resulting in more predictability and efficiency within the court system and better justice for all Georgians.

The new evidence code will go into effect on January 1, 2013, and will be applied to all evidentiary hearings and trials starting after that date.

Editor's note: An article by Professor Paul Milich summarizing the changes in the evidence code will appear in the next issue of the Georgia Defense Lawyer.

HB 41: Fix of Appellate Record Per-Page Fee

HB 41 removes the unintended consequence created with last year's HB 1055, the omnibus fee bill.

The fee for an appellate or Supreme Court record and transcript will be reduced from $10 to $1 per page. This was the previous fee under Georgia law.

HB 415: Jury Pool Reform

This bill revises how Georgia pulls together jury pools in each of the 159 counties. It requires the Council of Superior Court Clerks to establish and maintain a state administered master jury list for each county. Prospective jurors' names will be pulled from not only voter rolls but also the Department of Driver Services and the Secretary of State. By allowing for the screening of drivers' license records, vital records, and voter registration records a more inclusive source list of eligible jurors should be able to be gleaned. The database will be periodically cleaned of duplicates, bad addresses, and the names of felons and deceased people. Once this "clean list" is produced, the Council of Superior Court Clerks will certify and distribute annually an inclusive list to each individual county's Board of Jury Commissioners.

II. Business Law

HB 30: Clean up of Restrictive Covenant Statute

During the 2009 legislative session, the General Assembly passed HB 173, which was contingently effective on the passage of a constitutional amendment. The constitutional amendment was enacted by the General Assembly in 2010 and ratified by the voters in November 2010. Some questioned HB 173's validity due to a technical concern concerning its effective date. The effective date set out in HB 173 was upon approval of the voters, but the constitutional amendment's effective date was January 1, 2011.

This led some to argue that HB 173 was unconstitutional because the state constitution did not yet allow for its provisions on the date it took effect. To forestall any litigation on this issue, HB 30 was passed with an effective date after the constitutional amendment went into effect.

III. Criminal Law

HB 87: Illegal Immigration

Civil defense attorneys should familiarize themselves with HB 87 because of its impact on employers. The bill requires businesses with more than 10 employees to use E-Verify to confirm that an employee applicant is legally eligible to work

Continued on page 38

Our Panel of Excellent Mediators


John K. Miles, Jr


Joseph M. Murphey


David C. Nutter


Wayne C. Wilson


G. Michael Smith


James A. Rice, Jr


Patrick A. Lloyd


Scott D. Delius


Stephen L. Goldner


John P. Brocard


J. Robb Cruser


Tanya A. Tate


Andrew H. Schultz


Christopher E. Penna


Glenn A. Loewenthal


Kenneth L. Shigley


S. K. Rod Dixon


William S. Sutton


Erin S. Stone


Beverly M. Collins

Same Affordable Rate!

MILES MEDIATION

www.milesmediation.com

Please contact Sonja Peerman for information and scheduling
or visit our web site for profiles and booking.

Office: (678) 320-9118 E-mail: info@milesmediation.com

OSHA and Combustible Dust

By Frank Hagan, P.E.,
Michael Hanks, Ph.D., P.E., and
Bob Kenney, P.E.
Engineering Systems Inc.

Introduction

Between 1980 and 2005 approximately 281 fires and explosions occurred that involved combustible dust. These incidents resulted in 119 fatalities and 718 injuries.[1]

In 2008 OSHA issued a Combustible Dust National Emphasis Program (NEP).[2] The program instructs local OSHA officials to identify and inspect businesses that produce or handle combustible dusts. It also instructs the OSHA offices on conditions that should result in citations being given to a company.

Companies that generate, process, or handle combustible dusts need to be aware of the hazards presented by the dust, and be aware of the OSHA NEP and the likelihood of an audit under the Combustible Dust NEP.

What Is a Combustible Dust?

The National Fire Protection Association (NFPA) writes standards for companies that handle combustible dusts. The NFPA standards define a combustible dust as a "combustible particulate solid that presents a fire or deflagration hazard when suspended in air or some other oxidizing medium over a range of concentrations, regardless of particle size or shape."[3]

In lay terms, if a material can burn and is in the form of small particles (like the size of beach sand or smaller), it is likely to be a combustible dust and may present a fire or explosion hazard if it is not handled properly.[4]

If a combustible dust is suspended in air in the presence of an ignition source, the dust cloud can explode (deflagration). If there are accumulations of dust on surfaces in the area, this primary explosion can suspend additional dust that may subsequently explode. These secondary explosions can propagate until there is no more dust to suspend. This typical dust-explosion scenario can devastate an entire plant.

Combustible Dust Safety

The NFPA standards related to combustible dust safety provide instructions for designing processes and developing procedures to safely handle combustible dust.[5] In order to comply with these standards, a company needs to understand the properties of the dust it processes and of any fugitive dust that escapes from the process equipment and accumulates around the plant. Since the fire and explosion properties of dust depend strongly on particle size, the properties of fugitive dust accumulations may be significantly different (usually more hazardous) from those of the material being processed.

Companies that process or handle combustible dusts should perform a process hazard analysis that examines the hazards presented by the material as processed and by fugitive dust that may escape from the process. There are many good references that identify specific hazard scenarios that can assist companies in completing a through hazard analysis.[6]

Preventing or mitigating combustible dust explosions generally involves a combination of engineering design features and operating procedures. The engineering design focuses on controlling dust releases, eliminating ignition sources, and controlling or stopping fires and explosions if they do occur. The procedures focus on housekeeping, personal protective equipment, bonding and grounding to avoid electrostatic discharges, and handling containers and equipment safely.

OSHA NEP Audits

The OSHA Combustible Dust NEP instructs OSHA area offices and state OSHA agencies to identify companies in their jurisdiction that may process combustible dust. From this list they are to select specific companies for combustible dust safety audits. The OSHA offices have specific guidelines to identify hazardous conditions, and specific items they must show before they can issue a citation.

The OSHA officers will mostly be looking for accumulations of dust they believe may be a combustible dust. If they determine there are sufficient accumulations to present a hazard, they will collect a sample to submit for testing. Citations under the combustible dust program will depend on the test results as well as the conditions the officers observe in the plant.

Citations can be issued for violations of the housekeeping, electrical, hot work, hazard communication, egress, and other standards, or under the general duty clause.

How Does This Affect Your Clients?

If your client manufactures, processes, or handles a combustible dust, then it is important to understand the hazards presented by combustible dust in your client's plant, perform hazard analyses to make sure your client adequately address these hazards, and verify that operating procedures are adequate, effective, and followed.

If your client applies the principles in the NFPA standards, it will greatly reduce the likelihood of having a fire or explosion. Your client will also be prepared if OSHA decides to audit its plant, and potentially avoid costly fines or shut down orders until the plant is in compliance.

Continued on page 45


Understand
Your World
CaseMetrix™
Georgia cases for Georgia lawyers
Ensure you get the best result for your client by using *the most comprehensive* settlement and verdict database in Georgia.
Kim White: (404) 849-6422 www.case-metrix.com

annoyance may instead be interpreted as signs of "guilt." These mannerisms take on significance as a function of various principles of nonverbal communication, and are ultimately connected to deeply engrained, stable temperament characteristics of the witness that require concentrated efforts to remediate effectively.

The realm of communication comprises the totality of means in which a message is conveyed, much of it relating to subjective reactions, affect, tone, mannerisms, and other aspects of nonverbal channels that transmit "hidden messages." (In *Nonverbal Communication* [Mehrabian, 1972], the author notes that 93 percent of communication is nonverbal, with only seven percent relegated to verbal content.) Although most counsel are good judges of when these nonverbal messages are conveying a favorable versus unfavorable image of a witness, the more elusive key is *inducing* beneficial witness behavior and making it "*stick*."

Moreover, verbal content—which can be of greater importance in depositions that are not videotaped—may also be affected by psychological factors. A witness often has psychological barriers that impede the process of conveying the desired information. Some witnesses "freeze up" like a deer in the headlights; others cannot control their emotions (anger, fear, anxiety, apathy, etc.). Some start agreeing with just about anything; others speculate, concoct phony scenarios, or just seem unable to carry a coherent thematic position.

Many of these problems are rooted in adverse psychological reactions to the testimony setting, and can be remedied with the proper training. Others are linked to personality traits or stable temperament characteristics, requiring more intensive efforts for amelioration.

The Cost

The importance of nonverbal communication was powerfully illustrated during a mock trial project that we conducted. The same case was tried twice, before separate groups of mock jurors, with vastly different results: the average damage award was $190 million at the first trial but only $2 million at the second. The only difference between the trials, however, was that the deposition testimony of two insurance adjusters was presented on video at the first trial, but only read to the jurors at the second. The two adjusters came across very poorly in the video depositions due to their nonverbal behavior, and this factor was suspected to be the reason for the high verdict at the first trial. Therefore, the case was retried with transcripts of the two depositions substituted in place of the video. The second trial was conducted the same as the first in all other respects, and the mock juror groups at the two trials were equivalent in terms of demographic and attitudinal parameters. The only difference was that the jurors did not have an opportunity to observe the adjusters' nonverbal behavior at the second trial. This proved to be a $188 million difference.

