Rebutting the Damages Driven Life Care Plan

HIPAA Regulations and the Standard of Care in Medical Privacy Violations

U.S Supreme Court Decision Impacts Service of Process Upon Foreign Manufacturers

GEORGIA DEFENSE LAWYER

A Magazine for the Civil Defense Trial Bar

Volume XIV, Issue II
Fall 2017

Celebrating 50 Years!

The 2017-2018 officers at The Breakers during the 50th GDLA Annual Meeting: President-Elect Hall McKinley, Secretary Jeff Ward, President Sally Akins and Treasurer Dave Nelson..

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INSIDE

GEORGIA DEFENSE LAWYER

50TH GDLA ANNUAL MEETING
38

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COLUMNS

AMICUS BRIEFS

GATE CITY/ GABWA JUDICIAL RECEPTION

Promoting Diversity

36

FEATURES

SPONSOR ARTICLES

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HAPPENINGS


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GEORGIA DEFENSE LAWYER
Volume XIII, Issue IV

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President's Message

It is with a humble heart and great excitement that I begin my service as GDLA president. Thank you for having confidence in me and entrusting the leadership of this wonderful organization to me. I pledge that I will do my best.

My election as GDLA president was an honor, but I truly came to understand the magnitude and the legacy I've inherited while preparing for the 50th Annual Meeting at The Breakers this past June. It's the incoming president's job to plan the upcoming annual meeting (of course, most of the hard work is done by our dynamic and hard-working Executive Director, Jennifer Davis), but this year's was significantly more important because of our Golden Anniversary.

To mark this milestone, Past President—and resident GDLA historian—Salty Forbes agreed to tackle penning our history. As part of that effort, we sent questionnaires to the living past presidents to help build our historical record; we then included their replies in a special section at the end of what became a magazine. You can find it online in our website under "About Us."

It was during that process—reading Salty's history and the remembrances of so many of our past leaders—that really impressed upon me the extraordinary value of membership in this great association, and the immense duty I have to carry on the tradition of excellence.

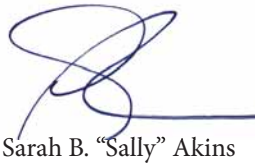
This role is particularly meaningful for me, too, as I'm following in the footsteps of my law partner, mentor and dear friend, Paul Painter, Jr., who served as GDLA President from 1986-1987. We lost Paul this year (you can read a tribute to him on page 12), but not before he completed his questionnaire for our history. That's just the kind of person Paul was, leaving no task undone. His closing thought says everything to me about this association that I have grown to treasure on so many levels: "GDLA has had 50 wonderful years thanks to an impressive membership of kind and highly professional lawyers and their supportive spouses." Paul summed it up—GDLA is successful because it's comprised of the best and brightest lawyers who support each other at work and enjoy each other at play. As my law partner and close friend, 2010-2011 President Bubba Hughes, said in his remembrance, "I have made many great friends through GDLA. I have learned a great deal and worked with many fine lawyers as a result."

My central goal as your 50th president is to ensure that each of us knows the many benefits that GDLA membership has to offer, from our e-blast system to the Verdicts Database to our judicial receptions and more. After all, that's what GDLA is here for—to help you do the best job possible for your clients, and to help us all have a little fun along the way. I encourage you, among other things, to show up to events and answer the call to submit articles to this award-winning magazine and to our *Law Journal*. Or contribute your wins (and losses) to our Verdicts Database. Or peruse the topics in our Current Legal Trends Database to see what you can add under these areas: Daubert and expert qualifications, discovery of surveillance, joint and several liability, medical funding companies, medical expenses, motions in limine, qualified protective orders, reptile issues, and social media.

I've often heard it said that you don't have time to get involved. But with GDLA, you can be involved by simply replying to a blast e-mail. You can do as much or as little as you want to ensure GDLA is an invaluable asset to everyone's practice.

We're all in this together, so let's make the civil defense bar as strong as we can so we will continue to positively impact the justice system for the next 50 years.

For the defense,



Sarah B. "Sally" Akins
Ellis Painter Ratterree & Adams
Savannah

Member News & Case Wins

MEMBER NEWS

During the 50th GDLA Annual Meeting, the Association's Bylaws were amended to increase the number of at-large members on the **GDLA Board of Directors** from three to as many as six. The newly-elected at-large directors are **Beth Boone** of **Hall Booth Smith** in Brunswick, **Daniel C. Hoffman** of **Young Thagard Hoffman Smith & Lawrence** in Valdosta, **Garret W. Meader** of **Drew Eckl & Farnham** in Brunswick, and **Joseph D. Stephens** of **Cowsert Heath** in Athens. See page 46 for a complete list of the 2017-2018 officers and Board of Directors.

Hall F. McKinley III, GDLA President-Elect, has been appointed to a two-year term as chair of the continuing legal education board of the American Bar Association's Tort Trial and Insurance Practice Section (**ABA TIPS**), and will also serve on its Finance Committee. He is a partner in **Drew Eckl & Farnham's** Atlanta office.

Darrell C. Sutton was sworn in as Treasurer of the **State Bar of Georgia** during its Annual Meeting in Jekyll Island, Ga., in June. He is the founder of **Sutton Law Group** in Marietta.

Nicole C. Leet was sworn in as President of the **State Bar of Georgia Young Lawyers Division** (YLD) during its Annual Meeting in Jekyll Island, Ga., in June. She is a partner with **Gray Rust St. Amand Moffett & Brieske** in Atlanta. S

GDLA Board member and **Freeman Mathis & Gary** partner **Wayne S. Melnick** was appointed the co-lead chairperson of the national Municipal Law Committee for the **Claims and Litigation Management Association (CLM)** at its 2017 Annual Meeting. CLM has more than 35,000 members in the claims resolution and litigation management industries.

Cowsert Heath in Athens announced the firm has changed its name from Cowsert & Avery. Name partners **Sen. William S. Cowsert** and **M. Steven Heath** confirmed the firm will continue its focus in the areas of insurance defense and civil litigation. The firm also welcomed two new associates, **Joseph D. Stephens** and **David F. Ellison**. Mr. Stephens was recently elected to the GDLA Board of Directors. The firm's physical address and telephone numbers remain the same, but all e-mail addresses now end with @cowserthealth.com.

David F. Root, a partner in **Carlock Copeland Stair's** Atlanta office, was inducted as a fellow of the **American College of Trial Lawyers (ACTL)** during its 2017 Annual Meeting in Montreal, Quebec. Founded in 1950, the college is composed of distinguished trial lawyers from the U.S. and Canada. Fellowship is extended by invitation only to those with 15 years' minimum experience and diverse backgrounds who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality.

Marvis L. Jenkins and **Jay O'Brien** have joined **Carlock Copeland & Stair** as of counsel in the firm's Atlanta office. Mr. Jenkins has represented a wide variety of clients in the transportation industry including commercial motor vehicle companies and motor carriers, specialty haulers, bus lines and motor coaches, automobile dealerships, emergency and non-emergency transportation providers, and their insurers. He is admitted to practice in both Georgia and Alabama. Mr. O'Brien's litigation experience includes matters involving premises liability, toxic torts, aviation, trucking, products liability, pharmaceuticals, construction, and insurance coverage disputes. He regularly defends clients in cases involving serious injuries, wrongful death, and property damage. He is admitted to practice in both Georgia and Florida.

Waldon Adelman Castilla Hiestand & Prout announced that **Brian F. Williams** has been named a partner. He focuses his practice on insurance defense and premises liability. Mr. Williams resides in the firm's Atlanta office.

Charles R. Beans has joined **McLaughlin & Loring** in Alpharetta. The firm is staff counsel for Chubb Insurance Company in Georgia. He will continue defending insureds in tort litigation, drawing from his experience handling complex cases for several firms and companies in Atlanta.

Weathington McGrew announced that two partners were listed in *The Best Lawyers in America*® 2018. They are partners **Paul E. Weathington** and **W. Dan McGrew**. Each was recognized under the category of personal injury litigation—defendants.

Freeman Mathis & Gary in Atlanta announced that **Jan Sigman**, formerly a partner at **Dennis Corry Smith & Dixon,** has joined the firm as a partner. She will concentrate in construction and business liability litigation.

GDLA Executive Director **Jennifer M. Davis** was reappointed by the Supreme Court of Georgia to a three-year term as a layperson on the **Investigative Panel of the State Disciplinary Board**, which investigates grievances against lawyers.

CASE WINS

Swift Currie McGhee & Hiers partner and GDLA Vice President **Pamela Lee** recently had the Court of Appeals of Georgia uphold a grant of summary judgment in a food poisoning case. In a 5-4 decision, the Court of Appeals affirmed the ruling by the lower court finding that the plaintiff could not meet

their burden of proof in a case involving alleged food poisoning at a wedding rehearsal dinner. Properly citing the correct burden of proof in such cases, the Court of Appeals found that the plaintiff could not rule out all other reasonable theories as to the cause of the alleged sickness of the plaintiffs. These theories included food consumed at the wedding the following day, spread of infection by a bartender at the rehearsal dinner, consumption of food at the dinner not provided by the defendant, and food consumed at a fast food restaurant. The plaintiff/appellant has applied to the Supreme Court for a writ of certiorari, which is currently under consideration. The case is *Patterson v. Kevon*, Court of Appeals of Georgia, Case No. A17A0399.

Nik Makarenko of **Groth & Makarenko** in Suwanee tried an automobile accident in July 2017 in front of a Gwinnett County jury. The jury deliberated five and one-half hours over two days before returning a verdict for the plaintiff in the amount of $30,750. Liability for the accident was admitted and the case went forward on proximate cause and damages. The plaintiff was claiming past medical expenses of $243,000 and she underwent surgery to her neck and back from Dr. James Chappius after treating with Dr. Shelvin Pollydore and APEX Healthcare. Plaintiff requested $2.4 to $3.8 million from the jury. Defendant did an offer of settlement in the amount of $150,000 that was rejected by the plaintiff. Dr. Chappius and Dr. Pollydore testified via video, as did Dr. Barry Jeffries on the defense side, and the plaintiff presented seven before and after witnesses during her case in chief, including family members, coworkers and church members.

GDLA Vice President **William T. "Bill" Casey, Jr.** and **Monica L. Wingler** of **Hicks Casey & Morton** in Marietta defended a case during a four-day trial before Chief Judge W. Alan Jordan, State Court of Cherokee County.

Defendant Danny Ryder was employed by Cherokee Auto Group in Canton, Ga. Ryder was hauling a hearse on I-285 when he rear-ended the plaintiff Harry B. Harris around 4 p.m. on a Friday. Harris was sometimes self-employed, and sometimes worked for others as a parking lot striper. At the time of the wreck, he was towing a medium sized landscape trailer loaded with painting equipment, paint, etc. Ryder said Plaintiff slowed suddenly in rush hour traffic leaving him no time to avoid impact. Defendants admitted fault but contended Plaintiff was also at fault for braking suddenly with no traffic ahead of him. The impact bent the ramp on the rear of Plaintiff's trailer. There was only slight damage to the front of the pick-up truck Ryder was driving. There was more than one impact with Plaintiff's trailer. Plaintiff refused medical transport and drove home.

Later that evening, Plaintiff drove himself to the E.R. but, because it was so crowded, left before being treated. He went back the next day complaining of pain all over, but primarily his low back. He was initially treated by a chiropractor for low back pain. He was later treated by Pran Sood, M.D. who also primarily treated his low back pain. He later started to complain of neck pain. He then treated with Shahram Rezaiamiri, M.D. who recommended neck surgery. Plaintiff claimed special damages of: past medicals at $169,341; future medicals at $214,000-$224,000; past lost wages at $385,954; and future lost wages at $253,228. Plaintiff also sought damages for his pain and suffering and punitive damages. The basis of the punitive claim was the multiple impacts, which meant Ryder must have acted intentionally. Plaintiff Tomika Harris sought damages for loss of consortium.

Plaintiff's pre-mediation demand was policy limits of $1 million. After mediation failed, Defendants sent Plaintiff an offer of settlement for $40,000. Plaintiffs' counsel, Linley Jones and Angela Forstie, sent their own to Defendants for $599,999. Both Plaintiffs testified at trial. They also presented testimony of a former employer (via video), Dr. Rezaiamiri (via video) and a friend of Mr. Harris.

Defendant Ryder and a representative of Cherokee Auto Group testified at trial. Defendants presented testimony of J. Seigel, M.D. who said MRI films of Plaintiff's spine showed no encroachment on the spinal cord or nerve roots and that he was not a surgical candidate. Defendants also presented testimony from Torrence Welch, Ph.D., who testified that the impact between Ryder's truck and Plaintiff's trailer was less than five m.p.h. and did not delta V sufficient to cause injury.

During closing, plaintiffs' counsel asked the jury for pain and suffering in an amount three to five times the special damages. The court granted Defendants' Motion Directed on Plaintiffs' Claim for Punitive Damages. Defendant suggested a reasonable award would equal the cost of an E.R. and ortho visit to rule out injury.

The jury returned a verdict in favor of Plaintiff Harry B. Harris for $5,997 reduced by five percent for his comparative negligence. Tomika Harris was awarded nothing on her consortium claim.

Plaintiffs' counsel withdrew after the verdict. Defendants filed a Motion for Attorneys' Fees, which Plaintiffs opposed *pro se*. After offsetting for the verdict in his favor, interest and cost of filing Plaintiff Harris owes just over $59,000 in fees and expenses.

Tracy O'Connell of **Ellis Painter Ratterree & Adams** in Savannah obtained a favorable verdict for her client—a pavement marking subcontractor—in a four-day wrongful death trial in Muscogee County. Eleven months prior to the automobile accident involving the decedent, the road had been resurfaced but the stop bar was not placed back in its original location 19 feet from the roadway edge, a point at which a motorist approaching the intersection would have had a clear line of sight of traffic traveling on the intersecting highway, which was a pivotal issue in the case. Both the pavement marking subcontractor and the road paving contractor, represented by separate defense counsel, admitted that the applicable regula-



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tions and their contract with the Department of Transportation required the stop bar to be put back in its original location, but instead it was installed 48 feet from the roadway edge. This location violated the applicable regulations and was at a point at which a driver had an obscured line of sight of oncoming traffic. The decedent, a 64-year old woman, had a red stop light and was to yield the right of way to oncoming traffic. A tractor-trailer driver was traveling on cruise control at 62 m.p.h. (seven miles above the speed limit) as he approached a yellow caution light at the intersection where the decedent was approaching. The decedent stopped for between one and two seconds before entering the intersection, where she was struck and killed by the tractor-trailer. The collision was captured on surveillance video from the adjacent gas station. The tractor-trailer driver and the Department of Transportation settled prior to trial. At trial, plaintiffs' counsel argued the main cause of the accident was the obscured line of sight due to the improperly placed stop bar. The defense argued that despite its mistake in putting the stop bar in the wrong location, the decedent had a duty to move forward to a location she could see. Plaintiffs' counsel asked the jury to assign 80 percent of the fault on the road contractors and asked the jury for $18 million (which equated to $1 million per year of the decedent's life under the mortality table). The jury returned a verdict of $600,000 and assigned 60 percent fault to the road contractors.

W. Dan McGrew of **Weathington McGrew** in Atlanta and a colleague obtained a defense verdict in favor of a general surgeon in a week-long medical malpractice trial in Gwinnett County. The case involved a delayed bowel perforation complication days after performance of a rectosigmoid colon resection. The surgeon was alleged to have failed to recognize signs of infection in the post-operative period in order to timely diagnose the problem. The jury disagreed.