Although the cost of a bad deposition may not be quite so substantial in the typical case, most depositions do have an impact on the value of a case. Generally, every bad deposition will have some effect in increasing a defendant's damages exposure. Even depositions that have only a relatively modest monetary impact when viewed in isolation add to the bottom-line of the defendant's damages exposure, and the cumulative effect of these depositions may run into tens of thousands of dollars or hundreds of thousands of dollars. As experienced by litigation managers—*e.g.*, in-house counsel—the net effect is often a persistent feeling of helplessness from being "nickel and dimed" to death by one substandard deposition after another, case after case, month after month. As just one example, consider this quote from a frustrated general counsel of a large southeastern health system:

> I am sick and tired of opposing attorneys using bad depositions against me during mediation and settlement discussions; I end up paying out more on that case than I should, which needs to stop. I hate surprises. I hate being told that a witness will do 'just fine' and then they go bomb the deposition. These 'bombs' end up costing an extraordinary amount of money.

Most in-house counsel expect their outside lawyers to be able to train witnesses adequately, but persuasive qualities of witnesses are a complex mixture of psychological variables predicated on nonverbal behavior—areas in which lawyers are simply not qualified to produce optimal results. Witness credibility is a *psychological* issue, and the entire case depends on it.

In the long run, retaining an experienced psychologist to assist in training witnesses will lead to lower litigation expenditures, not higher. The decision-maker must be willing to look past short-term costs and consider the entire picture.

The Ten Commandments

Commandments 1-3

Jurors want to be led to a comprehensive understanding as quickly as possible with a minimum of cognitive discomfort. While many "non-answers" result from a witness trying to be clever, more commonly they occur because the witness is thinking about potential responses when

Continued on page 22

Devil in the Details

Continued from page 20

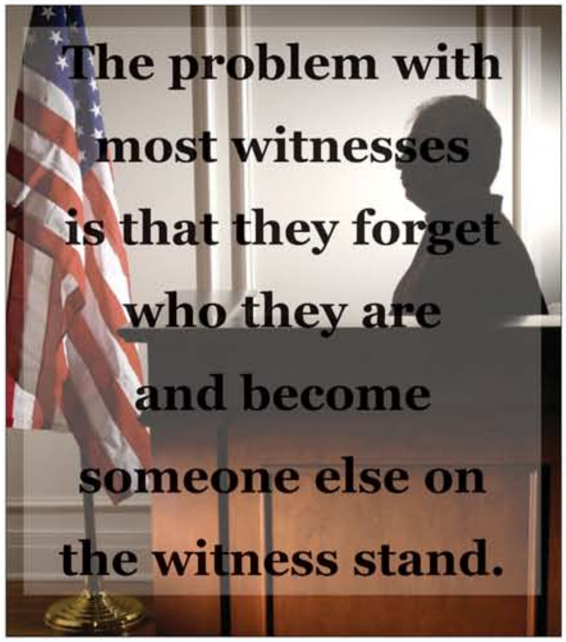
the question is being asked. In other words, witnesses inadvertently impede their own attention and concentration levels by trying to listen and think simultaneously. From a neurocognitive standpoint, the brain is forced to split the vital resources necessary to listen carefully and respond appropriately, which leads to poor listening skills and careless mistakes in responses. Therefore, these considerations lead to three commandments:

1. Thou shalt listen to the question, forsaking all other thoughts at this juncture.
2. Thou shalt answer only the question that has been asked and only after that question has been completed.
3. Thou shalt meet the jurors where *they* are and meet their psychological needs first (trust, likability, honesty, etc).

Commandments 4-6

The judge and the jury are aligned in the sense that both want the case finished in a timely manner. Therefore, the "no-nonsense" rule of directness in responses reigns supreme. At the same time, however, jurors do react as humans and like things that other people like. Therefore, tell witnesses to decide in advance that they *like* the jury and that they *care* that the jurors understand. Moreover, witnesses must understand that there is a double standard in jury psychology: attorneys are "allowed" to become histrionic, aggressive, and combative, but witnesses do not enjoy this luxury. Thus, the following commandments also come into play:

4. Thou shalt not get into arguments, become sarcastic, or show anger or frustration of any kind.
5. Thou shalt care about the jurors and care whether they understand.
6. Thou shalt be professional, confident, and friendly at all times, both verbally and nonverbally.



Commandments 7-8

While a comprehensive overview of effective nonverbal behavior (facial expressions, vocal tone, eye contact, posture, etc.) is beyond this article's scope, many of the most optimal nonverbal behaviors come into play naturally and effortlessly when the witness fully adopts the prior admonitions.

As one colleague has remarked, moreover, "the problem with most witnesses is that they forget who they are and become someone else on the witness stand." In response to the unnatural environment of litigation, many witnesses "morph into something else" by means of the unnatural responses that are a result of this unnatural environment.

Accordingly, a vital part of witness training is to ensure that the witness maintains his own innate characteristics that create affinity among others, making a special effort to preserve natural reactions that are charismatic, endearing, and positive. The following commandments therefore are applicable:

7. Thou shalt not memorize or rehearse your testimony.
8. Thou shalt testify naturally, only according to your best current recollection.

Commandments 9-10

To "cash the checks" written in the lawyer's opening, a witness must hold her own and be consistent and coherent. Establishment of a thematic structure that is invariant and reliable regardless of the pressures of hostile cross examination is essential to a solid impression of credibility. This "thematic structure" should consist of a set of lynchpin, cornerstone, or anchoring concepts that unify, integrate, and summarize a witness' essential position.

9. Thou shalt do thy homework.
10. Thou shalt know thine rights.

A witness' "rights" pertain to various entitlements or privileges—for example, the witness needs to learn how to protect his testimony from becoming twisted, distorted, mischaracterized, and even interrupted—as well as the requirement that the witness know what he is allowed to do in certain situations, such as refusing to answer a question without seeing a supporting document, if necessary. While examples are too numerous to list exhaustively here, the final commandments are, in many instances, the most critical of all.

Conclusions

Practice—and in particular, practice with videotape, along with the resolve to do it over and over until the results are right—represents the single most overlooked aspect of witness training as currently implemented by most trial teams. Far too often, this preparation method is disregarded due to the "trial by hurry" factor, concerns about the discoverability of videotape, or both. The most common reason for poor witness performance, however, is the assumption that "sitting down and talking" is sufficient, when in reality the skills that need to be taught require practice, with video feedback.

While awareness of the need for witness preparation is obviously not a new development, the continued problem of poor witness performance points to the need for an increased understanding of the flaws in "status quo" witness preparation procedures. Simple economic analyses of the detrimental impact of substandard witness performance on damages exposure demonstrates that witness training by experienced psychologists can be extremely cost effective.

Although using psychologists in witness training may increase short-term costs, the decision *not* to use such expertise frequently has *far more expensive long-term results*, once mediation, settlement, and jury awards have been taken into account. ❖

Editor's Note: *This article was edited to meet space constraints. To read the unedited version, visit the Members' Only area of the GDLA website then click on Newsletters.*

Dr. George Speckart is National Director of Consulting with Courtroom Sciences, Inc.—a GDLA Platinum Sponsor and full-service, national litigation consulting firm with offices in Dallas, Texas, and Chicago, Illinois. Dr. Speckart received his Ph.D. in Psychology from UCLA in 1984, with a specialization in personality measurement. He has been active in the jury consulting field since 1983, and has conducted over 800 mock trials and focus groups in pretrial research for numerous types of litigation. Dr. Speckart has worked with litigators in over 150 jury selections, beginning with Dalkon Shields cases in 1983, the Agent Orange litigation in 1984, and Exxon Valdez litigation in 1994.

Dr. Bill Kanasky is a Senior Litigation Consultant with Courtroom Sciences, Inc. Dr. Kanasky obtained his Ph.D. in Clinical Psychology from the University of Florida. He specializes in a full range of jury research services, including the design and implementation of mock trials and focus groups, venue attitude research, and post-trial interviewing. His systematic witness-training methodology is efficient and effective, as it is designed to meet each witness' unique needs, while concurrently teaching core principles of persuasive communication. Dr. Kanasky has published in the areas of motivation and jury psychology, and has conducted presentations before numerous state bar conventions, corporate counsel organizations, corporate legal departments, and major law firms.

Employment Case Law Update

By Charles M. Dalziel, Jr.
Brock Clay Calhoun & Rogers, Atlanta

WHISTLEBLOWER RETALIATION: Burden-shifting analysis applicable to federal Title VII retaliation claims should be used to determine whether summary judgment on state whistleblower retaliation claims is warranted.
***Forrester v. Georgia Dep't of Health & Human Services*, 308 Ga. App. 716 (2011).**

In this case, the Court of Appeals affirmed summary judgment against three terminated state employees on their whistleblower claims. The Court of Appeals determined that the appropriateness of summary judgment on the plaintiffs' state whistle-blower claims should be evaluated under the burden-shifting analysis for Title VII retaliation cases adopted by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-806 (1973), as modified by *St. Mary's Honorcenter v. Hicks*, 509 U.S. 502 (1993), and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Applying that analysis, the Court of Appeal affirmed summary judgment because the plaintiffs lacked sufficient evidence of a causal connection between the alleged protected disclosures and the adverse employment action. It was undisputed that the final termination decision was made by the Department of Family and Children Services ("DFCS") field operations director, who based her decision solely on a report from the Office of Investigative Services. Furthermore, the plaintiffs had no direct evidence of a causal connection between their protected disclosures and their terminations, and the Court of Appeals concluded that the plaintiffs' circumstantial evidence of a connection was too speculative to create a genuine issue of material fact.