Mickey Bresee and **Arthur Park** of **Mozley Finlayson & Loggins** in Atlanta obtained summary judgment on behalf of a major electronics manufacturer in a wrongful death lawsuit filed in Gwinnett County. The plaintiffs had alleged that the television at issue was defective and started a fire in the home. Tragically, a father and son were killed in the blaze. However, the firm's Daubert motion to exclude the expert testimony of the plaintiff's design/causation engineer was granted, and summary judgment was also awarded by the trial court. This ruling was recently affirmed by the Court of Appeals of Georgia in September of 2017, noting in part that many other potential ignition sources existed.

Douglas W. Smith, a partner in **Carlock Copeland & Stair's** Atlanta office, and associate **Claire A. Sumner** obtained dismissal for a chiropractor and his practice in a malpractice case filed in the State Court of Muscogee County where the plaintiff alleged she suffered a spinal cord injury requiring hospitalization with lasting paralysis following two instances of negligent care and treatment by the chiropractor. After years of litigation, the Carlock defense duo filed a motion for summary judgment arguing that the plaintiff had failed to provide sufficient causation testimony linking the alleged negligence to the plaintiff's injury.

Fred M. Valz III, a partner in **Carlock Copeland & Stair's** Atlanta office, and associate **Melissa Bailey** recently obtained a ruling from the State Court of Chatham County granting summary judgment in favor of their landlord client in a dog bite case. Ruling in the property owner's favor, the Court held that, as an out-of-possession landlord, the property owner was not liable for the torts of its tenants, including the alleged failure to adequately control the subject dog. The Court further held that the plaintiff failed to prove that the property owner had superior knowledge of the alleged hazard posed by the dog, a separate basis for the grant of summary judgment.

Carrie L. Christie, managing partner of **Rutherford & Christie's** Atlanta office, and her associates **Robert H. Burke** and **Courtney Marcelo Norton** have recorded several successes over the last few months.

Most recently, they won a defense verdict in favor of their clients Buffalo Rock Company and Joseph Watson in Paulding County Superior Court on September 21, 2017, in a contested-liability three vehicle collision involving an 18-wheeler. The accident arose when Jennifer Salter made a left-hand turn in front of plaintiffs Wilburn and Patricia Presley's car, which was traveling northbound on Highway 61. Mr. Presley's vehicle T-boned Ms. Salter's van, which then collided with the front-end of a tractor-trailer owned by Buffalo Rock and operated by employee Joseph Walton and which was undisputedly stopped in the left-turn lane of Highway 61 southbound, waiting to turn left. Plaintiffs, relying on testimony by Salter, claimed that Salter pulled out in front of their oncoming vehicle only after she was purportedly waved into traffic by Watson. Plaintiffs sustained over $155,000 in special damages and sought a $2 million recovery. The defense impeached Salter's credibility by introducing her recorded statement given two weeks after the accident in which she failed to report the alleged wave. They also introduced her emergency room records from the day of the accident, which reflected that she was alert, conscious and attentive following the collision, which totaled both vehicles.

The Rutherford & Christie defense offered expert testimony by accident reconstructionist Shane Keller of Collision Specialist, Inc., a GDLA Platinum Sponsor, who testified about Salter's significant sight distance to the Presley vehicle as it crested the hill. The defense also presented testimony of an independent witness who disputed that Watson waved prior to Salter darting into oncoming traffic. The jury deliberated for three hours before returning a defense verdict in favor of Buffalo Rock and Mr. Watson. The case is *Wilburn & Patricia Presley*

v. Jennifer Salter, Joseph Watson & Buffalo Rock Company, Case No. 11CV-3922KV.

In the next case, Ms. Christie, Ms. Norton and Mr. Burke won summary judgment on August 2, 2017 in a slip-and-fall case that arose when plaintiff Susanne Clark allegedly slipped in the parking lot of a McDonald's restaurant. Ms. Clark testified that she noticed, after her fall, that the pavement in the parking lot was wet and as she was driving away, she claimed that she saw a maintenance employee washing the asphalt on the other side of the building. McDonald's argued that the plaintiff failed to carry her burden of proving a legally cognizable hazard. Even if the pavement was wet, as the plaintiff contended, it has long been the rule in Georgia that a plaintiff must "prove more than the existence of a slick or wet floor" in order to establish a hazard. McDonald's also argued that there was a lack of superior knowledge on McDonald's part. Though Ms. Clark testified that while driving away she saw an employee spraying down the parking lot on the other side of the restaurant, there was no showing that defendant knew that merely spraying water in one part of the parking lot created a hazard in another part. Moreover, Ms. Clark had just traversed the area of her fall two to three minutes prior without difficulty and, at the time she fell, there were no employees in the vicinity such that Ms. Clark was the only person with knowledge of the condition of that area. McDonald's successfully argued that the plaintiff's failure to establish defendant's superior knowledge of a hazard warranted summary judgment in defendants' favor. The case is *Susanne Clark v. Jonathan's Fast Foods, LLC d/b/a McDonald's Restaurants*, Case No. 2016-CG-0645.

The Rutherford & Christie defense trio also won summary judgment in Putnam County State Court on April 6, 2017 in a trip-and-fall case that arose when plaintiff Larose Brown, while visiting Friendship Baptist Church with her choir, ascended a single carpeted step flanked by prayer rails that led to the church's pulpit area. The plaintiff noticed the step and traversed it successfully. She then ascended to the choir performance area where she and her choir performed and then processed back through the pulpit area. The plaintiff testified that the bright lights in the performance area contrasted with the dimmer lighting in the sanctuary impaired her ability to see the step. Friendship Baptist argued that the plaintiff's prior traversal of the step put the case within a category of "second approach to a static hazard" decisions in which the Court of Appeals has affirmed summary judgment to the premises owner where a plaintiff ascends a step and later falls while descending the same step, even where certain visual cues of the step are apparent only on ascent. The plaintiffs submitted testimony from Jeffrey H. Gross, who opined that the lack of a proper handrail and the use of patterned carpeting without contrast at the step nosing violated applicable code, contributed to the plaintiff's fall, and thus caused a genuine issue of material fact regarding the church's superior knowledge of the hazard that gave rise to the plaintiff's injury. The church successfully argued that expert testimony of alleged code violations could not circumvent the longstanding rule that successful negotiation of an obvious, static hazard, including a step up, bars recovery for injuries sustained in a fall on the way back down where the condition of the step remained unchanged between ascent and descent. The case is *Larose Brown and James Henry Brown v. Friendship Baptist Chapel, trade name of Friendship Baptist Church at Lake Sinclair, Inc.*, Case No. STC-2016-00045.

Finally, Ms. Christie, Ms. Norton and Mr. Burke obtained dismissal of a renewal action against their client, Saint Paul African Methodist Church of Macon, Inc., by showing that the original action was void due to the expiration of the statute of limitations where the plaintiff could not satisfy the "notice" elements required for relation-back under O.C.G.A. § 9-11-15 (c). The plaintiff's original Complaint alleged that during an event hosted by Saint Paul, the plaintiff suffered physical injuries while riding in a golf cart and named defendants Noble-Interstate Management Group, LLC d/b/a Macon Marriott City Center, Marriott International, Inc., The Sixth Episcopal District, Inc. and a "John Doe" employee of these defendants. On February 9, 2016, the plaintiff filed an Amended Complaint attempting to substitute both of the Saint Paul defendants for the single "John Doe" named in the case. On March 11, 2016, Saint Paul moved to dismiss. Prior to a ruling on the Motion, the plaintiff voluntarily dismissed. The plaintiff's renewal action named only Saint Paul, Marques Brown, and the Sixth Episcopal District, Inc. In opposition to the defendant's Motion to Dismiss, the plaintiff argued that she was not required to satisfy her burden of showing

Welcome New GDLA Members!

The following were admitted to membership in GDLA since the last edition of this magazine.

Luciana Aquino
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Taylor Barnett
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Samantha Joy Bily
Savell & Williams, Atlanta

Amber Bishop
Parker Hudson Rainer & Dobbs, Atlanta

Dawn Sandra Burke
Worsham Corsi Scott & Dobur, Savannah

Claire Cronin
Constangy Brooks Smith & Prophete, Macon

Angie Doan
Waldon Adelman Castilla Hiestand & Prout, Atlanta

David F. Ellison
Cowsert Heath, Athens

W. Donald Handberry, Jr.
James Bates Brannan Groover, Macon

Daniel Hofman
Ken David & Associates, Atlanta

Jessica Holland
Weathington McGrew, Atlanta

Christopher R. Jordan
HunterMaclean, Brunswick

Anita Kant
Gray Rust St. Amand Moffett & Brieske, Atlanta

Jamie Kim
Hawkins Parnell Thackston & Young, Atlanta

David Lin
Smith Moore Leatherwood, Atlanta

William R. Merchant
Levy Sibley Foreman & Speir, Macon

Chris E. Miranda
Chambless Higdon Richardson Katz & Higgs, Macon

Jessica Nwokocha
Balch & Bingham, Atlanta

Morganne G. Patterson
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Hermise Pierre
Thomas Kennedy Sampson & Tompkins, Atlanta

Steven Lee Pruitt II
Perry & Walters, Albany

Dawn Rivera
McLain & Merritt, Atlanta

Dallas Roper
James Bates Brannan Groover, Macon

E. Wayne Satterfield
Hall Booth Smith, Atlanta

Amanda Schwartz
Martin Snow, Macon

Rahul Sheth
Hawkins Parnell Thackston & Young, Atlanta

Casey L. Smartt
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Law Office of Karen St. Amand, Atlanta

J. Maria Waters
Worsham Corsi Scott & Dobur, Savannah

Constance Boaz Woods
American Southern Insurance Company, Atlanta

"notice" under O.C.G.A. § 9-11-15 (c) because her original Complaint named a John Doe driver. This Complaint was not served on St. Paul or Marques Brown until two years after the statute of limitations had expired. Thus the defendant successfully showed that naming a John Doe defendant did not remove the plaintiff from the notice requirements of O.C.G.A. § 9-11-15 (c). As service upon St. Paul and defendant Brown occurred years after the statute of limitation expired, plaintiff was required to satisfy the "notice" elements of O.C.G.A. § 9-11-15 (c). The court also agreed with defendant that naming one John Doe driver is not tantamount to naming both a John Doe employer/principal and a John Doe driver/agent. Thus, the plaintiff's failure to meet the relation-back elements of O.C.G.A. § 9-11-15 (c) rendered the original suit void and not capable of renewal under O.C.G.A. § 9-2-61 (a). The case is *Mary Favors v. The Sixth Episcopal District, Inc., Saint Paul African Methodist Church Macon, Inc. and Marques Brown*, Case No. 2014-A-52741E5.

Wiley A. Wasden III and GDLA Board member **Tracie Macke** of **Brennan Wasden & Painter** in Savannah obtained a defense verdict on behalf of their client, an urologist, in Chatham County State Court in June 2017. The patient had undergone a surgical procedure to treat transitional cell carcinoma. The plaintiff alleged the physician's use of Toradol lead to post-surgical complications, including acute kidney failure and permanent kidney damage. Prior to the trial, after defense counsel filed motions to prohibit the introduction of the plaintiff's lost wage claims and medical expenses, the plaintiff withdrew these claims. Plaintiff sought recovery for his past, present and future pain and suffering, including an alleged decrease in his life expectancy. The defense presented evidence that the physician did not negligently treat patient and any resulting transient injury was due to a recognized surgical complication. After a three-day trial, the Chatham County jury deliberated for less than 30 minutes before returning a verdict in favor of the defendant physician. ◆

IN MEMORIAM: Paul W. Painter, Jr.

By Sarah B. "Sally" Akins
Ellis Painter Ratterree & Adams, Savannah

Paul W. Painter, Jr., was a founding partner of Ellis Painter Ratterree & Adams in Savannah and served as GDLA President from 1986-1987. He lost a hard-fought battle with cancer on May 27, 2017. I had the privilege of having Paul as my mentor for a quarter-century, and was humbled to have had him ask me to give his eulogy. Below is a transcript of how I attempted to honor the memory of a true gentleman who was loving, kind, generous, accomplished, devout and humble:

Paul served for three years as a Naval officer between his graduation from Georgia Tech and beginning at the University of Georgia School of Law.

During that time, he was on an aircraft carrier doing operations in the Mediterranean Sea. In those days, some of the Navy wives would go to Europe and meet their officer husbands at each port when they were on operations. Once one of the wives did just that. Paul, the officer and his wife would see each other at the local watering holes in port during this trip. Finally, the officer's wife said to Paul, "You need to call our daughter," and pulled out a picture of their daughter, who was modeling at the time. Upon seeing the girl in the photo, Paul quickly agreed to call her. That was the singular best phone call he ever made in his life. Lt. Junior Grade Painter and the beautiful and lovely Judi Babine went on their first date on Valentine's Day 1971 and were married in August 1971.

What a love story! When you are in Paul and Judi's presence, their mutual respect, admiration and love for each other absolutely emanates from them. Theirs is the example to all of what a marriage should be. They are helpmates to each other, supporters of each other and the Presidents of each other's fan clubs.

I recall being in Paul's office several times when his phone rang. He would answer and then a big smile would come on his handsome face, he would get a twinkle in his eye and then I'd hear, "Hi, baby doll," and I'd know it was Judi on the phone.

A devoted father, Paul coached Paul III in Little League Football. When Paul III went on to play high school football, many times his games would be somewhere like Brunswick at 3 o'clock on a weekday afternoon. Paul would invariably tell his son that he might not make the game, as it would be hard to get away from the office. The years Paul III was playing high school football were the busiest time of Paul's career—and before he retired, he always worked harder and put in more hours than anyone else at the law firm. Paul never missed one single football game, no matter where it was, no matter what time it was and no matter how much work he had to do. Not one single game.

He is proud of his son, who is just the perfect combination of his parents. Paul and Paul III tried a case together several years ago, and while Paul would never brag about himself or his family, I know that experience impressed upon him what a fine lawyer Paul III is.

In a characteristic act of kindness, Paul wrote his own obituary, as opposed to leaving that for his grieving family to do. Paul III was tasked with proofreading it. Paul III added one sentence to the obituary and then observed, "That experience was like the briefs we collaborated on: my contribution was small, but stood out due to being the only part of the brief that was legally unsound and poorly written."

Paul is a doting and fun-loving Granddad to the delightful Anna Clair. Anna Clair loves babies. Her favorite game is to play "family" where she is the mother and the other participant is the baby. Her favorite partner for this game is "baby" Granddad because he is always willing to play the baby and let her put him to bed, check in on him and play the role to the hilt and to Anna Clair's great delight! If Paul and Anna Clair aren't found playing family—you might find Paul leading her to the windows to the backyard where they both would look for invisible elephants. Anna Clair sleeps with an elephant on her bed due to the great fun she has on Granddad's elephant safaris!

I was speaking with Judi recently about Paul and she shared with me that when Paul III was about 10 years old, he asked her, "What is it about Dad that makes him so special?" She has spent 30 years answering that question. Summing it up, she said it's his absolute respect for each and every person and that she's never seen a situation when he put himself first. Judi then quipped that she has often joked with Paul that God put her in his life so that he could see human close up!

Of course, one measure of a man's character is how he treats others. Paul knows the names of the security guard at our office building as well as the gentleman who empties our trash and cleans the office. He treats those folks with the same dignity and respect that he treats the Chief Justice of the Supreme Court of Georgia. That is just how Paul is wired. He lives by the Golden Rule, "Do unto others as you would have them do unto you."

Paul is generous with himself and his time. Giving freely to his family, his community, his profession, his colleagues and his friends. There is probably not one lawyer here who hasn't at one time called Paul for legal advice or to run a sticky situation by him. He takes those calls with same enthusiasm and good cheer as he would a paying client's call. He is never too busy to help his fellow man, in any

way needed. You want Paul's wisdom when faced with any tough life decision. He is so prescient, that he can see three steps ahead, while most of us can only see the next step. He's the man you want on your team, no matter the task.