ERISA: Supreme Court's decision in *Kennedy v. Plan Administrator*, 555 U.S. 285 (2009), does not bar contract action to enforce waiver of claim to benefits.
***Alcorn v. Appleton*, 308 Ga. App. 663 (2011).**

The executrix of Richard Alcorn's estate brought a breach-of-contract action against Alcorn's second wife, Bonnie Ann Appleton, because she collected the proceeds of Alcorn's 401(k) and life insurance plans even though she had waived her right to these proceeds in a settlement agreement with Alcorn that was incorporated into an order of separate maintenance. Under *Kennedy v. Plan Administrator*, 555 U.S. 285 (2009), the plan administrator had acted properly in distributing the proceeds to Appleton because she was the designated beneficiary of the life insurance plan and no beneficiary had been designated in the 401K plan. Nevertheless, the Court of Appeals determined that *Kennedy* did not preclude a breach-of-contract action to recover the proceeds. The court further noted that this conclusion was supported by decisions from other jurisdictions and that it was consistent with prior Georgia decisions. Therefore, the Court of Appeals reversed the trial court's entry of summary judgment for Appleton.

RESTRICTIVE COVENANTS: Appeal from order granting injunction is not mooted by employer's dismissal of claim for injunctive relief where employee has asserted counterclaim for wrongful restraint based on injunction.
***Cox v. Altus Healthcare & Hospice, Inc.*, 308 Ga. App. 28 (2011).**

During the former employee's appeal from an injunction enforcing restrictive covenants, the trial court allowed the former employer to amend its complaint to dismiss the claim for injunctive relief with prejudice. Nevertheless, the Court of Appeals determined that the appeal was not moot, as the former employee had asserted a counterclaim for wrongful restraint based on the injunction. On the merits, the Court of Appeals analyzed the restrictive covenants under the old standards (which applied due to the age of the case), and determined that the covenants failed because they lacked reasonable limitations.

COMMISSIONS: Where parties to employment contract agreed to payment of commissions but evidence conflicts as to formula to be used is calculating commissions, conflict does not render agreement unenforceable but instead creates jury issue.
***Dye v. Mechanical Enterprises, Inc.*, 308 Ga. App. 311 (2011).**

The plaintiff brought suit against his former employer to recover unpaid commissions. Although the evidence showed that the parties had intended for the plaintiff to be paid commissions, the trial court granted summary judgment to the former employer on the ground that the agreement was unenforceable because the letter setting forth the terms of employment lacked a formula to calculate the commissions. The Court of Appeals reversed, however, because there was evidence showing that the parties had reached agreement on the formula. The evidence conflicted as to what the agreed formula was, but the Court of Appeals ruled that this conflict should be resolved by the jury. ❖

Insurance Coverage Case Law Update

By Robert M. Darroch, SLC Chair
Goodman McGuffey Lindsey & Johnson, Atlanta

WAIVER AND ESTOPPEL: Party must be named insured or additional insured to have standing to raise waiver and estoppel against insurer.
***Flintlock Consrt. Servs. v. American Safety Risk Retention Group,* No. 1:09-CV-616-TWT**
2011 WL 1827977 (N.D. Ga. May 12, 2011)

American Safety Risk Retention Group, Inc. ("AS Risk"), issued a policy of insurance to Flintlock Construction Services, Inc. ("Flintlock Inc."). In March 2004, Well-Come Holding, LLC ("Well-Come"), retained Flintlock Construction Services, LLC ("Flintlock LLC"), as general contractor of a project in New York. Well-Come and Flintlock LLC entered into a construction contract that required Flintlock LLC to defend, indemnify, and hold harmless Well-Come and to insure itself and Well-Come. Flintlock LLC provided Well-Come with two certificates of insurance that listed American Safety Indemnity Co. ("AS Indemnity ") as the insurer.

In 2004, suit was filed against Flintlock LLC and Well-Come regarding the project. Well-Come demanded a defense from Flintlock LLC, which originally rejected the defense. Eventually, Flintlock LLC agreed to defend Well-Come, and AS Risk agreed to defend Flintlock LLC. Well-Come contended that AS Risk retained a defense for it, which AS Risk denied.

In 2008, AS Risk disclaimed coverage to Flintlock LLC, asserting that Flintlock Inc. was the only named insured under the policy. Flintlock LLC sued AS Risk and a related entity, seeking coverage. Well-Come filed a complaint in intervention against AS Risk, among others.

On cross-motions for summary judgment between AS Risk and Well-Come, Well-Come argued that it was an additional insured under the policies pursuant to the certificates of insurance it was issued. Well-Come also argued that, because AS Risk had defended Flintlock LLC and Well-Come in the underlying actions, AS Risk was estopped from arguing that Well-Come was not an additional insured.

The district court determined that Well-Come was not an additional insured, but found that a question of fact existed as to whether AS Risk had indeed assumed Well-Come's defense. Nevertheless, the court further concluded that AS Risk was entitled to summary judgment regardless of this question of fact. The court ruled that Well-Come lacked standing to argue waiver and estoppel against AS Risk because Well-Come was neither a named insured nor an additional insured under the AS Risk policy issued to Flintlock Inc.

LATE NOTICE: Questions of fact exist as to whether insured was reasonable under the circumstances in waiting for two years after slip-and-fall incident to give notice to its insurer.
Forshee v. Employers Mut. Ins. Co.
309 Ga. App. 621 (2011)

The Forshees owned a Chevron station insured by Employers Mutual Insurance Company. In November 2007, a woman fell while walking from her car to the entrance of the Chevron station. None of the station's employees saw the woman fall, but Mr. Forshee saw the woman lying on the ground after the incident. He helped her to her feet and then to her car. He then returned to the station to obtain a drink for her.

By the time Mr. Forshee returned to the parking lot, the woman was seated in her car. When he offered to call for medical assistance, the woman refused and stated that she was going home. The woman then left the station without giving Mr. Forshee her name or contact information. She may have indicated that her arm hurt, but did not give any indication of the severity of her injuries.

Two years later, the woman filed suit, claiming she had broken her arm when she fell at the Forshees' station. The Forshees immediately forwarded the lawsuit to their insurance agent, who in turn forwarded it to Employers Mutual. Employers Mutual defended the Forshees under a reservation of rights, and filed a declaratory judgment action in which it argued that the Forshees had failed to provide notice of the potential personal-injury claim "as soon as practicable," as required by the policy. The Forshees contended that they had first learned of the injury when they were served with a lawsuit.

After a bench trial, the trial court entered judgment in favor of Employers Mutual, holding that the Forshees' failure to provide notice until two years after the fall was unreasonable. The Forshees appealed, arguing that the trial court had applied the wrong legal standard in reaching this finding.

The Court of Appeals vacated the judgment and remanded the case, holding that the trial court had focused improperly on "how severe the injury turned out to be, rather than how severe it would have appeared to a reasonable person in the position of the Forshees." The court ruled that the reasonableness of the Forshees' failure to give earlier notice must be assessed from the perspective of a reasonable person in the Forshees' position at the time of the incident, rather than that of "an omniscient being having the benefit of full and accurate information that emerged only later and the benefit of hindsight." The Court of Appeals vacated the judgment and remanded the case for a factual determination under the proper standard.

DUTY TO DEFEND: Insurer has duty to defend where complaint's factual allegations arguably bring occurrence within policy's coverage, and any ambiguities or exclusions in the insurance contract will be strictly construed against the insurer.

Landmark American Ins. Co. v. Khan

307 Ga. App. 609 (2011)

Customer Jamil Khan was attacked after visiting Flashers Nightclub. As Khan left the club and walked to his car, two individuals exited the club behind him. As Khan got into his car, one of these individuals shot at him, hitting him six times in the chest and back.

Khan filed a premises-liability lawsuit against the club, alleging that Flashers had negligently failed to provide adequate security. Khan also made a claim for assault and battery, alleging that an employee or employees of Flashers either had ordered and directed the assault on him or had actually shot him. The complaint further alleged that Flashers "is responsible for the intentional or negligent acts and omissions of its employees or agents made within the course of its business under the established doctrine of respondeat superior."