An accomplished athlete, Paul led the undefeated Rossville Bulldogs high school football team to a State Championship victory in 1962. Of course, Paul was not only the co-Captain of the team, but the quarterback and the punter! Paul was awarded a football scholarship to Georgia Tech by the legendary Bobby Dodd.

An avid outdoorsman, Paul loves nothing more than a good bird hunt. He's a superior wing shot in the dove field.

Someone once described Paul as "The Most Decorated Lawyer in the State of Georgia." This is true. He has been honored with just about every award there is to earn in Georgia. Among them, The Tradition of Excellence Award from the General Practice and Trial Section of the State Bar of Georgia, the Professionalism Award from the Savannah Bar Association, the Chief Justice Thomas O. Marshall Professionalism Award from the State Bar of Georgia. He is the first recipient of an award named in his honor, The Paul W. Painter, Jr. Professionalism and Civility Award from the S.E. Georgia Chapter of the American Board of Trial of Advocates.

Paul is a member of the most elite group of trial lawyers in the country, the American College of Trial Lawyers. He has served as President or Chairman of just about every group or association with which he's been affiliated—the Savannah Bar Association, Georgia Defense Lawyers Association, General Practice and Trial Section of the State Bar of Georgia, Royce Learning Center, Savannah Arthritis Foundation and the University of Georgia Law School Alumni Association, to name just a few.

His counsel is also sought by Georgia's judiciary. Appointed by the Supreme Court of Georgia, he served on the Board of Bar Examiners for six years. Appointed by the Chief Judges of the 11th Circuit United States Court of Appeals, he served on the Committee of Lawyer Qualifications and Conduct. Appointed by the Chief Judge of the United States

GDLA President Sally Akins, with her mentor and GDLA Past President, Paul Painter, at his son's wedding in December 2016.

District Court for the Southern District of Georgia, he served on its Court Advisory Committee.

He has been named a Georgia Super lawyer since the inception of that honor. Super lawyers are selected by their peers and comprise the top five percent of Georgia lawyers. Consistently named in the top 100 lawyers, Paul was named as one of the top 10 lawyers in Georgia by this group during his last year of active law practice.

Paul is blessed with a keen intellect, capable of quickly assessing a problem, analyzing it and coming up with a solution. If he doesn't know the answer to the legal question off the top of his head (which is rare), he will turn around and pull an old black notebook from his desk drawer, flip to one of the yellowed pages of hand written notes that he has kept over the years and immediately provide the answer. Paul the third and I are currently embroiled in a heated custody battle over the black notebook!

One afternoon, I rushed into Paul's office to get his wisdom on the crisis of the day and we began a rather serious talk about life. He suggested to me that I might want to check my priorities and make sure I had them in order. He told me that to properly prioritize you must put God first, family second and work third. I quickly realized that he was right; my crisis was not as dire as I imagined. This is sound advice and advice he lives by.

When Paul was going through some treatment and the treatment was having good success, I teased him that he had "Painterized cancer." He slowly shook his head "no," pointed upward and said, "Painter has nothing to do with it."

With all of these wonderful qualities and accomplishments, some people might be awfully proud of themselves and egotistical. Not Paul. He is consistently humble and gracious. He never takes himself too seriously. He is quite simply the best. The gold standard. A true gentleman in every sense of the word. He has an easy smile and an incredible sense of humor. There is not one person who encounters him whose life is not made richer from being in his presence.

For 25 years I have practiced law with Paul. He has been on my shoulder like an angel. Whenever I encounter a harsh or rude person and am tempted to react in like manner, I pause and try to picture Paul saying or doing what I am contemplating. I can't say I always resist the temptation, and sometimes I brush him off my shoulder and do what I know I shouldn't. But, because he's there on my shoulder, I know the right response. The right response is how he would react.

I have spoken about Paul in the present tense this morning because he is still with us. His spirit and the fine example he sets lives on in our hearts forever. ◆

He is Not Dead

BY JAMES WHITCOMB RILEY

I cannot say and I will not say
That he is dead. He is just away.
With a cheery smile, and a wave of the hand,
He has wandered into an unknown land
And us left dreaming how very fair
It needs must be, since he lingers there.
And you, oh you, who the wildest yearns
For an old-time step, and the glad return,
Think of him fairing on, as dear
In the Love of There as the love of Here.
Think of him still the same. I say,
He is not dead—he is just away.

GDLA Files Amicus Brief in Uninsured Motorist Case

On September 17, 2017, GDLA filed an amicus curiae brief supporting a petition for certiorari in the Georgia Supreme Court on the issue of whether Georgia law requires an insurance company, which previously informed an insured of statutory uninsured/underinsured motorist (UM) coverage options and obtained written rejections of the UM coverage in writing, to obtain additional written rejections of UM coverage at an amount equal to the policy's liability coverage limits when the insured later decides to add UM coverage to a renewal policy under O.C.G.A § 33-7-11. On October 2, 2017, the high Court denied the petition.

In this case, the plaintiffs signed written rejections of UM coverage at the statutory minimum and in limits equal to the policy's liability limits of $100,000/ $300,000/$50,000 in 1992, 2000, and in January 2003. In August 2003, the plaintiffs decided to add UM coverage to their policy, which was subsequently renewed every six months. In November 2012, one of the plaintiffs was involved in a motor vehicle accident and alleged that she had suffered damages totaling more than $100,000. The defendant tendered his liability limits of $25,000. The plaintiffs were covered under an automobile policy issued by GEICO, which included liability limits of $100,000 and UM coverage. The plaintiffs demanded $100,000 from the UM policy, although the declaration page demonstrated that UM exposure totaled only $25,000. Additionally, plaintiffs signed affidavits stating that GEICO failed to inform them that they had the option of adding UM coverage at an amount equal to the limits of their liability policy. In response, GEICO tendered $25,000. Plaintiffs filed a personal injury lawsuit against the defendant and served GEICO. GEICO filed an answer and raised a counterclaim for a declaratory judgment, stating that UM coverage was limited to $25,000. At the close of discovery, GEICO filed a motion for summary judgment. The trial court entered an order against GEICO and denied its motion for summary judgement. Instead, the court ruled that the plaintiffs' policy provided UM coverage totaling $100,000.

The Court of Appeals affirmed the trial court's ruling and held that the plaintiffs' previous rejections, as shown on their completed optional coverages selection forms, did not limit their UM claim to $25,000. Additionally, the Court stated that the plaintiffs did not affirmatively choose a $25,000 limit when they requested UM coverage in 2003. As such, the Court held that plaintiffs were entitled to UM coverage totaling $100,000.

The case is *Government Employees Insurance Company v. Wanda Morgan, Victor Morgan, and Dwayne Mims*, Case No. S17C1721.We thank the brief's author, Nnenna T. Opara of Waldon Adelman Castilla Hiestand & Prout in Atlanta. as well as Amicus Chair Martin A. "Marty" Levinson of Hawkins Parnell in Atlanta and Vice-Chair Garret W. Meader of Drew Eckl & Farnham in Brunswick for their service to GDLA. ◆

GDLA Wins Bar's Best Newsletter Award Again

2016-17 State Bar President and GDLA member Pat O'Connor (right) presented this year's award to Georgia Defense Lawyer *Editor-in-chief Jeff Ward (left) and Executive Director Jennifer Davis.*

GDLA was honored for the sixth time by the State Bar of Georgia with the Best Newsletter Award among voluntary bar associations with more than 500 members. We had previously won the award five consecutive years—2011-2015.

The award is presented each year during the State Bar's Annual Meeting, held most recently at the Jekyll Island Convention Center from June 8-11, 2017.

Winners are showcased in the State Bar's Annual Meeting brochure and the *Georgia Bar Journal*. We continue to see the benefits of this publicity in heightening the GDLA's visibility with both the bench and bar.

Such a collection of awards does not happen without significant time and effort. Executive Director Jennifer M. Davis' tireless work on content, layout, and all other aspects of this magazine, guide what makes this the award-winner you see today.

Kudos also go to the countless contributing authors, which include GDLA members and sponsors, but especially to the newsletter Editors-in-Chief: Peter D. Muller of Goodman McGuffey in Savannah for 2011; Evelyn Fletcher Davis of Hawkins Parnell Thackston & Young in Atlanta for 2012; Sarah B. "Sally" Akins of Ellis Painter Ratterree & Adams in Savannah for 2013, 2014 and 2015; and Jeffrey S. Ward of Drew Eckl & Farnham in Brunswick for 2017.

We also thank the 2016-17 Editorial Board: Christopher L. Foreman of Watson Spence in Albany; Nicole C. Leet of Gray Rust St. Amand Moffett & Brieske in Atlanta; Megan Usher Manly of Ellis Painter Ratterree & Adams in Savannah; James Scarbrough of Mabry & McClelland in Atlanta; and R. Matthew Shoemaker of Jones Cork in Macon. ◆

Georgia Supreme Court Sides with GDLA in Case Attacking Constitutionality of Apportionment Statute

On September 13, 2017, the Supreme Court of Georgia rejected a plaintiff's attempt to attack the constitutionality of the apportionment statute, O.C.G.A. § 51-12-33, finding instead that the plaintiff lacked standing to assert constitutional arguments said to belong to the nonparty to whom fault would be apportioned. In *Johnson Street Properties, LLC v. Clure*, plaintiff Cynthia Clure sued the owner of the real property on which she was injured when she was struck by a tree limb. The property owner moved for summary judgment and also filed a notice of intent to apportion fault to the nonparty owner of the premises on which the tree was actually located. Clure then filed a motion for partial summary judgment on the nonparty apportionment claim, alleging causation issues and also that O.C.G.A. § 51-12-33 is unconstitutional.

The trial court denied the defendant's motion for summary judgment and rejected Clure's constitutional arguments but nevertheless granted Clure's motion for partial summary judgment on causation grounds. Both parties appealed to the Supreme Court. On appeal, Clure again argued that the defendant could not establish causation for any purported nonparty fault and also attempted to make arguments about the constitutionality of O.C.G.A. § 51-12-33 in terms of how it impacted the nonparty.

In reversing the trial court's decision to grant partial summary judgment to the plaintiff on the defendant's notice of intent to seek apportionment of fault to a nonparty, the Supreme Court followed its prior decision in *Zaldivar v. Prickett*, 297 Ga. 589 (2015). Specifically, the Supreme Court explained that O.C.G.A. § 51-12-33 permits "consideration … of the 'fault' of a tortfeasor, notwithstanding that he may have a meritorious affirmative defense or claim of immunity against any liability to the plaintiff." And while the defendant does have to establish a "rational basis" for apportioning fault to a nonparty, the Court held that "whether the non-party contributed to the alleged injury is a question of fact for a jury to decide." And, much like questions of proximate cause relating to a plaintiff's claims, the Court held that questions of proximate cause pertaining to the potential fault of a nonparty are "undeniably a jury question and may only be determined by the courts in plain and undisputed cases."

On Clure's constitutional arguments, the Supreme Court held, as the GDLA argued in its amicus brief, that Clure lacked standing to challenge the constitutionality of O.C.G.A. § 51-12-33. Specifically, GDLA argued and the Court held that since Clure is not among the class of persons (nonparties) impacted by the statute, she could not move for summary judgment based on an argument that the apportionment statute violated the constitutional rights of nonparties. Accordingly, the Supreme Court reversed the trial court's grant of partial summary judgment to Clure on the defendant's claim for nonparty apportionment.

GDLA thanks the brief's authors, C. Shane Keith of Hawkins Parnell Thackston & Young in Atlanta and Charles B. Carmichael, who has since left the practice to do tax consulting. ◆

GDLA Files Amicus Brief on Admissibility of Evidence of Party's Wealth to Show Witness Bias

On September 18, 2017, GDLA filed an *amicus curiae* brief in the Georgia Supreme Court on the issue of whether, despite Georgia's general prohibition on evidence of the wealth of a party, evidence of the compensation a party pays to its CEO is admissible to show witness bias under O.C.G.A. § 24-6-622.

In the case, the plaintiffs alleged that their decedent son died in a fire caused by the defective design of the Chrysler vehicle he was riding in at the time it was struck from behind in a collision. At trial, over Chrysler's repeated objections, plaintiffs' counsel adduced testimony of the compensation package paid by Chrysler to its then-CEO, which exceeded $68 million. Plaintiffs' counsel then asked in closing for damages "of at least $120 million ...[t]hat's less than two years of what [Chrysler's CEO] made just last year." The jury awarded $120 million in noneconomic wrongful death damages and $30 million in pain and suffering, constituting a historically large verdict.

The Court of Appeals affirmed the admission of the CEO's compensation on the basis that it was relevant to show the bias of the CEO as a witness, pursuant to Georgia's witness bias statute, O.C.G.A. § 24-6-622. In fact, the Court of Appeals held that any concerns regarding the prejudicial effect of evidence offered to show a witness's bias "must yield" to O.C.G.A. § 24-6-222, which provides that the feelings and relationship between a witness and a party "may always be proved." The Court of Appeals also rejected Chrysler's argument that the evidence was inadmissible as evidence of a party's wealth, on the basis that the CEO was not a party.

In its brief, GDLA asserted four primary arguments. First, the Court of Appeals erred in holding that O.C.G.A. § 24-6-622 requires the admission of bias evidence, regardless of the prejudicial effect of the evidence offered. Second, the evidence of the CEO's compensation, even if minimally relevant on the issue of bias, should have been excluded as highly inflammatory and prejudicial to Chrysler under O.C.G.A. § 24-4-403. Third, the evidence was also barred under Georgia's rule prohibiting evidence of the wealth of a party, because the significant money paid by Chrysler to its CEO was direct proof of Chrysler's considerable financial resources. Fourth, in the absence of a reversal by the Supreme Court, there will be an increase in damages awarded against corporate defendants based not on the extent of their liability, but on the extent of the financial resources they possess, as demonstrated by what they pay their executives.

The case is *Chrysler Group LLC n/k/a "FCA US LLC" v. James Bryan Walden et al.*, Georgia Supreme Court, Case No. S17G0832. We thank the brief's author, Chris Jordan of Hunter Maclean in Brunswick for his efforts on this. ◆

HIPAA Regulations and the Standard of Care in Medical Privacy Violations

By D. Campbell Bowman, Jr.
The Bowman Law Office, Savannah

The Healthcare Insurance Portability and Accountability Act (HIPAA or "the Act") was intended to "improve the portability and accountability of health insurance coverage" for employees moving from one job to another. Among other things, the Act also included provisions to make the administration of health insurance simpler, and to encourage health plans and medical providers to convert their records into electronic formats.[1] In the years since the passage of HIPAA, the U.S. Department of Health and Human Services has written regulations intended to govern the privacy and security of electronic health information and to enforce the regulations against health plans or medical providers who violate the rules.

HIPAA's privacy and security regulations apply to health plans, most health care providers, and health care clearinghouses.[2] Covered health care providers include those that conduct certain business electronically—such as electronic billing the patient's health insurance—including most doctors, clinics, hospitals, psychologists, chiropractors, nursing homes, pharmacies, and dentists.[3] HIPAA also applies to business associates of these entities.[4]

HIPAA is not intended to cover any other entities. Thus, HIPAA does not cover law enforcement agencies, many state and municipal agencies, workers' compensation insurers, employers, schools, or school districts, among others, as the records of these entities are excluded from the definition of "protected health information" (PHI).[5]

HIPAA defines "protected health information" as individually identifiable health information that is ttransmitted or maintained in electronic media or in any other form or medium.[6] The Act imposes limitations on the circumstances in which PHI can be used and shared.[7] Uses and disclosures of PHI are permitted for treatment, payment, and the conduct of healthcare operations[8], and disclosures may be made to the patient or his or her designees. Typically, other uses are permitted only with a valid authorization.

If a covered entity violates the privacy or security regulations, it can be subject to civil penalties or even criminal prosecution for repeated violations. These penalties can be quite harsh.

A single inadvertent violation can be punished with a civil monetary penalty of up to $50,000.[9] Breaches of PHI that are the result of what the rules term "willful neglect"[10] can result in a minimum penalty of $50,000 per violation and repeated violations within a calendar year can draw penalties of up to $1,500,000.[11]

HIPAA does not allow private actions against a covered entity for compensatory damages. The statute only permits enforcement through civil or criminal action by the Department of Health and Human Services or by way of a civil action by state attorney generals.[12]

Although HIPAA does not permit private civil actions for damages, since 2006 a growing number of states have allowed negligence claims under state law to proceed against health care providers for violations of medical privacy, on the theory that HIPAA Privacy and Security rules set the standard of care for the protection of medical information.[13] This began with the *Acosta* case in North Carolina that is discussed below. Similar conclusions have been reached in Maine,[14] Missouri,[15] Minnesota,[16] Tennessee,[17] West Virginia,[18] Kentucky,[19] Delaware,[20] and Connecticut.[21]

While no case in Georgia has yet presented this issue, Georgia has permitted negligence claims arising out of the violation of federal statutes and regulations for decades.[22] It is likely that when the Georgia appellate courts are presented with this issue, they will join the growing number of state appellate courts allowing state law negligence claims arising out of HIPAA violations.

Private Civil Actions for Negligence Alleging Violations of HIPAA

In *Acosta v. Byrum* (2006), the North Carolina Court of Appeals concluded that HIPAA privacy regulations could be offered as evidence of the standard of care. [23]Acosta, the plaintiff, was a patient of Psychiatric Associates. She was also employed by Psychiatric Associates from September 2003 until early spring of 2004. Psychiatric Associates was owned by Dr. Faber, a citizen and resident of Alabama. Byrum, the defendant, was the office manager at Psychiatric Associates during the time period at issue.

Plaintiff alleged that Byrum had severe personal animus towards her, and that Dr. Faber improperly allowed Byrum to use his medical record access number. Numerous times between December 31, 2003 and September 3, 2004, Byrum used Dr. Faber's access code to retrieve Plaintiff's confidential psychiatric and other medical and healthcare records. Byrum then provided information contained in those records to third parties without Plaintiff's authorization or consent.

Acosta brought suit, alleging invasion of privacy and intentional inflic-

Continued on page 53

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U.S. Supreme Court Decision Impacts Service of Process Upon Foreign Manufacturers

By James D. "Dart" Meadows
Balch & Bingham, Atlanta

This article addresses the impact—with regard to an Italian entity—of the U.S. Supreme Court's recent decision in *Water Splash, Inc. v. Menon*, No. 16-254, 2017 WL 2216933 (U.S. May 22, 2017), on whether compliance with the Hague Convention is required to serve a foreign manufacturer.

Impact of *Water Splash* on Service by Mail

Article 10(a) of the Hague Convention states, "[p]rovided the State of designation does not object, the [Hague] Convention shall not interfere with (a) the freedom to send judicial documents, by postal channels, directly to persons abroad." In *Graphic Styles/Styles Int'l LLC v. Men's Wear Creations*, 99 F. Supp. 3d 519 (E.D. Pa. 2015), the Court analyzed Article 10(a) and held service of process by registered mail upon a foreign defendant outside the United States is improper under the Hague Convention. The *Graphic Styles* court held the drafters' use of the word "send" instead of "serve" or "service" in Article 10(a) was intentional. "Service of process refers to a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action." 99 F. Supp. 3d at 523 (quoting *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988)). "Service," however,

> does not refer to subsequent filings in the same action. Having established a highly formalized methodology to ensure that foreign defendants would have timely, effective notice that an action is pending against them, it appears that the drafters wanted to make clear [in Article 10(a)] that the same deliberate, albeit time-consuming, methodology would not also be necessary for subsequent pleadings, once the defendant already had received formal notice of the lawsuit. Making clear that the method of service the Convention created was only required for the initial service of process and not for later "sending of judicial documents" is not superfluous, it is language that appears to be designed to ensure that parties can process with alacrity the many documents they must exchange during litigation.

Id. In other words, the court held, the intent of Article 10(a) is that the procedures of the Hague Convention do not have to be utilized for sending subsequent filings in an action to a defendant in a foreign country; compliance with Hague Convention procedures is required, however, to effect initial service of process on a foreign defendant. *See id.*

This argument was recently expressly rejected by the U.S. Supreme Court in *Water Splash, Inc. v. Menon*, No. 16-254, 2017 WL 2216933 (U.S. May 22, 2017),[1] in which the Court, resolving a conflict among courts, held Article 10(a)'s phrase "send judicial documents" encompasses sending documents abroad for purposes of service of process. Article 10(a) accordingly does not prohibit service of process abroad by mail.

The Court held the text and structure of the Convention strongly suggest Article 10(a) pertains to service of documents. The key word in Article 10(a)—"send"—is a broad term, and there is no apparent reason why it would exclude the transmission of documents for the purpose of service. The Convention's preamble and Article 1 limit the scope of the Convention to service of documents abroad, and its full title includes the phrase "Service Abroad." "[T]the text of the Convention reveals … the scope of the Convention is limited to service of documents. In light of that, it would be quite strange if Article 10(a)—apparently alone among the Convention's provisions—concerned something other than service of documents." 2017 WL 2216933 at *4. Since Article 1 already eliminates the possibility that the Convention would apply to any communications that do not culminate in service, "in order for Article 10(a) to do any work, it *must* pertain to sending documents for the purposes of service." *Id.* at *5 (emphasis in original). Suggesting that Article 10(a) applies not to service of process but only to the service of "post-answer judicial documents" lacks any plausible textual footing in Article 10. *See id.*

The Court found unpersuasive the counterargument that Article 10(a)'s "send judicial documents" should mean something different than "effect service of judicial documents." Compelling structural considerations strongly suggest Article 10(a) pertains to service of documents. Moreover, reading the word "send" as a broad concept that includes, but is not limited to, service is more plausible than inter-

Continued on page 67

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Rebutting the Damages Driven Life Care Plan

By Reg Gibbs (left) and Steve Yuhas
Inquis Global

Introduction

A life care plan is a dynamic document that comprehensively identifies an injured individual's present and lifetime needs. Specifically, it identifies the person's need for health care, educational/vocational assistance, living arrangements, attendant care, equipment and supplies, medications, and community services. Additionally, the plan also provides projected costs for services and products necessary to meet these needs. Its purpose is to provide guidelines for restoring and/or maintaining an optimal level of health and functioning in the most appropriate environment.

Unfortunately, an alarming trend has developed in recent years in which life care planners abandon this basic purpose and the principles and methodology on which sound planning is based. Instead of creating comprehensive plans for the lifetime care needs of someone with serious injuries, planners are increasingly designing plans that are calculated to maximize monetary damages, regardless of an injured person's actual needs. Some planners even take liberties with sound medical opinion provided by specialists, and in violation of professional standards, substitute their own opinions for them. In so doing, they make recommendations not grounded in the evidence and, in effect, "practice medicine without a license." All of this is done with the objective of creating a plan that will seem to justify a demand for particular amount of money predetermined by a plaintiff's lawyer.

Such an approach not only prolongs litigation, but often creates false expectations in the mind of the injured individual whom the plan is supposed to benefit. Moreover, a shift of focus from rehabilitation to monetary damages sullies the reputation of the life care planning profession and leads to unjustified suspicion of the many legitimate, evidence-based, medically sound plans.

This article will look briefly at three issues in the rebuttal of damages-driven life care plans. First, it will address the issue of attempting to win a case solely on an argument against liability, as opposed to employing a life care planning expert to rebut damages. Second, it will look at how an inflated life care plan can be effectively rebutted and at the kind of experts who can aid in this effort. Third, the article discusses the importance of focusing on details when dealing with such plans.

To Designate or Not to Designate

Defense attorneys find themselves in a familiar quandary when they must argue that a client did not cause an accident, that a manufacturer's product was not used for its intended purpose, or that a physician being sued for malpractice followed medical protocol. They must make their argument to a jury in the presence of a plaintiff who may have an obvious injury—in some cases a catastrophic one—with significant complications that will require lifelong treatment. Unfortunately, fighting liability altogether and avoiding a rebuttal of damages is becoming ever more difficult with the increasing use of the exaggerated life care plan.

A common misconception that defense attorneys make is to assume that they can easily win a case in which a plaintiff attorney has demanded an outrageous amount in damages. A jury that does not award the high amount demanded can award a lower amount that is still too high if it is based on exaggerations made in the plaintiff's life care plan. The key to avoiding such an outcome is to designate a life care planner and other experts early in the case, before deadlines approach.

Generally, there is a paucity of available medical records available that the defense can use to establish realistic damages. While qualified experts can respond to plaintiff allegations of causal injury, hiring a life care planner at the outset can help a defense attorney establish a realistic figure for damages before going to the expense of hiring a team of expert witnesses.

A life care planner can look at medical records from the perspective of a rehabilitation professional whose goal is to ensure a plan on which an injured individual can rely on for a lifetime. Important in such analysis is a life care planning expert's ability to project future health care needs. This enables him or her to advise the defense of potential weaknesses in the case and of a need to hire medical experts to rebut particular claims made in a plaintiff life care plan.

Additionally, an early look at medical records often extracts information about non-causal comorbidities that can easily be missed by the non-trained eye. The plaintiff life care plan may conveniently overlook the injured individual's health status in the days, months, and years leading up to the subject accident, subject operation, or subject interaction with a product. A seasoned life care planner can distinguish medical problems that existed before the time of the injury and project what likely lay in the individual's future. Reviewing published research, the planner can also determine if the individual's life span would have corresponded to the statistical average or would likely have been shorter due to pre-existing factors.

An early review of the records is also cost-effective for the defense. It can show attorneys which kind of medical experts should be hired to provide testimony and which kind will be unnecessary to make their case. Moreover, it often provides the alleged tortfeasor, self-insured, or carrier with an early look at damage amounts that can be critical to the business decision of whether to settle early or in mediation before costs escalate.

Continued on page 59

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Seven Habits of Highly Effective Advocates in Mediation

By Hon. Patricia Killingsworth
Georgia Academy of Mediators & Arbitrators

The Seven Habits of Highly Effective People, by Stephen R. Covey, is a practical and insightful review of the power of communication in both our business and personal lives. Over the course of the more than two thousand mediations that I have facilitated to date, I have discovered that the principles espoused by Dr. Covey are clearly applicable to the mediation process—no surprise, as communication is the key element in a successful conference.

So, with due apology to Dr. Covey, this article represents my attempt to tie together my mediation experiences with hundreds of attorneys over the past ten years to the seven habits he espouses. I have found that excellent advocates generally practice all of these habits, and approach each mediation thoughtfully and with insight into the case at hand.

1. Be Proactive

Your client will be looking to you for your recommendations on how to proceed with their legal action, and will particularly look to you for your thoughts on how to proceed with the settlement process. Your values will drive the case. Good advocates look at their clients for insights into what the parties really need to get out of the process, and look for creative solutions to address those interests. While clients often cannot get what they want from the legal system, knowing where their interests lie can help in ultimately creating a suitable settlement for them.

One of the most valuable assets of the mediation process, and one frequently overlooked by attorneys who have practiced in our trial system for many years, is the flexibility it allows in applying new solutions to old problems. To revisit an old maxim, this is an ideal setting for you and your client to *"think outside the box."* You should always look at each case as an opportunity to find another creative solution that more perfectly suits your client's needs. Every case is unique. Every client is unique. Every resolution can be unique.

As a proactive attorney, prior to coming in to a mediation you should have evaluated your case from the perspective of *all* parties, and shared these perspectives with your client. Determine all of the factors likely to impact on the resolution of the case, and be prepared to share them with your client and with the mediator prior to the conference, if possible. If what you tell your client before the mediation is reiterated by the mediator at the conference, your client will be more willing to face reality than they might otherwise have done.

In particular, attorneys should feel free to let the mediator know of any problems that they anticipate, knowing that the mediator will keep this information in strict confidence. In general, the more the mediator knows about what pitfalls to expect during the course of the conference, the more prepared they can be to handle them. Remember, the mediator is not a judge of the case, but is a neutral third party with no interest in the claim outside of assisting the parties to settle it. As a neutral, the directive against *ex parte* communications with a judge do not apply. That is precisely why caucuses are permissible and effective.

After you have fully evaluated your claim, I would encourage you to talk with the mediator you have chosen and discuss how they can be most helpful to you. Does your client need a "reality check," or just an opportunity to vent? Does the adjuster need to be convinced of the validity of the plaintiff's position, or the other way around? Does the mediator need to defuse the anger between the claimant and adjuster, or between the two attorneys, or between the claimant's attorney and the adjuster? Are there particular concerns that need addressing that are not obvious on the face of the case? The more a mediator knows in advance, the more efficient and effective the mediation can be.

And, finally, discuss the mediation process with your client in advance, particularly noting the fact that the conference will allow them the full opportunity to be heard, unlike a trial, where the information received by the jury will be restricted by the rules of evidence. Emphasize the fact that the resolution of the case through mediation will be in *their* hands, not the hands of unknown jurors, and can be crafted to more personally resolve their particular issues. Help them understand that they have more control through mediation than they ever would through a trial.

2. Begin with the End in Mind

This should go without saying, but, in my experience, parties often fail to discuss the real parameters of the range of settlement possibilities and the end that they have in mind before they approach a mediation conference. They may have a general idea of what may be available to them, but they often fail to set a real goal for themselves which takes into account the myriad of solutions that a mediation conference can provide, and look instead to the mediator to give them this insight. As counsel, you should *always* be in a better position to make this call than anyone else.

Once you have had an opportunity to discuss the case with your client from a legal perspective, give them an opportunity to give you an overview of their individual concerns. While money is the medium by which settlements are achieved, it helps a great deal to know what it is that your client is seeking to achieve with those funds. What do they need? How do they expect their wrongs to be redressed? How do their expectations fit into the

Continued on page 61

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Alleged Slips of Bathmats, Entrance Mats, and Walkway Mats in Premises Liability Cases

By John Leffler, P.E.
Forcon International

Introduction

Premises liability cases may involve invitees who allege they fell after a bathmat or other walkway mat they stepped on slipped on the walkway. Though there are "standards" in place that address the traction of mats on a floor, the quality of these "standards" (and their applicability) can vary.

Mats are manufactured from a wide variety of materials, with a wide variety of designs. Ordinary non-employee invitees may encounter mats in restaurants (around beverage and food preparation areas), near building entrances, by water fountains, in restrooms, and in hotel room bathrooms. Such mats are usually intended to either remove solid contaminants from footwear, or to dry footwear (or bare feet, as the case may be). For purposes of this article, we will focus on mats used outside the bathtub.

Issues of interest regarding the traction of any type of mat on a floor includes five issues which are set forth below in detail:

1. Floor traction: Expectably, a floor with little inherent traction (variously called Coefficient of Friction [COF] or slip resistance) will provide little resistance to any mat sliding on it. The amount of traction necessary for a floor varies depending upon the expectable usage—some floors should be smoother to facilitate a more-thorough cleaning, and some floors should be rougher when there are persistent contaminants. This is a complex topic in itself; competent traction testing (using a human slip research-based test methodology such as American National Standards Institute (ANSI) A137.1 or American Society for Testing & Materials (ASTM) F2508 can provide useful information.