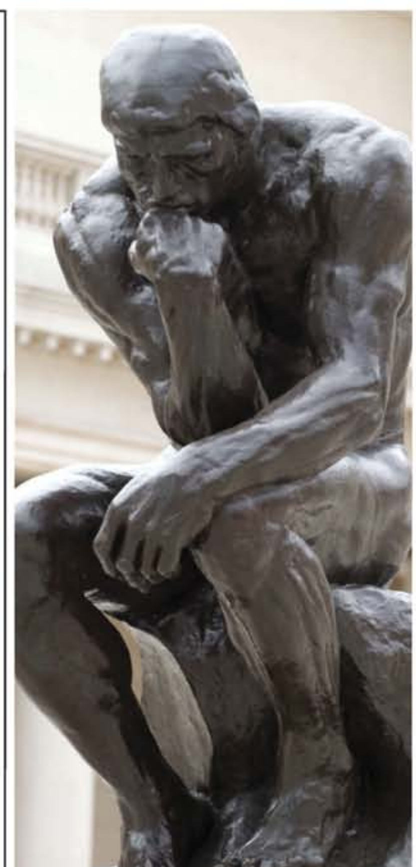
Flashers' insurer, Landmark American Insurance Company, refused to defend the lawsuit or to indemnify Flashers, asserting that Khan's claims were not covered under Flashers' insurance policy. Specifically, the policy covered an assault or battery only if committed by a Flashers employee *while the employee was trying to protect persons or property*. According to Landmark's own investigation, the person who shot Khan did not fall within that description.

Flashers did not retain counsel and did not file any responsive pleadings. The trial court entered a default judgment and awarded Khan over $2.3 million in damages. Flashers assigned all its causes of action against Landmark under the insurance policy to Khan, in exchange for Khan not executing the judgment against Flashers' assets. Khan then filed a lawsuit against Landmark, asserting claims for (1) breach of duty to defend, (2) bad faith refusal to defend or settle, and (3) breach of contract.

Landmark moved to dismiss the action, and Khan moved for partial summary judgment on Landmark's liability for breach of the duty to defend. The trial court denied Landmark's motion and granted Khan's, finding that Landmark had breached its duty to defend Flashers in the underlying lawsuit.

In affirming the trial court's decision on appeal, the Court of Appeals reviewed the rules of construction applicable in these cir-

Continued on page 46



Premises Liability Case Law Update

By Peter D. Muller
Goodman McGuffey Lindsey & Johnson, Savannah

STATUS OF INJURED PARTY: Prison visitor was invitee rather than licensee.
KNOWLEDGE OF HAZARD: Regardless of status, premises liability plaintiff must prove that proprietor had superior knowledge of hazard.
***Freeman v. Eichholz* 308 Ga. App. 18 (2011)**

While visiting her friend, an inmate at Wayne State Prison, Carolyn Freeman suffered neck, head, and back injuries when a chair collapsed underneath her in the prison's visitation area.

Freeman retained an attorney to represent her in a personal injury action against the State of Georgia and the Department of Corrections. The attorney failed to timely file the ante litem notice required by O.C.G.A. § 50-21-26, however, and Freeman's lawsuit was dismissed with prejudice.

Freeman then filed a legal malpractice suit against the attorney, but the trial court granted summary judgment against her. The court determined that Freeman was a licensee at the prison, and held that she had failed to prove that, but for the attorney's negligence, she would have won a judgment in her favor on the underlying personal injury claim.

The Court of Appeals disagreed with the trial court's conclusion that Freeman was a licensee rather than an invitee. An invitee is one who enters the premises for any lawful purpose "by express or implied invitation." O.C.G.A. § 51-3-1. Because the prison uses visitation as a tool to punish, reward, or rehabilitate its inmates, the Court of Appeals determined that the prison receives a benefit from the inmates' visitors, making Freeman an invitee rather than a licensee.

Nevertheless, the Court of Appeals ruled that summary judgment was proper because the record contained no evidence showing that the prison officials had actual or constructive knowledge of a defect to the chair.

Given this lack of evidence, Freeman could not have prevailed in the underlying case. Therefore, the Court of Appeals affirmed the trial court's grant of summary judgment, albeit on different grounds. ❖

Professional Liability Case Law Update

By George T. Major, Jr., *SLC Chair*
Oliver Maner, Savannah

Howard v. Sellers & Warren, P.C.
309 Ga. App. 302 (2011)
(physical precedent only)

In *Howard*, the Court of Appeals rejected a plaintiff's allegations of legal malpractice and negligence against an attorney who conducted a real estate closing, and affirmed the trial court's grant of summary judgment to the attorney and his firm.

A document entitled "Acknowledgment and Receipt of Settlement Documents," which had been signed by the plaintiff, stated his understanding that the "Closing Attorney was designated to close this transaction by and on behalf of the Lender," and further stated that "Closing Attorney accordingly represented the lender in this transaction" and "did not represent Purchaser/Borrower or any other party (other than Lender) in connection with this transaction."

Lastly, the Acknowledgment stated, "The undersigned finally acknowledge that they did not receive or rely upon any advice from Closing Attorney regarding this transaction. Despite the signed acknowledgment, plaintiff claimed that the defendant attorney had made certain representations to him regarding the accuracy and effect of the closing documents.

Particularly, plaintiff claimed that he had signed all of the documents in blank in order to catch a flight for vacation and that, based on the defendant attorney's representations, he had "read nothing." Plaintiff filed suit against the lawyer, the firm, and other parties involved in the closing when he was informed that he did not hold a first mortgage on the property and would have to pay the first-mortgage holder to preserve his interest.

The Court of Appeals rejected plaintiff's contention that the defendant attorney owed a legal duty that was not disclaimed in the written acknowledgment. The Court of Appeals further determined that plaintiff could not show that any act or omission on the part of the defendant attorney had caused his damages, as the defendant did not handle the portion of the closing that purportedly deprived plaintiff of the first mortgage.

Wilson v. McNeely
307 Ga. App. 876 (2011)

In *Wilson v. McNeely*, the Georgia Court of Appeals distinguished between experience and licensing for purposes of determining the admissibility of expert testimony in a legal malpractice action.

On the eve of trial, the *pro se* plaintiff in a legal malpractice case sought to proffer an expert to testify regarding the acceptable behavior of an attorney in performing a real estate closing. The expert, a licensed attorney who was also the plaintiff's brother, was excluded by the trial court because he had not been practicing law at the time of the allegedly negligent closing.

On appeal, the court noted that, although the proposed expert had been licensed and a member of the State Bar of Georgia at the time of the alleged malpractice, he had not been engaged in the practice of law as defined by O.C.G.A. § 15-19-50. Instead, the proffered expert had been working with the family business, and though he testified that he performed some legal functions for that business, the Court of Appeals pointed out that he lacked a municipal business license to work as an attorney and did not have attorney's malpractice insurance.

In excluding plaintiff's expert, the trial court had also drawn an analogy to the "area of specialty" provisions applicable to medical malpractice actions under O.C.G.A. § 24-9-67.1(c)(2). Presumably, the trial court did so to highlight that, even though the expert was an active member of the bar, he had no experience in drawing deeds and conveying properties. The Court of Appeals agreed with the plaintiff, however, that the express language of subsection (c)(2) limited its application to medical malpractice actions. Nevertheless, the Court of Appeals concluded that the trial court's "misguided 'analogy'" did not result in any reversible error. ❖

Tort & Civil Procedure Case Law Update

By Robert A. Luskin
Goodman McGuffey Lindsey & Johnson, Atlanta

SERVICE OF PROCESS: Trial court may reconcile conflicting evidence regarding whether defendant was properly served with process.
***Jones v. Lopez-Herrera*, 308 Ga. App. 81 (2011)**

In this personal-injury action, plaintiff Inyianie Jones' court-appointed process server allegedly served the summons and complaint on defendant J. Soledad Lopez-Herrara just a few days after the statute of limitations expired.

Lopez-Herrara moved to dismiss for lack of service. In an affidavit supporting this motion, Lopez-Herrara claimed that he had not been served and that he did not live at the address where he had allegedly been served.

In response, Jones submitted an affidavit from her process server, who averred that a Hispanic male had answered the door at the address in question and that the man had responded to the name Soledad. Lopez-Herrara replied with an affidavit from his landlord, showing that he lived at a different address. Jones then filed the affidavit of a private investigator, who attested to a skip trace he had performed on Lopez–Herrera's brother.

Based on the evidence presented by the parties, the trial court granted the motion to dismiss.

The Court of Appeals affirmed. Although a return of service is prima facie evidence of personal service, the defendant can overcome that evidence when he presents evidence that is "the strongest of which the nature of the case will admit."

The sufficiency of this evidence to overcome facts reflected in a return of service is a matter addressed to the discretion of the trial court, however, and the court is authorized to resolve factual disputes. The trial court's factual findings will be upheld on appeal if there is any evidence to support them.

The Court of Appeals held that Lopez-Herrara's affidavit was sufficient evidence to support the trial court's dismissal. Lopez-Herrara's evidence showed that he did not reside at the address where process was served and that he instead lived at a different address.

The evidence further showed that Lopez-Herrara's brother lived at the address where process had been served and that the brother advised Lopez-Herrara that he had received the complaint. Although there were conflicts in the evidence, the trial court was authorized to resolve them against plaintiff Jones.