2. Contaminants: Investigation of a mat slip event may reveal the presence of either transient or persistent

contaminants. Water is the most common contaminant, but cleaning chemicals, lubricants, construction dust, food residues, and other such substances can affect the mat's resistance to sliding on the floor. Whether such contaminants were expectable, or unforeseeable, may be important.

3. Human gait and mat positioning: The normal straight-line human walking gait has the highest horizontal force application to a mat at the points of leading-foot heel strike and trailing-foot push off. These forces can cause a mat to slide, leading to a "heel slip" or a "toe slip." Heel slips are the primary cause of slipping falls; toe slips usually do not lead to falls as the majority of body weight has already been transferred to the leading leg. Turns while walking cause horizontal forces to be applied to a mat as well. An aggressive "spin turn," in which the pedestrian rotates about their inside foot, can be difficult to recover from, if there is a slip, as the pedestrian's center of gravity may be outside the base of support provided by their feet. If a pedestrian encounters the edge of a large mat or any part of a small mat with a high amount of horizontal loading, a mat slip is more likely. One illustration of this would be when a bathmat is placed some distance from the edge of the bathtub, and the dripping bather takes a long step exiting the bathtub while trying to land on the mat.

4. Mat traction: As there are myriad styles and configurations of mats, it is difficult to generalize what comprises an adequately slip-resistant mat. Entrance mats and runners tend to have an elastomer (e.g., rubber) contacting the floor, while bathmats commonly found in hotels are made of terrycloth. Mat traction is affected by factors including the floor-contacting material (solid elastomer, elastomer-coated woven textiles, uncoated fabrics, synthetic foams, natural fibers), the texture of the floor-contacting material surface, and the thickness of different mat layers. As the pedestrian steps on this "system" forces are transferred and energy is absorbed in different ways, depending upon the mat, eventually resulting in traction. The stiffness of the mat also affects slipping; a floppy mat may slide in one area, while a stiff mat holds its shape better—though it still may slip. There is little "standardization" in mats, which brings us to:

5. "Standards:" There are a variety of documents that purport to provide guidance on mat traction. True consensus-approved standards (published by ANSI, ASTM, or ICC) are the place to start, but further inquiry is necessary to evaluate both applicability and technical competence. Not all standards are competent, and some documents are not actually consensus-approved "standards" at all.

a. There is no relevant mention of mat traction in the Americans with Disabilities Act (ADA) regulations, the International Building Code, the NFPA 101 Life Safety Code, or other Georgia-adopted codes.
b. The ANSI A1264.2 *Provision of slip resistance on walking/working surfaces* standard,[1] created by an American Society of Safety Engineers committee, specifies that slip resist-

Continued on page 64

What Are Medical Bills Really Worth?

CPT Code	Description	Provider Charge	Medicaid Allowable	Medicare Allowable	Insurance Allowable	Work Comp Allowable
70450-26	CT Scan/Head	190.00	37.64	46.08	69.12	104.28
70450-TC	CT Scan/Head	1386.00	126.47	126.47	164.41	199.00
71020-26	Xray - Chest	43.00	10.03	11.81	17.12	33.45
71020-TC	Xray - Chest	180.00	57.35	57.35	58.65	95.59
72125-26	CT Scan/Body	220.00	51.75	57.89	86.84	131.22
72125-TC	CT Scan/Body	1386.00	126.47	126.47	202.35	347.60
72141-26	MRI - Spinal cord	315.00	71.21	79.99	99.99	184.23
72141-TC	MRI - Spinal cord	2256.00	294.78	294.78	383.21	411.90
73030-26	Diagnostic Radiology	40.00	8.15	10.60	14.84	29.68
73030-TC	Diagnostic Radiology	240.00	57.35	57.35	80.29	99.36
	Total	**$6,256.00**	**$841.20**	**$868.79**	**$1,176.82**	**$1,636.31**

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Government Enforcement Defense Case Law Update

By Richard E. Glaze, Jr., Government Enforcement Defense Substantive Law Section Chair, and Jessica Nwokocha
Balch & Bingham, Atlanta

The Government Enforcement Defense Section is for attorneys who defend clients from enforcement actions taken by government entities.

Securities: Liability for Insider Trading Tipper Does Not Require Financial Benefit

In *Salman v. United States*, 137 S. Ct. 420 (2016), the Supreme Court resolved a circuit split by upholding the Ninth Circuit's interpretation of the long-standing *Dirks v. SEC* "personal benefit" standard for insider trading under the federal securities laws, which required that a tipper reap some personal benefit before the tippee would be held responsible.[1] The Court held that tippees of confidential information can be held responsible for improperly tipping off family members, whether or not the tipper reaps any of the profits from the tip. In a unanimous decision, the Court found that the personal benefit from making a gift of valuable information to a relative includes "'the benefit one would obtain from simply making a gift of confidential information to a trading relative.'"[2]

The petitioner in the case, Bassam Salman, had traded on lucrative trading tips from his brother-in-law, Michael Kara, who passed along the information from his brother Mara, who worked on the trading floor at Citigroup. Salman argued that he could not be held liable as a tippee because Mara did not personally receive money or property in exchange for the tips and thus did not personally benefit from them. He argued that a close family relationship is insufficient to show personal benefit, and cited *United States v. Newman*, which required "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature."[3] The Ninth Circuit disagreed, relying on the Supreme Court's 1983 holding in *Dirks v. SEC* that the "elements of fiduciary duty and exploitation of nonpublic information . . . exist when an insider makes a gift of confidential information to a trading relative or friend."[4]

As the court reasoned:

> Our discussion of gift giving resolves this case. Maher, the tipper, provided inside information to a close relative, his brother Michael. *Dirks* makes clear that a tipper breaches a fiduciary duty by making a gift of confidential information to "a trading relative," and that rule is sufficient to resolve the case at hand. As Salman's counsel acknowledged at oral argument, Maher would have breached his duty had he personally traded on the information here himself then given the proceeds as a gift to his brother. Tr. of Oral Arg. 3-4. It is obvious that Maher would personally benefit in that situation. But Maher effectively achieved the same result by disclosing the information to Michael, and allowing him to trade on it.[5]

The message in this case is that, at least among family, the tipper does not have to reap a financial benefit for the tippee to be held responsible. Though not part of the Court's holding, a close personal relationship among non-family is likely to result in a similar outcome, but it is unclear whether an unrequited tip between mere business associates would lead to the same result.

NOTE: Insider trading of securities is often prosecuted as a crime but is often handled as a civil matter.[6]

Stayed Clean Water Act Jurisdictional Rule Targeted for Withdrawal

In the Fall 2016 edition of this newsletter, we reported that an Obama Administration rule promulgated by the Army Corps of Engineers and the U.S. Environmental Protection Agency in 2015 that defines the scope of federal jurisdiction under the Clean Water Act was stayed by the Sixth Circuit Court of Appeals after being challenged by a coalition of 18 states and several industries.[7] The rule drew the ire of many as a power grab by the federal government that unfairly overregulates the nation's waters and diminishes the power of individual states to control the resource. It also alarmed agricultural interests by classifying many ditches as "waters of the United States" and extending protection to marginal waters many believe do not warrant federal protection.

It appears now that instead of ultimately being resolved by the courts, the rule may now be withdrawn and ultimately replaced with a new definitional regulation. On June 27, the Corps of Engineers and the EPA announced they would begin the withdrawal process to comply with the President Donald Trump's earlier executive order that the rule be withdrawn. While a new rule is being written, the Corps and the EPA, who share enforcement authority, will continue to make enforcement decisions based on the current definitional rule as interpreted under applicable case law.

Key False Claims Act Issue Update: Circuit Courts Apply Materiality Standard Post-*Escobar*

Last year, in *Universal Health Services v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1995 (2016), the U.S. Supreme Court ruled that the False Claims Act ("FCA") imposes liability

under certain circumstances when a defendant has failed to comply with all conditions of payment when submitting a claim to the government. To the extent the defendant knowingly fails to disclose the defendant's violation of a material statutory, regulatory, or contractual requirement, the defendant is deemed to have impliedly certified compliance with the requirement and failure to comply with it can render the claim "false and fraudulent" under the FCA. *Id.* at 1996.

According to the Court, the false certification theory can be a basis for liability when the following conditions are satisfied: (1) the claim does not merely request payment, but also makes specific representations about the goods or services provided; and (2) the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths. *Id.* at 2001. Regarding the materiality requirement, the Court held that "a misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's *payment decision* in order to be actionable under the False Claims Act." *Id.* at 2002 (emphasis added). However, the failure to "disclose violations of legal requirements does not turn upon whether those requirements were expressly designated as conditions of payment." *Id.* at 1996. The Court noted that the "materiality standard is demanding" and "cannot be found where noncompliance is minor or insubstantial." *Id.* at 2003.

This year various courts of appeals have applied *Escobar* to evaluate FCA liability. The outcomes are summarized as follows:

Fourth Circuit: Half-Truths as Actionable Misrepresentation

In *United States ex rel. Badr v. Triple Canopy, Inc.*, 857 F.3d 174 (4th Cir. 2017), defendant government contractor was required by its contract with the government to ensure its guards met a marksmanship requirement. The defendant submitted monthly invoices to the Government for its guard services and, although the defendant was not required to certify compliance with the contract, the defendant falsified marksmanship scorecards and "'billed the Government for each and every one of its unqualified security guards.'" *Id.* at 175.

On remand, the *Badr* court concluded the Supreme Court's ruling in *Escobar* did not affect its earlier ruling despite the Supreme Court's vacation of its decision based on the implied certification theory. The court again reversed the district court's dismissal of the Government's complaint and remanded for further proceedings. *Id.* 177-78. In analyzing *Escobar's* rigorous materiality requirement, the court determined that the Government sufficiently alleged material falsity. *Id.* at 178. First, the court found that by failing to meet a responsibility in the contract while requesting monthly payment for unqualified guards, the defendant stated a "half-truth," which could be an actionable misrepresentation. Second, the court found that the defendant's omissions were "material for two reasons: common sense and [the defendant's] own actions in covering up the noncompliance." Id. at 178. The court also found that the Government had introduced sufficient evidence of materiality, including the decision not to renew its contract for base security with the defendant and its immediate intervention in the litigation. *Id.* at 179. The court concluded that "[g]uns that do not shoot are as material to the Government's decision to pay as guards that cannot shoot straight." *Id.*

> *"The Court noted that the "materiality standard is demanding" and "cannot be found where noncompliance is minor or insubstantial."*

D.C. Circuit: Strong Evidence of Immateriality

In *United States ex rel. McBride v. Halliburton Company*, 848 F.3d 1027 (D.C. Cir. 2017), the contractual responsibilities for the defendant government contractor to the Department of Defense were set forth in individual task orders. *Id.* at 1028. A task order directed the defendant to provide certain support services for the military, including maintaining recreation centers for troops. *Id.* An employee of the defendant alleged the defendant inflated headcount data for the number of military personnel who used recreation facilities in Iraq, which resulted in overbilling the Government. *Id.* As evidence, the employee further alleged that the contractor destroyed sign-in sheets to conceal the falsity of the headcounts and then stopped inflating the headcounts after the employee reported the practice to her supervisors. *Id.*

In affirming the district court's grant of summary judgment, the court held that the false headcounts were not material to the Government's decision to pay. *Id.* at 1033. The defendant's tracking of headcount data was voluntary and not specifically required by the task order. *Id.* at 1032. Further, military witnesses testified that the headcount data "had no bearing on costs billed to the Government, and that there was no indication the data affected award fee decisions." *Id.* at 1033. Additionally, the speculative nature of some of the evidence the employee provided to the court failed to meet the "demanding" materiality requirement. *Id.* at 1034. However, the court paid special attention to the Government's actions in following its investigation of the employee's allegations—its failure to disallow any charged costs and its continued provision of an award fee to the contractor for exceptional performance under the task order. *Id.* The court determined that these facts were "very strong evidence" that the requirements allegedly violated by the inflated headcounts were not material. *Id.*

Continued on page 57

Premises Liability Case Law Update

By Brian Wade Johnson
Drew Eckl & Farnham, Atlanta

***Vinings Run Condominium Assoc., Inc., et al. v. Linda Stuart-Jones*, A17A0586, 2017 WL 2774576 (6/27/2017), Georgia Court of Appeals**

On June 27, 2017, the Georgia Court of Appeals reversed the denial of summary judgment to the appellants/defendants (Vinings Run Condominium Association Inc. and Access Management Group LP) in Plaintiff's premises liability suit seeking to recover for injuries she sustained when she fell on some exterior stairs at her condominium community because she had equal, if not superior, knowledge of the allegedly unsafe conditions. The Georgia Court of Appeals also reaffirmed the position that the "necessity" exception to equal/superior knowledge is limited to the context of a landlord-tenant relationship which did not exist between the plaintiff resident/occupant of a condominium and the defendant condominium association and defendant property management company.

After returning home one evening, the plaintiff claimed she fell while ascending concrete stairs located outside the condo unit she had occupied for more than five years. Plaintiff claimed injuries from the fall and filed suit. She argued that the defendants were responsible because they had failed to install adequate lighting and other features necessary to keep the stairway safe. The plaintiff also argued that the necessity exception applied to circumnavigate the equal/superior knowledge of conditions.

The evidence showed that the plaintiff had a verbal agreement with the owner of a condominium unit to lease-purchase the residence. In her deposition, the plaintiff claimed that she had previously made requests to maintenance regarding the need for lighting and an additional handrail on the concrete stairs leading from the parking lot to her condominium. However, she

claimed those requests were ignored. The appellants denied such requests were made and submitted affidavits from the other residents in the condominium building that the lighting was sufficient and the concrete steps were hazard free. The evidence also showed that the plaintiff had successfully traversed the subject steps at day and night on multiple occasions both before and after the alleged incident and the evidence showed that the subject steps were not the sole means of ingress and egress to the plaintiff's condo unit.

Defendants moved for summary judgment, arguing that plaintiff could not recover for her injuries because she had equal, if not superior, knowledge of the allegedly unsafe conditions and successfully traversed the conditions on multiple occasions before and after the alleged incident. In response, plaintiff argued that she could still recover because the necessity exception applied, meaning that it was necessary for her to traverse the allegedly unsafe conditions to enter her residence. Defendants argued that the exception only applied in the context of a landlord-tenant relationship, which did not exist between them and plaintiff. The trial court denied the defendants motion for summary judgment, finding that the necessity rule applied.

In reversing the denial of defendants' motion for summary judgment, the Georgia Court of Appeals (Branch, McMillian, Mercier and Bethel, JJ., concur. Doyle, J., concurred in judgment only. Barnes, P.J., McFadden, P.J., and Reese, J., dissented. Miller, P.J., concurred in judgment only of the dissent) noted that the necessity rule exception only applies to situations involving landlords and tenants and a landlord-tenant relationship did not exist between the parties in this case. Accordingly, because plaintiff had equal knowledge of the allegedly unsafe conditions and because the necessity rule did not apply, the trial court erred in denying summary judgment.