EMPLOYER'S VICARIOUS LIABILITY: Employer is not vicariously liable for employee's accident during morning commute.
***Farzaneh v. Merit Constr. Co. Inc.*, 309 Ga. App. 637 (2011)**

While commuting to work in his personal vehicle, David Redic struck and severely injured a pedestrian crossing the street. The pedestrian, Peyman Farzaneh, filed suit against Redic's employer, Merit Construction Company, arguing that Merit was vicariously liable for its employee's negligence.

Merit moved for summary judgment, arguing that vicarious liability was inapplicable because Redic was not acting in the course and scope of his employment at the time of the collision. The trial court granted Merit's summary judgment motion, concluding that the uncontroverted evidence showed that Redic had been commuting to work in his personal vehicle at the time of the collision.

On appeal, Farzaneh argued that genuine issues of material fact existed as to whether Redic was acting in the course and scope of his employment when the accident occurred. Citing evidence that Merit had originally owned Redic's vehicle and had sold it to Redic at a price below fair market value and on favorable payment terms, Farzaneh argued that there was a rebuttable presumption pursuant to *Allen Kane's Major Dodge v. Barnes*, 243 Ga. 776 (1979), that Redic had been acting in the scope and course of his employment at the time of the accident.

The Court of Appeals rejected this argument, ruling that the pertinent issue under *Allen Kane's Major Dodge* is the vehicle's ownership status at the time of the accident. Because the uncontroverted evidence showed that Redic had paid for his vehicle in full and held its title free and clear at the time of the accident, the court determined that the *Allen Kane's Major Dodge* presumption did not apply. Therefore, the case fell within the longstanding rule that commuting to work is a purely personal matter.

Farzaneh also contended that this case involved "special circumstances" warranting the imposition of vicarious liability, citing evidence that Redic had an employee-issued "direct connect" cell phone with him, that he had at least one employee-issued tool in his vehicle, and that he may have received a "vehicle allowance" as part of his compensation.

The Court of Appeals rejected this argument, citing prior cases in which courts had considered similar facts and found them insufficient to support the imposition of vicarious liability. The court further noted that there was no evidence Redic had been on the phone at the time of the collision.

Farzaneh also pointed to a "Commercial Auto Fleet Safety Policy" executed by Redic that described operation of motor vehicles as a "necessary part" of Merit's business operations. The Policy

Continued on page 44

Welcome, Y'all Reception

PARTICIPATING SPONSOR

BAY Mediation & Arbitration Services

Scenes from the opening reception at the Falcon's Nest: 1. Platinum Sponsor BAY's Michaela Young and Past President Steve Kyle; 2. Judge Edgar Ennis and President Mel Haas; 3. Executive VP Lynn Roberson and her husband, Judge Henry Newkirk; 4. Dave Nelson with his wife, Jenifer, and kids, Elizabeth and Lanier; 5. Past President Jimmy Singer (right), Platinum Sponsor ESI's Roy Gottschalk and his wife, Betsy; 6. (l-r) John Miles, of Platinum Sponsor Miles Mediation, with Doug Wilde, Craig Avery, Steve Kyle and Bill Cowsert; 7. Jason Logan and his wife, Wendy; 8. Then-President Bubba Hughes and his wife, Debbie. 9. (l-r) Gold Sponsor Trial Exhibits' Mike Berens and his wife, Jaime; Platinum Sponsor SEA's Wade Wilson and his wife, Andrea; Jeff and Greer Ward; 10. Jamie (middle), Anne Allston and Adair Weston; 11. Frank Butler and his wife, Pat; 12. Chris Wolfe with his wife, Mary, and daughter, Maran.












Amelia Island Plantation, June 9-11

Scenes from the two-day educational program and sponsors' exhibit hall; Mel Haas served as CLE program chair: 1. Retired Georgia Chamber of Commerce President and CEO George Israel addressed tort reform; 2. Constangy Brooks & Smith's Jeff Thompson discussed covenants not to compete; 3. Tim Williams, SVP, General Counsel and Corporate Secretary of Winn-Dixie, provided a peek behind the in-house curtain; 4. Platinum Sponsor Exponent's Stacy Imler discussed biomechanics and accident causation; 5. Gold Sponsor Southern Medical Legal Consulting's Cindy Lifsey in the exhibit hall; 6. Past President Steve Kyle (left) and Wayne Melnick reviewed the Medicare Secondary Payer Act; 7. Platinum Sponsor DecisionQuest's Neil Subramanya (left) talks with Past President Bob Travis in the exhibit hall; 8. Platinum Sponsor Nelson Architectural Engineers' Belinda Rueffer talks with Jeff Ward in the exhibit hall; 9. Platinum Sponsor CED's Peter McCawley (right) talks with Steve Kyle in the exhibit hall; 10. Platinum Sponsor Courtroom Sciences Inc.'s Mary McKay talks with Dart Meadows in the exhibit hall; 11. Terrence Croft, of Platinum Sponsor Georgia Academy of Mediators & Arbitrators, addressed winning in mediation; 12. Alan Pershing, of Platinum Sponsor CaseMetrix, discussed how to use data to win cases when media headlines say otherwise; 13. Rep. Edward Lindsey, House Majority Whip and GDLA member, provided an overview of the 2011 legislative session (see article on page 16); 14. Macon Superior Court Judge Edgar Ennis offered advice for avoiding professionalism pitfalls.

Scenes from Friday's President's Reception, golf sponsored by Platinum Sponsor ESI and tennis sponsored by Gold Sponsor Esquire Solutions. 1. (l-r) Hall McKinley, Ann Hopkins, Resa and Craig Avery; 2. The winning golf foursome: Past President Steve Kyle, Gold Sponsor Trial Exhibits' Mike Berens, Platinum Sponsor Forcon's Bill VerEecke, and Jim Cook; 3. Tennis tournament players: (front) Resa, Ali and Sarah Avery; (middle) Peter Muller, Matt and Diane Moffett, Laura Melnick, Debbie Holliday, Esquire's Jackson Dodworth, Mary McKay, Lisa Muller, Lynn Leffler; (back) John Leffler, Wayne Melnick, and Esquire's Cliff Walker; 4. (l-r) President Mel Haas, Past President Bob Travis, Linda Haas, Kathy McClelland and Past President Walter McClelland; 5. Bobbie Foster, Platinum Sponsor Collision Specialists' Jodie and Jeff Kidd, Gold Sponsor Merrill's Doug Pristasch, and Past President Johnny Foster; 6. Evelyn Davis and her son, Fletcher, with Diane Moffett; 7. Wayne and Laura Melnick.

2011-2012 Officers and Board of Directors

President:
W. Melvin Haas, III, Constangy Brooks & Smith, Macon

Executive Vice President:
Lynn M. Roberson, Swift Currie McGhee & Hiers, Atlanta

Secretary-Treasurer:
Ted Freeman, Freeman Mathis & Gary, Atlanta

Immediate Past President:
Edward M. "Bubba" Hughes, Callaway Braun, Riddle & Hughes, Savannah

Past President 2007-2008:
N. Staten Bitting, Jr., Fulcher Hagler, Augusta

Past President 2008-2009:
James E. Singer, Bovis Kyle & Burch, Atlanta

Vice Presidents:
Kirby G. Mason, Hunter Maclean Exley & Dunn, Savannah
Hall F. McKinley, III, Drew Eckl & Farnham, Atlanta
Matthew G. Moffett, Gray Rust St. Amand Brieske & Moffett, Atlanta
Peter D. Muller, Goodman McGuffey Lindsey & Johnson, Savannah

Northern District:
Christopher E. Parker (2012), Miller & Martin, Atlanta
Brian T. Moore (2013), Drew, Eckl & Farnham, Atlanta
James D. "Dart" Meadows (2014), Balch & Bingham, Atlanta

Middle District
Robert R. "Ruaty" Gunn, II (2012), Martin Snow, Macon
David N. Nelson (2013), Chambless Higdon Richardson Katz & Griggs, Macon
Craig C. Avery (2014), Cowsert & Avery, Athens

Southern District
Jeffrey S Ward (2012), Gilbert, Harrell, Sumerford & Martin, Brunswick
James S.V. Weston (2013), Trotter Jones, Augusta
Sarah B. "Sally" Akins (2014), Ellis Painter Ratterree & Adams, Savannah

State at Large
Evelyn Fletcher Davis, Hawkins Parnell Thackston & Young, Atlanta
Troy Lance Greene, McNatt Greene & Peterson, Vidalia
Jo A. Jagor, Hall Booth Smith & Slover, Atlanta

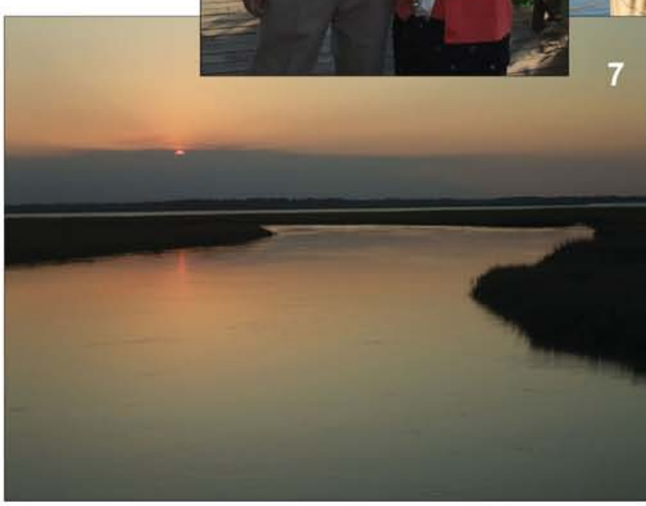
Amelia Island Plantation, June 9-11

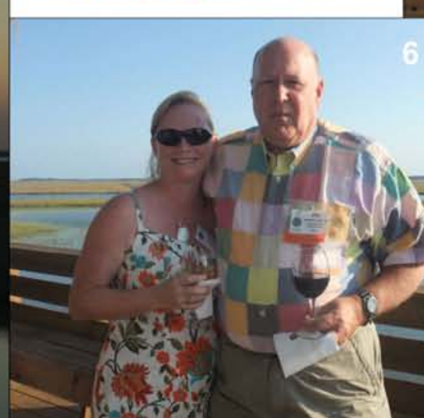
CLOSING DINNER
WALKER'S LANDING

PARTICIPATING SPONSOR

FORCON INTL.