The Court held that "[i]t has often been held that the true basis for a landlord's liability to a tenant for injuries resulting from a defective or hazardous condition existing on the premises is the landlord's superior knowledge of the condition and of the danger resulting from it." *Richardson v. Palmour Court Apartments*, 170 Ga. App. 204, 205, 316 S.E.2d 770 (1984). "In accordance with the superior knowledge principle, it has been held that where a portion of leased premises is dangerously out of repair and such condition is patent and known to the tenant, who continues to use that area, the tenant cannot recover from the landlord for damages resulting from the condition." *Id.* (citation and punctuation omitted). *See also Flores v. Strickland*, 259 Ga. App. 335, 337, 577 S.E.2d 41 (2003) ("A landlord is not liable for a plaintiff's injuries caused by a dangerous condition when the plaintiff had equal or superior knowledge of the danger and failed to exercise ordinary care to avoid it." (footnote omitted)). A tenant is presumed to have knowledge of allegedly dangerous, but static, conditions that

Continued on page 70

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Professional Liability Case Law Update

By Shaun Daugherty, Substantive Law Section Vice-Chair
Freeman, Mathis & Gary, Atlanta

Hobbs v. Great Expressions Dental Centers of GA, P.C.
337 Ga. App. 248 (May 27, 2016)

Plaintiff filed suit against the defendant alleging claims of breach of contract, fraud, breach of covenant of good faith and fair dealing, punitive damages and attorney fees related to the alleged failure to properly perform and complete implant and related dental procedures. No expert affidavit was attached to the complaint and the defendant moved to dismiss all claims under O.C.G.A. §9-11-9.1 stating that they sounded in professional negligence and required an expert affidavit. The trial court agreed and dismissed the claims.

On appeal, plaintiff argued that his complaint did not assert a claim for professional negligence; rather, he was asserting a breach of contract. The Court of Appeals found that the gist of the allegation for breach of contract was one for sub-standard dental care and it required the support of an expert affidavit. The dismissal of the professional malpractice claims was proper by the trial court. However, for the claims of fraud, the Court of Appeals held that the expert affidavit was not necessary and the dismissal of that cause of action was in error based on the factual allegations in the complaint.

Zarate-Martinez v. Echemendia
299 Ga. 301 (July 5, 2016)

Plaintiff filed a medical malpractice complaint against the defendants seeking damages for injuries sustained during an open laparoscopic tubal ligation. Plaintiff filed two expert affidavits, one with the complaint to meet the requirements of O.C.G.A. § 9-11-9.1 and one for summary judgment purposes. After deposing both experts, defendant moved to strike their testimony as being unqualified under O.C.G.A. § 24-7-702(c) and moved for summary judgment. Plaintiff responded and challenged the constitutionality of the evidentiary statute. The trial court granted the motion to strike, but allowed plaintiff 45 days to file an affidavit of a competent expert. Plaintiff filed a third affidavit within the 45 days, but a motion to strike was filed due to the lack of indication of the expert's qualifications in the affidavit. An amended affidavit was filed outside the 45 days. The trial court struck both of the new affidavits which left plaintiff with no qualified expert affidavit to satisfy O.C.G.A. § 9-11-9.1 and the claims were dismissed.

On appeal, the Court of Appeals affirmed the trial court on the merits, but did not address the constitutional issues related to O.C.G.A. § 24-7-702. The Georgia Supreme Court granted Cert to address the merits and the constitutional matters as it retained the exclusive appellate jurisdiction over the latter. The Supreme Court found that the requirements for expert qualifications found in O.C.G.A. § 24-7-702(c) did not violate due process, the right to a trial by jury, equal protection, special privileges and immunities, the separation of powers or Uniformity Clause and was not unconstitutional.

However, on the merits, the Court looked to the decision of *Dubois v. Brantley*, 297 Ga. 575 (2015) to determine whether the last expert submitted by plaintiff qualified under the requirements. The Court restated the ruling in *Dubois* that the requirements of Rule 702 do not require that an expert actually have performed or taught the very procedure at issue in order to be qualified. "The pertinent question is whether an expert has an appropriate level of knowledge in performing the procedure or teaching others how to perform the procedure, not whether the expert himself has actually performed or taught it." For this reason, the Court vacated and remanded the matter back to the trial court to reconsider the qualifications of the last submitted expert in light of *Dubois*. ◆

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Trucking Case Law Update

By Jonathan Kandel
Swift Currie McGhee & Hiers, Atlanta

***Grange Indem. Ins. Co. v. Burns*, 337 Ga. App. 532 (2016)**

Applicability of Federal or State Financial Responsibility Regime—Court of Appeals adopts majority "trip specific" analysis for application of MCS-90 Endorsement.

The Court of Appeals held that a MCS-90 Endorsement did not apply to an accident that occurred during a purely intrastate trip transporting non-hazardous materials. In so holding, the *Burns* Court followed the approach adopted by the majority of federal courts: "the determination of whether the MCS-90 endorsement provides coverage hinges upon an analysis of the trip route and goods being transported at the time of the subject accident." *Id.* at 536.

As background, the Federal Motor Carrier Safety Regulations (FMCSR) require motor carriers transporting property in interstate commerce to maintain minimum liability insurance coverage of $750,000. *See* 49 C.F.R. § 387.15. A very common way for motor carriers to comply with this requirement is to have a MCS-90 Endorsement attached to their auto insurance policy. "MCS-90" is the commonly used name for the federally-required endorsement, which is formally titled "Endorsement for Motor Carrier Policies of Insurance for Public Liability under Sections 29 and 30 of the Motor Carrier Act of 1980."

Plaintiff Burns brought suit for injuries she sustained in a motor vehicle accident involving a box truck being driven by an employee of J.B. Trucking, Inc., a motor carrier, and included a claim against J.B. Trucking's insurer under Georgia's direct action statute. J.B. Trucking had a commercial auto insurance policy with liability limits of $350,000, and the policy included a MCS-90 Endorsement.

On the day of the accident, the employee had picked up the box truck in Monroe, Ga. and drove it to Norcross, Ga., where he picked up a load of "sales papers" and delivered them to a paper company in Newnan, Ga. The sales papers were manufactured in Georgia and were destined for end users located in Georgia. While on his way from Newnan to Monroe to return the empty box truck, the employee was in an accident with Plaintiff Burns. *Id.* at 533.

The Court rejected the plaintiff's argument that the MCS-90 Endorsement should apply regardless of whether a specific trip is interstate or intrastate in nature. Specifically, the Court noted that the plain language of the MCS-90 Endorsement (which is mandated by the FMCSR), of the Motor Carrier Act of 1980, and of the FMCSR all make clear that the Endorsement applies only when vehicles are presently engaged in interstate commerce or when hazardous materials are being transported. *Id.* at 536-38. The Court also rejected—as contrary to Georgia statutes and regulations—the plaintiff's argument (and the trial court's conclusion) that a Georgia Uniform Rule of Road statute, O.C.G.A. § 40-6-10.1, showed that the Georgia legislature intended the MCS-90 Endorsement to apply to all accidents involving an interstate motor carrier regardless of the specific trip at issue. *Id.* at 539-40.

Finally, the Court rejected the plaintiff's public policy arguments as well. The Plaintiff argued (on public policy grounds) that the MCS-90 Endorsement should always apply because "a Georgia citizen injured by an interstate motor carrier conducting intrastate commerce of nonhazardous materials at the time of an accident should be given the same amount of protection as a citizen injured by the same truck, owned by the same carrier, and covered by the same insurance policy, but whose cargo may be destined for another state." *Id.* at 540-41. However, the Court found the plaintiff's public policy arguments could not "trump the clear and unambiguous statutory and regulation language." *Id.* at 541. ◆

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GDLA Platinum Sponsors Host Summer Happy Hour

GDLA Platinum Sponsors Collision Specialists, Inc., Esquire Deposition Solutions and LexisNexis joined forces to help members escape the heat and network at a Summer Happy Hour. The event was held on July 25, 2017 at RiRa Irish Pub in Midtown Atlanta.


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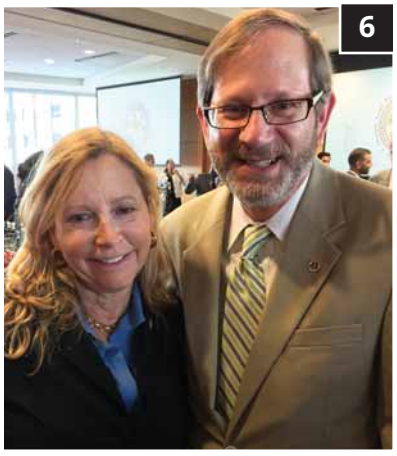
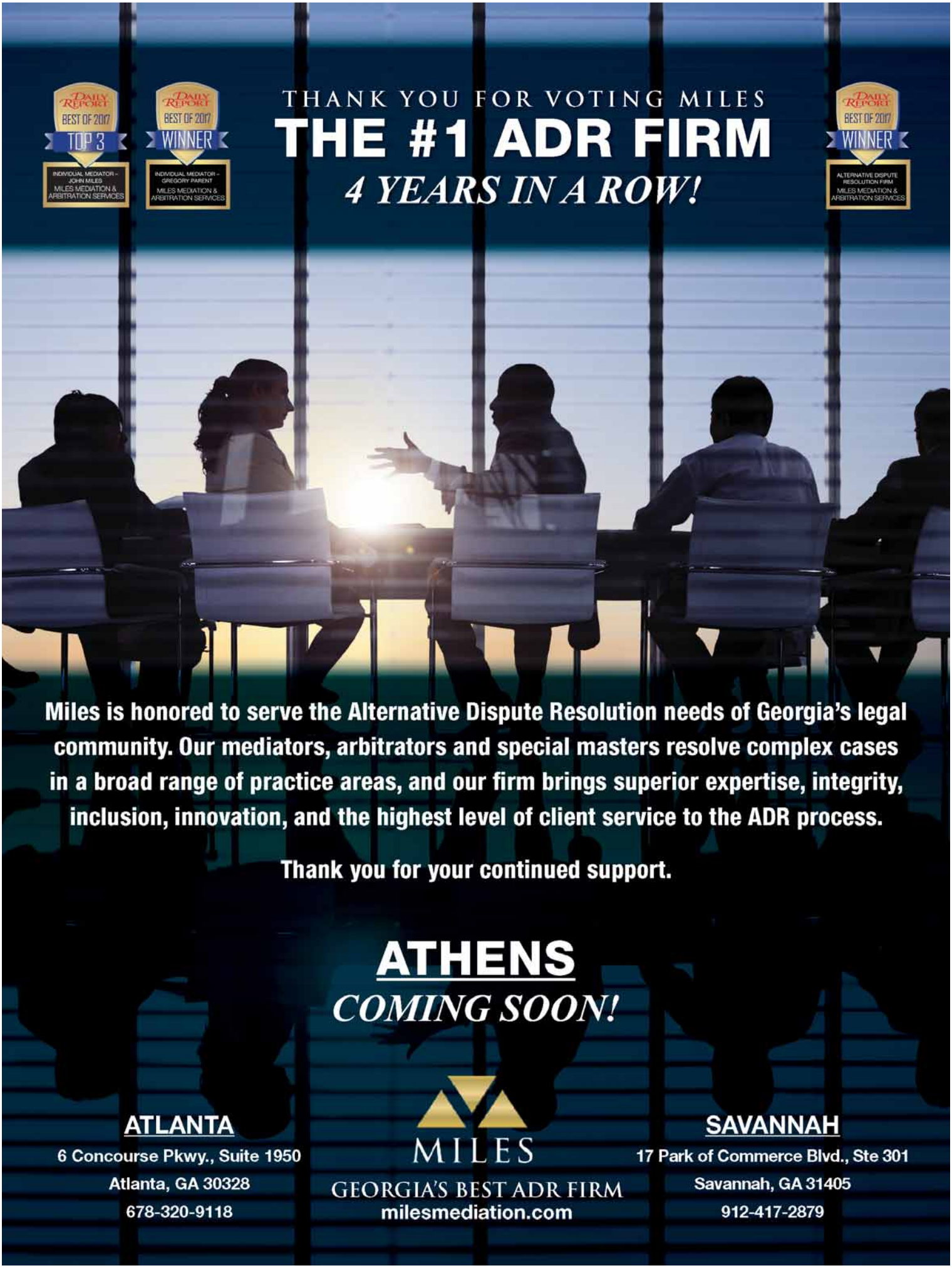
Pictured enjoying the Summer Happy Hour hosted by Collision Specialists, Inc., Esquire Deposition Solutions and LexisNexis at RiRa Irish Pub in Atlanta (on this page and the prior page) are: 1. Marcia Stewart and Rachel Reed; 2. Mike Miller and Elissa Haynes; 3. Constance Woods, Sean Boyd and Bridgette Eckerson; 4. Secretary Jeff Ward and Clay O'Daniel; 5. President Sally Akins with Esquire's Kendrea Jenkins and Michael Joshua; 6. Michael Denney and Jeff Wasick; 7. Scott Young, Tina Cheng and Collision Specialists' Analiese Stopek; 8. Immediate Past President Peter Muller and LexisNexis' Justin Kolumber; 9. John McKinley and Stephanie Vari.

GDLA Co-Sponsors Gate City/GABWA Judicial Reception

In an ongoing effort to promote diversity within our association and the bar generally, GDLA was again pleased to be among the bar associations co-sponsoring the Annual Judicial Reception of the Gate City Bar Association and Georgia Association of Black Women Attorneys (GABWA). The event was held on August 22 at King & Spalding's offices in Atlanta.



Pictured at the reception are: 1. Diversity Chair Candis Jones and Fulton Superior Court Judge Paige Reese Whitaker; 2. Lynne Espy-Williams and U.S. District Court Judge Steve Jones; 3. Marcia Stewart, DeKalb State Court Judge Al Wong and Jodene White; 4. Past President Lynn Roberson, DeKalb State Court Judge Stacey Hydrick and DeKalb Superior Court Judge Asha Jackson; 5. Fulton State Court Judge Susan Edlein and Chuck Dalziel; 6. Court of Appeals Judge Anne Elizabeth Barnes and Mark Wortham; 7. Court of Appeals Judge John Ellington and Executive Director Jennifer Davis.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50th GDLA Annual Meeting

CELEBRATING 50 YEARS

In the spring of 1967, five lawyers from across Georgia came together and formed the Georgia Defense Lawyers Association. They were Jack Capers of Augusta, Dick Richardson of Savannah, Ed Lane of Decatur, John David Jones of Atlanta and Mead Burns of Atlanta. The mission was to foster collegiality and professionalism within the civil defense bar. Without these visionaries, there would not be a Georgia Defense Lawyers Association.

Years later, we created a formal mission statement, which can be found on our website. In essence, it states that we are an association devoted to improving the practice of law as conducted by lawyers who devote most of their professional time to the handling of litigated matters where they are representing defendants.

Following the spring of 1967, a meeting was held at the Travel Lodge Motel in Atlanta at which Jack Capers and Dick Richardson were the moderators. Attending the meeting were Ferd Buckley, Oscar Smith, Bill Scrantom, Glenn Frick, Frank Love, Gould Hagler, James Dunlap, John Gayner, Ed Lane, John David Jones and Mead Burns.

Dick Richardson drafted the Association's first bylaws, and the Association was officially recognized under Georgia law.

In celebration of our founding a half-century ago, lawyers, judges, sponsors and guests gathered at The Breakers in Palm Beach, Fla. from June 8-11, 2017 for the 50th GDLA Annual Meeting. As part of the festivities, attendees received a magazine, "50 Years of Advancing the Civil Defense Bar: Georgia Defense Lawyers Association—1967-2017."

The history was penned by resident historian and 1991-1992 Past President Morton G. "Salty" Forbes of Savannah. It included remembrances by most of our living past presidents, as well as *Law Journal* President's Messages penned during their terms of office. It is available for reading on our website under "About Us."

On the pages that follow, you will find photos from the Golden Anniversary Celebration.

WELCOME, Y'ALL!
RECEPTION
Participating Sponsor
Miles Mediation
Team Murphey

Enjoying the opening reception are: 1. Judge Henry Newkirk and his wife, Past President Lynn Roberson; Susan Murphey and her husband, Joe Murphey, the evening's sponsor; and Candis Jones. 2. Special guest and plaintiff's lawyer Tommy Malone with Past President Warner Fox and Tommy's wife, Debbie.

June 15-18 at The Breakers

Pictured are speakers during the CLE program, which was planned by President-Elect Sally Akins; also included are scenes from Saturday's Business Meeting: 3. GDLA member and DRI Secretary-Treasurer Douglas Burrell reports on the national defense bar's work; 4. Amicus Chair Marty Levinson and Vice-Chair Garret Meader review amicus briefs filed in the past year; 5. Jake Daly provides a legislative update; 6. Past President Warner Fox, Rick Brown, Will Ronning and Dave Nelson explore understanding and challenging medical bills; 7. Stephanie Glickauf along with 8. Steve Kyle and Tracie Macke review bad faith; 9. Western Superior Court Judge Lawton Stephens (left) and Fulton State Court Judge Susan Edlein (right) lead an entertaining discussion on professionalism with crowd participation by (l-r) President Peter Muller, Douglas Burrell, Jamie Kim, Jason Lewis and Megan Manly; 10. Past President and DRI State Rep Ted Freeman presents outgoing President Peter Muller with an exceptional performance award from DRI; 11. Sherrie Brady, Jeff Ward and Past President Kirby Mason review apportionment; and 12. Alycen Moss, Erica Morton and Immediate Past President Matt Moffett prepare for their offers of settlement panel.

CELEBRATING 50 YEARS


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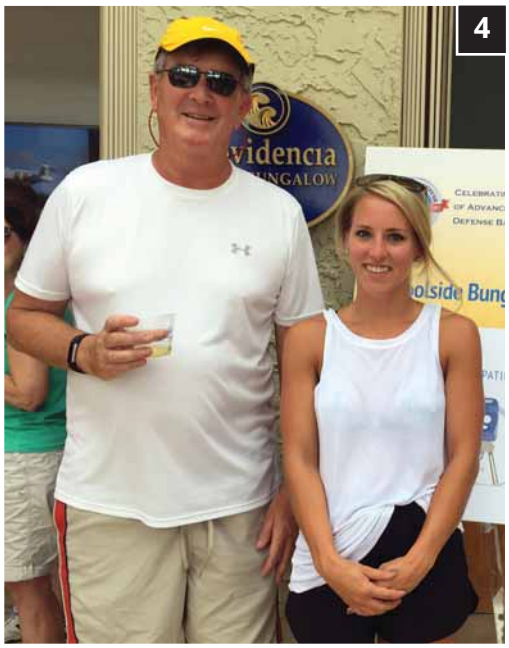
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After the educational programming concluded on both Friday and Saturday, everyone headed outdoors for some fun in the sun (and the occasional shower). While The Breakers boasts four pools and a half-mile private beach, GDLA reserved several indoor-outdoor beachside bungalows, thanks to the sponsors noted above, to maximize togetherness. There, members and guests cooled off with beverages, caught some rays (or Z's), watched sports on TV, or engaged in a rather competitive cornhole tournament.

Pictured are: 1. (gentlemen are noted from left) Past Presidents Jerry Buchanan, Steve Kyle and Mel Haas with their wives, Carolyn, Judy and Linda, respectively; 2. Past President Warner Fox and his son, Andrew; 3. Past President Salty Forbes and his wife, Lee. 4. Dart Meadows and Platinum Sponsor Analiese Stopek of Collision Specialists, Inc.

Pictured enjoying the great outdoors are: 5. Alex Barfield, Kasi Whitaker, Fielder Martin and Elliott Ream; 6. Will Martin and Garret Meader; 7. Past Presidents Walter McClelland and Matt Moffett with Matt's dad and plaintiff's lawyer interloper, Glenn Moffett; 8. Jason Logan and his daughter, Lilly. 9. Jamie Weston and Past President Grant Smith; 10. Dave Nelson and his wife, Jennifer, with Platinum Sponsor Jon Woody of Veritext; 11. Jason Lewis (left) and Marty Levinson with Platinum Sponsor Heather Uhrinek of ESI; 12. Sherrie Brady with her children, Saliyah and Aaden.

CELEBRATING 50 YEARS

PRESIDENTS' RECEPTION

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Pictured at Friday evening's Presidents' Reception are: 1. President Peter Muller (center) with Platinum Sponsors Rene Basulto and Dawn DiMarco of Robson Forensic; 2. Judge Lawton Stephens and his wife, Mary, President-Elect Sally Akins, and Megan Manly and her husband, John.

GDLA Past Presidents: 50 Years of Leadership

John D. "Jack" Capers, 1968-69

Willis J. "Dick" Richardson, 1969-70

Ferdinand Buckley, 1970-71

Oscar M. Smith, 1971-72

William G. "Bill" Scrantom, Jr., 1972-73

Glenn Frick, 1973-74

Frank Love, Jr., 1974-75

Gould B. Hagler, 1975-76

James A. Dunlap, 1976-77

Hubert Howard, 1977-78

John M. Gayner, 1978-79

Albert H. "Al" Parnell, 1979-80

S. Edgar (Ed) Kelly, Jr., 1980-81

Eugene P. "Bo" Chambers, Jr., 1981-82

Eugene G. "Gene" Partain, 1982-83

George C. Grant, 1983-84

Melburne D. "Mac" McLendon, 1984-85

Douglas Dennis, 1985-86

Paul W. Painter, Jr., 1986-87

E. Davison "Dave" Burch, 1987-88

Richard A. Marchetti, 1988-89

Patrick J. "Pat"Rice, 1989-90

Wilbur C. Brooks, 1990-91

Morton G. "Salty" Forbes, 1991-92

J. Bruce Welch, 1992-93

Hendley V. Napier, 1993-94

David T. Whitworth, 1994-95

R. Clay Porter, 1995-96

David H. Hanks, 1996-97

Joseph H. "Joe" Chambless, 1997-98

Steven J. Kyle, 1998-99

George E. Duncan, Jr., 1999-2000

F. Gregory "Greg" Melton, 2000-01

Walter B. McClelland, 2001-02

Jerry A. Buchanan, 2002-03

Richard A. "Rick" Rominger, 2003-04

Grant B. Smith, 2004-05

John A. "Johnny" Foster, 2005-06

Warner S. Fox, 2006-07

Robert M. "Bob" Travis, 2007-08

James E. "Jimmy" Singer, 2008-09

N. Staten Bitting, Jr., 2009-10

Edward M. "Bubba" Hughes, 2010-11

W. Melvin "Mel" Haas III, 2011-12

Lynn M. Roberson, 2012-13

Theodore "Ted" Freeman, 2013-14

Kirby G. Mason, 2014-15

Matthew G. "Matt" Moffett, 2015-16

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Past President Salty Forbes Honored with Inaugural Distinguished Service Award

Morton G. "Salty" Forbes, who served as President from 1991-1992, was honored with the inaugural GDLA Distinguished Service Award during the 50th Annual Meeting. GDLA is indebted to him for his tireless commitment to advancing the Association and the civil defense bar. Even his wife, Lee, shared this devotion and designed our first logo, which served us for almost 25 years. Salty is a founding partner at Forbes Foster & Pool in Savannah. Outgoing President Peter Muller (left) presented the award.

Governor's Proclamation Honors GDLA's 50th Anniversary

In recognition of GDLA's 50th anniversary milestone, Governor Nathan Deal issued a proclamation designating June 17, 2017 as Georgia Defense Lawyers Association 50th Anniversary Day in Georgia. Pictured holding the gubernatorial honor are Immediate Past President Peter Muller and President Sally Akins. Below is the proclamation text:

WHEREAS: The Georgia Defense Lawyers Association is the statewide organization for Georgia lawyers engaged primarily in the practice of civil defense litigation; and

WHEREAS: The Georgia Defense Lawyers Association and its members are dedicated to providing an opportunity for attorneys to exchange ideas, develop professional relationships, support the state and federal judiciary, and share resources and information for the civil defense practice; and

WHEREAS: The Georgia Defense Lawyers Association and its members are committed to improving the adversarial system of jurisprudence in our courts, to working for the elimination of court congestion and delays in civil litigation, and to seeking improvements in the justice system; and

WHEREAS: For 50 years, the Georgia Defense Lawyers Association has worked to elevate the standards of trial practice and has provided a platform of support for civil defense lawyers licensed in this State; now

THEREFORE, I, NATHAN DEAL, Governor of the State of Georgia, do hereby proclaim June 17, 2017, as GEORGIA DEFENSE LAWYERS ASSOCIATION 50TH ANNIVERSARY DAY IN GEORGIA.

Eighteen GDLA Past Presidents were on-hand to be honored at the 50th GDLA Annual Meeting at The Breakers in West Palm Beach, Florida. Pictured are (left to right) Grant Smith, Bruce Welch, Ted Freeman, Bubba Hughes, Warner Fox, Lynn Roberson, Jimmy Singer, Salty Forbes, George Duncan, Kirby Mason, Mel Haas, Steve Kyle, Staten Bitting, Johnny Foster, Jerry Buchanan, Matt Moffett, Peter Muller and Walter McClelland.

Pages 44 and 45 Photography by: LILA PHOTO

Sarah B. "Sally" Akins (left) of Ellis Painter Ratterree & Adams in Savannah was sworn in as the 50th President of the Georgia Defense Lawyers Association. Fulton State Court Judge Susan Edlein (right) conducted the swearing-in ceremony, which also installed the new officers: (l-r) President-Elect Hall F. McKinley III of Drew Eckl & Farnham in Atlanta; Treasurer David N. Nelson of Chambless Higdon Richardson Katz & Griggs in Macon; and Secretary Jeffrey S. Ward of Drew Eckl & Farnham in Brunswick.

Amicus Committee Leaders Honored with President's Award

During the 50th Annual Meeting, Immediate Past President Peter D. Muller (center) honored Martin A. "Marty" Levinson of Hawkins Parnell Thackston & Young in Atlanta (left) and Garret W. Meader of Drew Eckl & Farnham in Brunswick each with the President's Award for their dedicated leadership of the GDLA Amicus Curiae Committee. They have reviewed requests and then shepherded, or sometimes even authored, 18 amicus briefs since 2015, and two more are in process.

FORCON's Bill VerEecke treated everyone to a champagne toast as part of the Golden Anniversary Gala.

Outgoing President Peter Muller receives the traditional mint julep cup from incoming President Sally Akins.

GOLDEN ANNIVERSARY GALA

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Dinner and Champagne Toast
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50th History Magazine
DRI-The Voice of the Defense Bar


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The 50th Annual Meeting would not have been as special without the tremendous support of those Platinum Sponsors who contributed to make each event even more memorable. On the prior pages, we acknowledged and pictured representatives from Miles Mediation-Team Murphey, Robson Forensic, Collision Specialists Inc., ESI and Veritext. Here we thank our Golden Anniversary Gala sponsors: 1. S-E-A's Cliff Walker with his wife, Linda; 2. Exponent's Joe Lemberg with his wife, Mary; and 3. FORCON's John Leffler (left) and Bill VerEecke with Bill's wife, Susan.

Photography by: LILA PHOTO

2017-2018 Officers & Board of Directors

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Hall F. McKinley III, *Drew Eckl & Farnham, Atlanta*

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Secretary:
Jeffrey S. Ward, *Drew Eckl & Farnham, Brunswick*

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Peter D. Muller, *Goodman McGuffey, Savannah*

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

Past President 2014-2015:
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Jason D. Lewis (2020), *Chambless Higdon Richardson Katz & Griggs, Macon*

Southern District
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James S.V. Weston (2019), *Trotter Jones, Augusta*

James W. Purcell (2020), *Fulcher Hagler, Augusta*

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Candis Jones, *Gray Rust St. Amand Moffett & Brieske, Atlanta*

Daniel C. "Dan" Hoffman, *Young Thagard Hoffman Smith & Lawrence, Valdosta*

Garret W. Meader, *Drew Eckl & Farnham, Brunswick*

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Golden Anniversary Gala

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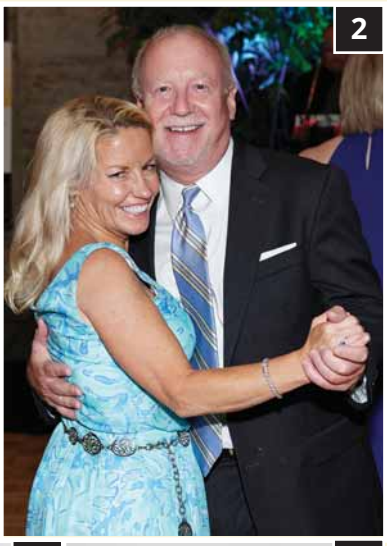


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The celebration of GDLA's semicentennial concluded with the Golden Anniversary Gala on Saturday evening in The Breakers' Circle Room. This architectural gem boasts soaring 30-foot frescoed ceilings and eight oval murals depicting Renaissance landscapes, including the Villa Medici, near Florence and the Tivoli Gardens, south of Rome.

During the evening, as seen on pages 46-47, President Muller presented two President's Awards, as well as the inaugural Distinguished Service Award. Then the 2017-2018 officers were sworn-in by Fulton State Court Judge Susan Edlein. Next, President Akins presented outgoing President Muller with a crystal gavel plaque and mint julep cup. Following dinner, one-man band and entertainer extraordinaire, Dave Bootle, had everyone on the dance floor for three hours straight. It was the perfect ending to a spectacular three days of commemorating our 50th.

Pages 48-52 are snapshots from Saturday evening; pictured on these two page are: 1. President Sally Akins (second from right) with her Ellis Painter Ratterree & Adams colleagues: (l-r) Past President Bubba Hughes, Tracy O'Connell and Megan Manly; 2. Ryan Mock and Pam Harrison; 3. Forbes Foster & Pool firm photo: Past President Salty Forbes and his wife, Lee, Tifani and Scot Pool, Andrew Foster and Past President Johnny Foster; 4. Past President Bruce Welch and his wife, Marcia; 5. Jason Lewis and his wife, Annie; 6. Walter Ballew and his wife, Ruthie; 7. Arthur Park with his wife, Janet, and their son, Jackson; 8. Past President Grant Smith and his wife, Holly; 9. Candis Jones and Demetrius Smith; 10. Dan Hoffman, and his wife, Sue; 11. President-Elect Hall McKinley and Stephanie Fuller; 12. Past President Kirby Mason with her husband, Frank, and daughters, Taylor and Alex; 13. Sen. Bill Cowsert and his wife, Amy; 14. Past President Jimmy Singer and his wife, Patti.

Photography by: LILA PHOTO

50th GDLA Annual Meeting

CELEBRATING 50 YEARS


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Pictured enjoying Saturday evening's Golden Anniversary Gala are: 1. Past President Jerry Buchanan and his wife, Carolyn, with Past President Walter McClelland and his wife, Kathy; 2. Scott Masterson and his wife, Lauryn. 3. Past President George Duncan and his wife, Gini; 4. Susan Murphey with her husband, Joe (both at left), with Nik Makarenko and his wife, Debbi; 5. Sherrie Brady and Jamie Kim; 6. Secretary Jeff Ward and his wife, Greer (both at left), with Past President Matt Moffett and his wife, Diane; 7. Past Presidents Steve Kyle and Peter Muller; 8. Kasi Whitaker (right) with her husband, Alex Barfield; 9. Rick Brown (right) and his wife, Debbie (left), with Scott Young and his wife, Michaela; 10. Judge Susan Edlein, Executive Director Jennifer Davis and Past President Lynn Roberson; and 11. Erica Morton and her husband, Robb.