Scenes from Saturday's closing dinner at Walker's Landing: President Mel Haas (left) and his wife, Linda, with Platinum Sponsor Forcon's Bill VerEecke and his wife, Susan; 2. Chris Parker and his wife, Robin, with Platinum Sponsor Exponent's Bette McKenzie; 3. Andy Holliday and his wife, Debbie; 4. Brett Miller and Stephanie Foley; 5. Past President Salty Forbes and his wife, Lee; 6. Jim Cook and his wife, Debbie; 7. A beautiful sunset over the marsh side of Amelia Island at Walker's Landing; 8. Rick Brown and his wife, Janet; 9. Brown Dennis with his wife, Kathryn, and their daughter, Wimberly; 10. Past President Staten Bitting (left) and his wife, Cindy (right), with visiting Alabama Defense Lawyers Association President-elect David Howard and his wife, Markie; 11. Brad Harmon with his wife, Heather, and their son, Will.





GDLA Committee Leadership 2011-2012

The GDLA announces the following committee leadership as appointed or reappointed by President Mel Haas, Constangy, Brooks & Smith, Macon.

In addition, Immediate Past President Bubba Hughes, Callaway Braun Riddle & Hughes, Savannah, will succeed Lynn Roberson, Swift Currie McGhee & Hiers, Atlanta, as DRI State Representative when her term expires in October.

- **Admissions**: Past President Warner Fox, Chair, Hawkins Parnell Thackston & Young, Atlanta
- **Amicus**: Jeff Ward, Co-chair, Gilbert Harrell Sumerford & Martin, Brunswick; and Rusty Gunn, Co-chair, Martin Snow, Macon
- **Deposition Boot Camp**: Jason Willcox, Chair, Moore Clarke DuVall & Rodgers, Albany
- **Education**: Wayne Melnick, Chair, Gray Rust St. Amand Moffett & Brieske, Atlanta; and Brett Miller, Vice-chair, Mabry & McClelland, Atlanta
- **Judicial Relations**: Past President Bob Travis, Chair, Bryan Cave, Atlanta
- ***Law Journal***: Kirby Mason, Editor, Hunter Maclean Exley & Dunn, Savannah
- **Meetings**: Past President Staten Bitting, Chair, Fulcher Hagler, Augusta
- **Membership**: Chris Parker, Chair, Miller & Martin, Atlanta; and Dart Meadows, Vice-chair, Balch & Bingham, Atlanta
- **Newsletter**: Evelyn Fletcher Davis, Editor, Hawkins Parnell Thackston & Young, Atlanta
- **Nominating Committee**: Past President Salty Forbes, Chair, Forbes Foster & Poole, Savannah
- **Sponsorships**: Peter Muller, Chair, Goodman McGuffey Lindsey & Johnson, Savannah
- **Substantive Law Committees**: Past President Johnny Foster, Chair, Forbes Foster & Poole, Savannah; and Brian Moore, Vice-chair, Drew Eckl & Farnham, Atlanta
- **Trial Academy**: Matt Moffett, Chair, Gray Rust St. Amand Moffett & Brieske, Atlanta; and Sally Akins, Vice-chair, Ellis Painter Ratterree & Adams, Savannah
- **Young Lawyers**: Brian Moore, Chair, Drew Eckl & Farnham, Atlanta
- **Website**: Dave Nelson, Chair, Chambless Higdon Richardson Katz & Griggs, Macon; and Lance Greene, Vice-chair, McNatt Greene & Peterson, Vidalia ❖

Support the GDLA Sponsors

The GDLA thanks its sponsors for partnering with the defense bar to help our members deliver quality services to their clients.

The GDLA encourages members to use these sponsors when the need arises. Should you have the opportunity to employ one or more, please let them know their sponsorship was a key factor; that helps them to measure their return on investment, which ultimately helps us to retain their valuable support.

All ads in this newsletter are from our sponsors; they are listed below alphabetically by level, and can also be found in the Members Only area of the GDLA website:

PLATINUM

- BAY Mediation & Arbitration Services LLC – www.bayatl.com
- CaseMetrix – www.case-metrix.com
- CED Investigative Technologies Inc. – www.cedtechnologies.com
- Collision Specialists, Inc. – www.collisionspecialistsinc.com
- Courtroom Sciences Inc. (CSI) – www.courtroomsciences.com
- Courtroom Visuals – www.courtroomvisuals.com
- DecisionQuest – www.decisionquest.com
- Engineering Systems Inc. – www.esi-website.com
- Exponent – www.exponent.com
- Forcon International Corp. – www.forcon.com
- Georgia Academy of Mediators & Arbitrators – www.georgiamediators.org
- Matson Driscoll & Damico LLP Forensic Accountants – www.mdd.net
- Miles Mediation & Arbitration Services LLC – www.milesmediation.com
- Nelson Architectural Engineers – www.nae-us.com
- SEA Limited – www.SEAlimited.com

GOLD

- Esquire Solutions – www.esquiresolutions.com
- Merrill Corp. – www.merrillcorp.com
- ProAssurance – www.galawic.com
- Southern Medical-Legal Consulting LLC – www.southernmlc.net
- Trial Exhibits Inc. – www.trialexhibitsinc.com

SILVER

- Norred & Associates Inc. – www.norred.com
- South Georgia ADR Service – www.southgeorgiaadr.com
- Tiffany Alley Court Reporters – www.tiffanyalley.com ❖

CLE: Premises Liability 360^0

Speakers included (l-r) Render Freeman, Charles Beans, Judge Pamela South, Wayne Melnick, Mel Mobley and Jimmy Scarbrough.

On April 27, 2011, GDLA members convened at Maggiano's Buckhead for an uncommon and entertaining CLE seminar, which offered a view from all sides of a recent premises liability/negligent security case that went to verdict in Gwinnett County—hence the title, "Premises Liability 360^0: Dissecting a Real Life Trial from Complaint to Verdict."

The seminar was presented by the GDLA Education Committee, chaired by Wayne Melnick, of Gray Rust St. Amand Moffett & Brieske in Atlanta, who also served as program chair.

Attendees heard all the attorneys involved—both plaintiff's and defendants' counsel—discuss the issues their clients faced and the strategies each employed to protect their clients' interests.

Plaintiff's counsel Render Freeman, of Anderson Tate & Carr in Duluth, first presented the tragic facts that found an office worker brutally beaten and robbed when she stayed late one weeknight to work.

The alleged culprit was a member of the office tower's cleaning crew. Jimmy Scarbrough, of Mabry & McClelland in Atlanta, defended the building owner; Mel Mobley, of Lokey Mobley & Doyle in Atlanta, defended the maintenance service company; Charles Beans, of Shivers & Associates in Alpharetta, defended the security company; and Mr. Melnick defended the building manager. All of the defense attorneys who presented are GDLA members.

The case went to trial before Judge Pamela D. South in Gwinnett County State Court. The judge delivered the luncheon keynote address, giving her view from the bench and discussing professionalism in a case such as this.

The GDLA Education Committee is considering offering another "360^{0}" CLE. So, if you participated in or know of a trial that went to verdict and might be a great case from which members can learn, please contact Wayne Melnick at wmelnick@grsmb.com. ❖

Legislative Update

Continued from page 16

IV. General Court Administration

HB 158: Changing Time (Again) for Judicial Elections

Several years ago, the legislature moved judicial elections to the November general election date due to concerns about insufficient voter participation in the summer primaries. Judicial candidates have complained, however, about problems caused by this switch, such as the difficulty in getting their message heard above the noise surrounding the other political races. Therefore, HB 158 will return non-partisan judicial races to the summer primary schedule. Qualifying will take place at the same time as other political office qualifying in April.

SB 30: Municipal Court Judges as Attorneys

SB 30 will require municipal court judges to be attorneys licensed in the State of Georgia. It includes a grandfather clause for existing judges who are not attorneys.

V. Miscellaneous

HB 343: Good Faith Immunity for Mental Health Facilities in Following State-Mandated Admission and Discharge Provisions

Under existing Georgia law, a physician, psychologist, peace officer, attorney, health official, or hospital official enjoys good-faith immunity from civil or criminal liability when acting in compliance with admission and discharge provisions under Chapter 4, Section 37 of the Georgia Code. The Georgia Court of Appeals refused to extend this immunity, however, to the hospital itself in the case of *Krachman v. Ridgeview Institute*, A09A1108 (December 1, 2009). HB 343 closes this loophole by extending good-faith immunity to hospitals.

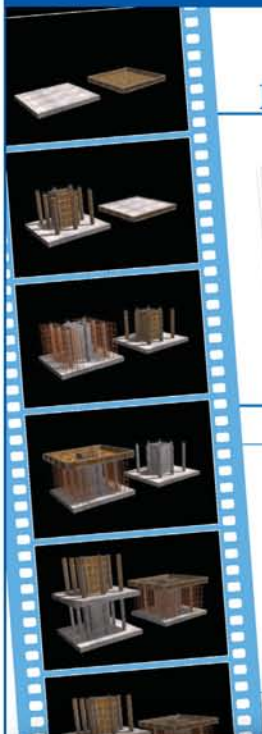
SB 88: Child Care Restraint Seats

SB 88 increases the age requirements for use of child restraint systems from six years old to eight. There continues to be exceptions to this requirement if the child is over 4' 9" or more than 40 pounds. ❖

Rep. Edward Lindsey (R-Atlanta) is the House Majority Whip. He is a GDLA member and partner with Goodman McGuffey Lindsey & Johnson.

COURTROOM Visuals

In the courtroom, seeing is believing.



Let us take you from this...

To this...

Based on three very basic drawings from the expert, Courtroom Visuals created a custom 3-D animation illustrating the construction process.

To the courtroom.

Actual trial setup including individual monitors, projector and screen, and document presenter.

Since 1991, Courtroom Visuals has successfully responded to the litigation & demonstrative support needs of Atlanta's most prominent law firms. Providing an excellent product, personalized customer service and fair pricing, Courtroom Visuals offers the expertise that is only gained from having worked on over five thousand cases and 60 years combined experience in graphics, animation and multi-media services.

Computer Graphics

- Designing Compelling Graphics
- Time Lines and Custom Trial Exhibits
- Trial Exhibit Production

Video

- Editing & Copying
- Evidence and Deposition Video
- Day-in-the-Life and Settlement Videos
- DVT (Digital Video Transcript)

Photography

- Custom Photo Enlargements
- Evidence Photography
- Computer Enhanced Photos

Multi-Media & Trial Technologies

- Custom Multi-Media Presentations
- High Volume Document Scanning
- Digital Courtroom/ Equipment Rental
- Full Trial Technology Assistance

Animation/Models

- Custom 2D & 3D Animations
- Custom Hand Made Scale Models

Platinum Sponsor 2011 Courtroom Visuals

Expertise Value Commitment 20th Anniversary 1991-2011

5603 Peachtree Rd. • Atlanta, GA 30341 • Tel: 770.458.5656 • Fax: 770.458.5655 • courtroomvisuals.com

CLE: Skits & Suds Uncorks Ethics and Professionalism Issues

On June 16, 2011, the GDLA Education Committee presented "Skits & Suds: Ethics & Professionalism Uncorked" at Gordon Biersch Brewery in Midtown Atlanta.

The seminar reprised a favorite program created 10 years ago by Past President George Duncan, of Duncan & Adair in Atlanta, and Jo Jagor, of Hall Booth Smith & Slover in Atlanta.

Almost 60 lawyers gathered to watch GDLA members perform skits depicting everyday ethical and professionalism dilemmas. While the seminar is especially geared toward younger practitioners, plenty of seasoned lawyers were in the audience to recount lessons learned in the trenches.

GDLA Education Committee Chair Wayne Melnick, of Gray Rust St. Amand Moffett & Brieske in Atlanta, moderated the seminar.

The GDLA was honored to have Court of Appeals Chief Judge John Ellington (photo 2) acting as the judge during the various hypotheticals. His appellate court colleague, Judge Herbert Phipps (photo 3), was also on hand to share insights following each scene.

In addition, GSU College of Law Professor Roy Sobelson, professional responsibility guru and Associate Dean for Academic Affairs, portrayed a somewhat obstinate plaintiff's attorney and offered sage advice after each skit. Professor Sobelson is pictured in photo 1 with GDLA Past President Steve Kyle (left).

The actors and GDLA mem-

Continued on next page

bers included Brett Miller, of Atlanta's Mabry & McClelland, who served as program chair and is the Education Committee's vice-chair; Erica Morton, of Hicks Casey & Foster in Marietta; Andy Treese, of Drew Eckl & Farnham in Atlanta; and Molly O'Connor and Jimmy Scarbrough, also with Mabry & McClelland. Ms. Morton, Mr. Treese and Ms. O'Connor are GDLA Education Committee members.

Photo highlights from Skits & Suds: 4. (l-r) Erica Morton, Professor Sobelson and Molly O'Connor act out a skit. 5. (l-r) Brett Miller, Jimmy Scarbrough and Wayne Melnick. 6. GDLA Past Presidents Walter McClelland (left) and George Duncan (right) with Bill Casey. 7. (l-r) David Harris, Michael Stacy and Robyn Roth. 8. Kristen Cawley, Cheryl Staugaitis, Kevin Patrick and Michael Melonakos. 9. (l-r) Colin Moriarty and Michael Broun. 10. (l-r) Andy Treese and Erica Morton. 11. (l-r) Nicole Leet and Jeff Wasick. ❖

CLE: Current Issues in Workers' Compensation

On July 15, 2011, the GDLA Education Committee hosted "Current Issues in Workers' Compensation" at State Bar headquarters. Education Committee member Andy Treese, of Drew Eckl & Farnham in Atlanta, served as program chair and Matt Walker, also of Drew Eckl & Farnham, identified and recruited the speakers.

GDLA member Julie John (photo 2), of Drew Eckl & Farnham, kicked off the seminar with a discussion of surveillance — the increasingly popular use of private investigators in an attempt to lessen liability in workers' compensation cases.

Next, Mark Goodman, of Swift Currie McGhee & Hiers in Atlanta, gave a presentation on the "ins and outs" of light duty assignments, how to handle them on a day to day basis, and the possible implications of firing a claimant who is on light duty.

GDLA Board member Lance Greene, of McNatt Greene & Peterson in Vidalia, and Ms. John led a panel discussion on the current state of the Medicare Secondary Payer Act and the handling of Medicare Set Asides.

The GDLA was honored to have Judge Richard Thompson (photo 1), former GDLA member and chairman of the State Board of Workers' Compensation, address the group during lunch regarding professionalism. He also provided attendees with written tips for preparing a record for appeal and for appellate practice at the Board.

The viability of Board Rule 205 is one of the hottest issues in workers' compensation law and was just argued to the Georgia Supreme Court in the case of *Mulligan* v. *Selective Insurance.*

Following Judge Thompson's luncheon address, attendees were fortunate to hear from the lawyers who argued both sides of *Mulligan*: GDLA member Jim Brieske (photo 3 right), of Gray Rust St. Amand Moffett & Brieske in Atlanta, offered the employer's perspective, while Thomas Herman, of Westmoreland Patterson Moseley & Hinson in Macon (photo 3 left), presented the claimant's point of view. The speakers discussed the history of the case, how each side handled its respective arguments, and they debated the viability of Board Rule 205 post-*Mulligan*.

The court had not yet decided *Mulligan* at press time; look for an article by Mr. Brieske in this newsletter once it is decided. ❖

Continued from page 30

specified rules that applied not only to operation of company vehicles but also to operation of personal vehicles while on "company business."

The Court of Appeals was not persuaded by this evidence, however, finding nothing in the Policy to suggest that commuting to work constituted use of a personal vehicle on "company business."

As another alleged "special circumstance," Farzaneh pointed to evidence showing that Merit's employees, including Redic, did not report to a central office at the beginning of each work day but instead commuted directly to their assigned worksites. The Court of Appeals rejected this argument, citing a prior case in which it had found such facts to be insufficient to support vicarious liability for an accident during a morning commute.

Finally, the court also rejected Farzaneh's argument that Redic's morning commute constituted a "special mission" on Merit's behalf. Having found all of Farzaneh's arguments unavailing, the Court of Appeals affirmed the trial court's grant of summary judgment to Merit.

MISTRIAL: Where subject of insurance had already been raised in trial court's questioning of potential jurors, court did not abuse its discretion in refusing to grant mistrial following second mention of liability insurance by plaintiffs' counsel during voir dire.
Park v. Nichols **307 Ga. App. 841 (2011)**

Seung Park, who was drunk, ran a red light and struck Stacey Camacho's vehicle, resulting in Camacho's death. Following a jury award of $5.83 million to Camacho's estate and surviving spouse, Park appealed.

Park contended that the trial court had erred by allowing the matter of liability insurance to be raised for a second time during voir dire. Initially, the potential jurors were to be prequalified as to whether they had any relationship with Park's auto liability insurer. Because it was unclear whether the potential jurors had actually been prequalified, however, the judge asked the venire about the subject:

> Are any of you an officer—director, officer, agent, employee, shareholder or policy holder of Nationwide Mutual Fire Insurance Company? Are any of you related by blood or marriage, third cousin or closer, to any director, officer, agent, employee or share holder of Nationwide Mutual Fire Insurance Company?

Later in voir dire, plaintiffs' counsel mentioned Nationwide Mutual Insurance Company in preface to a question, but was interrupted by the trial court. Park moved for a mistrial based upon the reinjection of insurance into the case. The trial court denied this motion, but instructed plaintiffs' counsel not to discuss insurance again.

The Court of Appeals ruled that the trial court had not abused its discretion in refusing to grant a mistrial. In Georgia, a mistrial should be granted "only where the testimony is so obviously prejudicial in its nature that its adverse effect cannot be eradicated from the minds of the jury or its consequences avoided by proper cautionary instructions from the court."

In this case, the subject of liability insurance had previously been mentioned to the potential jurors, and thus the trial court acted within its discretion when it ruled that the second mention of insurance did not require a mistrial.

CHOICE OF LAW: Public policy exception to *lex loci delicti* rule precluded application of Florida Wrongful Death Act.
Carroll Fulmer Logistics Corp. v. Hines
309 Ga. App. 695 (2011)

Travis Lamar Hardaway, a Georgia resident, was killed when his tractor-trailer collided with another tractor-trailer, also driven by a Georgia resident, near Jacksonville, Florida. Hardaway's estate and his minor son brought suit in Georgia, asserting survival and wrongful death claims.

The plaintiffs sought to apply Georgia substantive law, including Georgia's Wrongful Death Act (O.C.G.A. § 51-4-1 *et seq.*). The defendants contended that Florida substantive law, including Florida's Wrongful Death Act (Fla. Stat. § 768.16 *et seq.*), should instead apply. On cross-motions for summary judgment on the choice-of-law issue, the trial court ruled that Georgia law governed the action.

The Court of Appeal affirmed, ruling that application of Florida's Wrongful Death Act would contravene Georgia public policy. In tort cases involving conflict of laws, Georgia generally adheres to the rule of *lex loci delicti* ("place of the wrong"), which requires application of the substantive law of the forum where the tort occurred.

As the alleged tort occurred in Florida, the rule of *lex loci deliciti* would require application of Florida's substantive law. Georgia courts recognize an exception to the *lex loci delicti* rule, however, where application of the other forum's law would contravene Georgia public policy.

Georgia's Wrongful Death Act provides that designated persons have the right to recover "the full value of the life of the decedent without deducting for any of the necessary or personal expenses if the decedent had he lived." O.C.G.A. §§ 51-4-1, 51-4-2(a). Additionally, Georgia's survival statute, O.C.G.A. § 9-2-41, provides that the decedent's personal representative has the right to recover separate damages for the decedent's pre-death physical and mental pain and suffering.

In contrast, Florida's Wrongful Death Act would allow Hardaway's son to recover for the losses he incurred as a result of his father's death, including the son's pain and suffering, but would bar any recovery for Hardaway's own pre-death pain and suffering.

The Florida act did not authorize damages for a decedent's pre-death pain and suffering, and such damages could not be recovered on a survival personal injury claim because the Florida act precluded survival claims.

The Court of Appeals held that Georgia law applied pursuant to the public policy exception to the *lex loci delicti* rule. Florida's Wrongful Death Act measures damages from the perspective of the survivors' losses, while Georgia's Wrongful Death Act does so from the perspective of the lost value of the decedent's life.

Moreover, application of Florida law would preclude recovery for the decedent's pre-death physical and mental pain and suffering, whereas Georgia law allowed recovery of these damages in a survival action.

As such, application of Florida law in this instance would contravene Georgia public policy, and the Court of Appeals therefore held that Georgia law supplanted Florida law pursuant to the public policy exception to the *lex loci delicti* rule. ❖

OSHA

Continued from page 18

[1] Chemical Safety Board Investigation Report: Combustible Dust Hazard Study, 2006.
[2] OSHA Directive CPL 03-00-008 Combustible Dust National Emphasis Program, effective 3/11/08.
[3] NFPA 654-2006 3.3.4.
[4] Appendix D of OSHA CPL 03-00-008 lists SIC and NAICS codes of industries that are likely to process or handle combustible dusts.
[5] For example, see NFPA 654 for general dust explosion prevention, NFPA 484 for metal dusts, and NFPA 68, 69, 70, and 499 for explosion venting and prevention systems and electrical safety.
[6] See, for example, CCPS: Guidelines for Safe Handling of Powders and Bulk Solids (2005); Rolf Eckhoff, Dust Explosions in the Process Industries, 3rd Ed (2003). ❖

Engineering Systems Inc. is a Platinum Sponsor of the GDLA.

cumstances. An insurer's duty to defend is determined by comparing the allegations of the complaint with the provisions of the policy. Any ambiguities in an insurance contract are strictly construed against the insurer, as is any exclusion from coverage. If the facts as alleged in the complaint even arguably bring the occurrence within the policy's coverage, the insurer has a duty to defend the action.

Based on these rules of construction, the Court of Appeals determined that the complaint's allegations were sufficient to assert a claim against Flashers that, at least arguably, would have been covered by the insurance policy's provision that afforded coverage for an assault and/or battery committed by a Flashers employee to protect persons and/or property.

The Court of Appeals also faulted Landmark for its decision to simply refuse to provide a defense rather than to seek clarification of its duty to defend. Landmark could have defended the case under a reservation of rights, requested a stay of the underlying case, and then filed a declaratory judgment action to determine its obligation to provide a defense. The Court of Appeals concluded that "[i]t is Landmark's failure to exercise this reasonable option, not the trial court's ruling in this case, that has placed Landmark in its present position."

UNINSURED MOTORIST COVERAGE: Renewal policy carries same uninsured motorist coverage as prior policy if insured does not elect different coverage, even if there is a lapse in coverage prior to the renewal.
***Infinity Gen. Ins. Co. v. Litton* 308 Ga. App. 497 (2011)**

Jason Litton brought an action to recover for personal injuries he had sustained in a November 2007 automobile accident, alleging that he had been working for his employer, JM Brick and Stone, at the time of the wreck. Infinity General Insurance Company, the commercial vehicle insurance carrier for Jim Mendenhall d/b/a JM Brick and Stone ("Mendenhall"), answered the complaint in its own name and thus became a party to the action. Following a jury trial, the trial court entered a judgment that Mendenhall's insurance policy provided $1,000,000 per person in uninsured motorist (UM) coverage. Infinity appealed, arguing that the policy provided only $50,000 per person in UM coverage.

The key issue on appeal involved a 2006 lapse in Mendenhall's insurance coverage. Mendenhall's 2005 commercial vehicle insurance policy, which provided $1,000,000 per person in personal liability coverage and $50,000 per person in UM coverage, expired on July 5, 2006. Infinity had sent a renewal notice instructing Mendenhall to make payment by July 5, but it did not receive Mendenhall's payment until July 18. Infinity then issued Mendenhall a policy with a declarations page stating that the policy was a "renewal with lapse." The declarations page further stated that the policy had been "RENEWED WITH A LAPSE IN COVERAGE." The declarations page also stated that the policy's effective date was July 17, 2006, and it specified the same coverage levels as the 2005 policy, including the $50,000 per person in UM coverage. The policy was timely renewed in 2007, with the same coverage levels set forth on the declarations page.

Litton argued that, due to the coverage lapse, the 2006 policy was a new contract and that, as such, the default UM coverage amount provided by law applied unless Mendenhall affirmatively elected a different amount. Under O.C.G.A. § 33-7-11(a)(1), the default amount of UM coverage would be equal to the policy's level of liability coverage, *i.e.*, $1,000,000. Because Mendenhall had not affirmatively elected a different level of coverage in the 2006 policy or the 2007 renewal, Litton contended that the default UM coverage amount of $1,000,000 was in effect at the time of his November 2007 accident.

Infinity argued the 2006 policy was a renewal of the 2005 policy—rather than a new contract—and that, pursuant to O.C.G.A. § 33-7-11(a)(3), Mendenhall's election of $50,000 in UM coverage continued in effect in the 2006 policy without the need of an additional affirmative election. Because the 2007 policy was likewise a renewal, the $50,000 UM limit also continued in effect in that policy without the need of an additional affirmative election.

The Court of Appeals agreed with Infinity and reversed the trial court. Citing *Progressive Preferred Ins. Co. v. Brown*, 261 Ga. 837, 839(2) (1992), the Court of Appeal ruled that a lapse in coverage between the expiration of the first policy and the effective date of the superseding policy does not preclude the superseding policy from being a renewal. Because the unambiguous terms of the 2006 policy showed that the parties intended it to be a renewal policy, moreover, the court determined that it was indeed a renewal rather than a new contract. Therefore, Mendenhall's election of $50,000 in UM coverage continued in effect in both the 2006 policy and the 2007 policy, without the need of an additional affirmative election. As a consequence, Infinity was entitled to judgment as a matter of law that Mendenhall's policy provided only $50,000 in UM coverage. ❖