Photography by: LILA PHOTO

Golden Anniversary Gala

HIPAA Regulations

Continued from page 16

tion of emotional distress against Byrum and negligent infliction of emotional distress against Dr. Faber. In addition, Acosta alleged in her complaint that by providing Byrum with his access code, Dr. Faber violated the rules and regulations established pursuant to HIPAA.

Dr. Faber moved to dismiss for failure to state a claim, among other things, and the trial court judge agreed. On interlocutory appeal, the North Carolina Court of Appeals reversed.

Dr. Faber contended that HIPAA did not permit an individual right of action, and thus the violation of any HIPAA regulation did not furnish a basis on which to bring a civil suit against him. The appellate court, however, disagreed, explaining:

> In her complaint, plaintiff states that when Dr. Faber provided his medical access code to Byrum, Dr. Faber violated the rules and regulations established by HIPAA. This allegation does not state a cause of action under HIPAA. Rather, plaintiff cites to HIPAA as evidence of the appropriate standard of care, a necessary element of negligence. Since plaintiff made no HIPAA claim, HIPAA is inapplicable beyond providing evidence of the duty of care owed by Dr. Faber with regards to the privacy of plaintiff's medical records.[24]

Acosta was the first time that any state court had concluded that an alleged violation of HIPAA regulations might furnish a basis on which to bring a negligence suit against a medical provider.

In *Byrne v. Avery Center For Obstetrics And Gynecology, P.C.*,[25] the Supreme Court of Connecticut was presented the issue of whether HIPAA preempts state law claims for negligence and negligent infliction of emotional distress against a health care provider alleged to have improperly breached the confidentiality of a patient's medical records in the course of complying with a subpoena. The Supreme Court of Connecticut held that:

> to the extent that Connecticut's common law provides a remedy for a health care provider's breach of its duty of confidentiality in the course of complying with a subpoena, HIPAA does not preempt the plaintiff's state common-law causes of action for negligence or negligent infliction of emotional distress against the health care providers in this case and, further, that regulations of the Department of Health and Human Services (department) implementing HIPAA may inform the applicable standard of care in certain circumstances.

The facts showed that before July 2005, Defendant Avery Center provided Byrne with gynecological and obstetrical services. In 2004, Byrne began a relationship with Mendoza. After the relationship ended in the fall of 2004, Byrne instructed the Avery Center not to release any of her records to Mendoza. In the spring of 2005, Byrne moved to an adjoining state, and a few weeks later Mendoza began paternity proceedings against her in both states. The Avery Center was served with a subpoena to appear with Byrne's records in probate court. The Avery Center did not alert Byrne about the pending subpoena, file a motion to quash it, or appear at the hearing. Instead, The Avery Center simply copied Byrnes's chart and mailed it to the court. Several months later, Mendoza informed Byrne that he had read her file in the court records. Byrne filed a motion to seal, which the probate court granted. Byrne claimed that she suffered extortion, threats, and harassment because Mendoza viewed her medical file.

Byrne filed suit against The Avery Center for breach of contract for disclosing her protected health information without her permission, and for negligence in disclosing her records in violation of Connecticut law and HIPAA regulations, negligence, misrepresentation that the records would remain private in accordance with law, and negligent infliction of emotional distress.

The trial court dismissed the counts based on violation of HIPAA, reasoning that HIPAA preempted any claims arising out of the confidentiality or privacy of the medical information, but the trial court allowed the remaining claims to go forward.

Byrne appealed and argued that although there is no private right of action under HIPAA, she was asserting a claim for relief based in common law negligence, with HIPAA informing the standard of care. Among other things, she noted that this had been specifically approved by the Connecticut courts in relationship to negligence claims arising out of the violation of OSHA and state work place safety regulations. Plaintiff also argued that her claims were not preempted by HIPAA, since it was not contrary to HIPAA to afford a damages remedy for state common law claims for privacy breaches.

In response, The Avery Center pointed to a long line of cases holding that HIPAA provides no private right of action for a violation. The defense argued that because there is no private right of action under HIPAA, the plaintiff could not use HIPAA as a standard of care in a common law negligence claim. The defense also claimed that HIPAA was more stringent than the provisions of the state statute on medical privacy and thus preempted it as well.

At the outset of their analysis, the Connecticut appellate court noted that the question of whether Connecticut state causes of action were preempted by federal statutes and regulations was one over which it had plenary authority. The Court noted that nothing in HIPAA's statutory, or regulatory history indicated an intent to preempt tort actions arising under state law for unauthorized releases of patient medical records. The Court concluded that there was no preemption of the state law negligence claim and that,

> …to the extent it has become the common practice for Connecticut health care providers to follow the procedures required under HIPAA in rendering services to their patients, HIPAA and its implementing regulations may be utilized to inform the

> standard of care applicable to such claims arising from allegations of negligence in the disclosure of patients' medical records pursuant to a subpoena.[26]

The apparently growing tendency to permit negligence actions alleging a violation of HIPAA is by no means universal, however. A few courts have rejected state law claims.

In *Sheldon v. Kettering Health Network*,[27] Vickie Sheldon brought suit against Kettering Health after her ex-husband, Duane Sheldon, an administrator with Kettering, violated her medical privacy by accessing and disclosing protected health information. Among other claims, Sheldon asserted a negligence per se claim based on violation of HIPAA. Kettering moved to dismiss this claim asserting that allowing a state law claim based on a violation of HIPAA would circumvent HIPAA's bar on private actions.

The Ohio Court of Appeals concluded that while plaintiff's state law claims for violation of medical privacy survived, Sheldon's claim based on violation of HIPAA was subject to dismissal:

> However, we further conclude that federal regulations—as opposed to an Ohio statute that sets forth a positive and definite standard of care—cannot be used as a basis for negligence per se under Ohio law. Additionally, in our view utilization of HIPAA as an ordinary negligence "standard of care" is tantamount to authorizing a prohibited private right of action for violation of HIPAA itself ....[28]

In *Weinberg v. Advanced Data Processing, Inc.*[29], the United States District Court for the Southern District of Florida held that Florida law did not permit a state law claim for negligence based on violation of HIPAA. In 2012, Weinberg went by ambulance to the emergency room for medical treatment. The ambulance service he used contracted with the Defendants, Advanced Data Processing, Inc. and Intermedix, Inc., to handle its billing and payment processing. An Intermedix employee systematically accessed and viewed the personal and medical information of hundreds of patients, and then provided this information to third parties who used it commit identity theft against Weinberg and many others. Weinberg brought suit alleging negligence for failure to comply with HIPAA. The Defendants moved to dismiss on the grounds that the complaint failed to state a claim under Federal Rule of Civil Procedure 12(b)(6). The District Court rejected the argument that this claim was viable under Florida law. "Florida courts have refused to recognize a private right of action for negligence per se based on an alleged violation of a federal statute that does not provide for a private right of action."[30]

The Status of Georgia Law

O.C.G.A. § 51–1–6 provides that,

> When the law requires a person to perform an act for the benefit of another or to refrain from doing an act which may injure another, although no cause of action is given in express terms, the injured party may recover for the breach of such legal duty if he suffers damage thereby.

The Georgia Court of Appeals opinion in *Cardin v. Telfair Acres of Lowndes Co., Inc.*[31] involved a wrongful death action arising out of the collapse of sewer trench which had not been properly shored and sloped in compliance with the applicable OSHA regulations. Plaintiffs Donald and Sylvia Cardin brought a wrongful death suit against Telfair Acres seeking to recover for the death of their son. They alleged Telfair Acres was a third-party independent contractor who had dug the sewer trench in question. Telfair Acres contended that it merely supplied an excavator and an equipment operator to Cardin's actual employer, Altman Construction, who supervised the work done by the equipment operator but was not named as a defendant. At trial, the trial court excluded evidence of OSHA regulations. Though the Court of Appeals affirmed the trial court's decision under the particular facts of the case, the Court explained that

> Georgia statutory law gives a cause of action for breach of legal duty under the law requiring a person to perform an act or refrain from doing an act which may injure another. O.C.G.A. § 51-1-6. We have no doubt that OSHA regulations by definition constitute as much a duty under the law and are as enforceable as the laws authorizing their creation and promulgation (see 29 USCA § 651 et seq.), and breach of those regulations is a violation of law. They should be admissible not merely as "standards" of performance, but as evidence of legal duty, violation of which may give a cause of action under O.C.G.A. § 51-1-6.[32]

Since the opinion in *Cardin*, "[i]t is well-settled that Georgia law allows the adoption of a statute or regulation as a standard of conduct so that its violation becomes negligence per se."[33] A wide variety of federal regulations have been cited as grounds for negligence per se claims in Georgia. These include federal regulations relating to infection control in hospitals,[34] federal firearms regulations,[35] Medicare and Medicaid regulations relating to the treatment of nursing home patients,[36] and federal motor carrier safety regulations.

Given the ready acceptance of federal regulations as grounds for negligence and negligence per se claims in other areas, it is likely that Georgia will join the group of other states that have permitted state law negligence claims premised upon violations of HIPAA's privacy and security regulations. ◆

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ENDNOTES

1 42 U.S.C. §1320d-2.
2 45 C.F.R. §164.104(a).
3 45 C.F.R. §164.104(a)(3).
4 45 C.F.R. §164.104(b).
5 45 C.F.R §160.103, definition of "protected health information."
6 *Ibid.*
7 45 C.F.R. §164.502.
8 45 C.F.R. §164.501, definition of "health

care operations." This includes quality assessment and improvement, qualifications review and training, health insurance underwriting and enrollment, medical review and auditing, and business planning and management.

[9] 42 U.S.C. 1320d-5(a) and 45 C.F.R. 164.404(b).

[10] 45 C.F.R. § 160.401. "*Willful neglect* means conscious, intentional failure or reckless indifference to the obligation to comply with the administrative simplification provision violated."

[11] 42 U.S.C. 1320d-5(a) and 45 C.F.R. 164.404(b).

[12] 42 U.S.C. 1320d-5.

[13] *See, e.g., Doe v. Southwest Cmty. Health Ctr.*, No. FSTCV085008345S, 2010 Conn. Super. LEXIS 2167, 2010 WL 3672342 (Conn. Super. Ct. Aug. 25, 2010) (denying summary judgment on negligence claim alleging failure to safeguard adequately the confidentiality of the plaintiff's protected health care information pursuant to duty imposed by common law and by HIPAA); *I.S. v. Washington Univ.,* No. 4:11CV235SNLJ, 2011 WL 2433585, at 2 (E.D. Mo. June 14, 2011) ("[T]he Court finds that Count III may stand as a state claim for negligence per se despite its exclusive reliance upon HIPAA."); *R.K. v. St. Mary's Med. Ctr.*, 229 W. Va. 712, 735 S.E.2d 715 (2012) ("[W]e conclude that state common-law claims for the wrongful disclosure of medical or personal health information are not inconsistent with HIPAA. Rather, as observed by the court in *Yath,* such state-law claims compliment HIPAA by enhancing the penalties for its violation and thereby encouraging HIPAA compliance. Accordingly, we now hold that common-law tort claims based upon the wrongful disclosure of medical or personal health information are not preempted by the Health Insurance Portability and Accountability Act of 1996.")

[14] *Bonney v. Stephens Memorial Hospital,* 17 A.3d 123 (Me. 2011)

[15] *I.S. v. Washington Univ.,* No. 411CV235SNJL, 2011 U.S. Dist. LEXIS 66043, 2011WL 2433585 (E.D. Mo. June 14, 2011); *K.V. v. Women's Healthcare Network, LLC,* 2007 U.S. Dist. LEXIS 102654, 2007 WL 1655734 (W.D. Mo. June 6, 2007).

[16] *Yath v. Fairview Clinics, N.P.,* 767 N.W.2d 34 (Minn. App. 2009).

[17] *Harmon v. Maury County,* 2005 U.S. Dist. LEXIS 48094, 2005 WL 2133697 (M.D. Tenn. Aug. 31, 2005).

[18] *Tabata v. Charleston Area Medical Center, 233 W. Va. 512,* 759 S.E.2d 459 (2014); *R.K.*, 229 W. Va. 712.

[19] *Young v. Carran*, 289 S.W.3d 586 (Ky. App., 2008)

[20] *Fanean v. Rite Aid Corp. of Delaware, Inc.,* 984 A.2d 812, 823 (Del.Super.2009)

[21] *Byrne v. Avery Center for Obstetrics and Gynecology,* 102 A.3d 32 (Conn. 2014); *Southwest Cmty. Health Ctr., Inc.,* 2010 Conn. Super. LEXIS 2167, 2010 WL 3672342.

[22] Georgia statutory law gives a cause of action for breach of legal duty under the law requiring a person to perform an act or refrain from doing an act which may injure another. O.C.G.A. § 51-1-6. We have no doubt that OSHA regulations by definition constitute as much a duty under the law and are as enforceable as the laws authorizing their creation and promulgation (see 29 USCA § 651 et seq.), and breach of those regulations is a violation of law. They should be admissible not merely as "standards" of performance, but as evidence of legal duty, violation of which may give a cause of action under O.C.G.A. § 51-1-6.

Cardin v. Telfair Acres of Lowndes County, Inc., 195 Ga. App 449, 393 S.E.2d 731(1990). *See also McLain. v. Mariner Health Care, Inc.*, 279 Ga. App. 410, 631 S.E.2d 435 (2006); *Dupree v. Keller Industries, Inc.*, 199 Ga. App. 138, 404 S.E2d 291 (1991); *West v. Mache of Cochran, Inc.*, 187 Ga. App. 365, 370 S.E.2d 169 (1988).

[23] *Acosta*, 180 N.C. App. 562, 638 S.E.2d 246 (2006).

[24] *Id.* at 571.

[25] *Byrne*, 314 Conn. 433, 102 A.3d 32 (2014).

[26] *Id.* at 459, 102 A.2d at 49.

[27] 40 N.E.3d 661 (Ohio Ct. App. 2015).

[28] *Sheldon*, 40 N.E.3d. 672.

[29] *Weinberg*, 147 F.Supp.3d 1359 (S.D. Fla., 2015)

[30] *Id.* at 1365.

[31] 195 Ga. App. 449, 450, 393 S.E.2d 731 (1990). *See also Dupree, et al. v. Keller Industries, Inc.*, 199 Ga. App. 138, 141, 404 S.E.2d 291 (1991).

[32] *Cardin*, 195 Ga. App. at 450.

[33] *Pulte Home Corp. v. Simerly*, 322 Ga. App. 699, 705-06, 746 S.E.2d 173, 179 (2013)

[34] *Ford v. Saint Francis Hosp., Inc.*, 227 Ga. App. 823, 827, 490 S.E.2d 415, 420 (1997).

[35] *West*, 187 Ga. App. at 368

[36] *McLain*, 279 Ga. App. at 413.

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Continued from page 27

Third Circuit & Fifth Circuit: Insufficient Evidence to Dispute Evidence of Immateriality

The Third Circuit, in *United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481 (3d Cir. 2017), affirmed the district court's decision to dismiss the relator's claims against the defendant pharmaceutical company because the relator failed to satisfy the FCA's materiality requirement. *Id.* at 485. In *Petratos*, the relator alleged the defendant ignored and suppressed data that would have shown that the side effects for a certain drug affected certain patients more severely and were more common than reported. *Id.* This data would have required the defendant to file adverse-event reports with the FDA and could have changed the drug's FDA label. *Id.* The relator contended that the data-suppression caused doctors to submit Medicare claims that were not "reasonable and necessary." *Id.* The court concluded the materiality standard was not met where the relator did "not dispute that [the federal agency] would reimburse [the Medicare claims] even with full knowledge of the alleged reporting deficiencies." *Id.* at 490. Moreover, the relator failed to "claim that [the defendant's] safety-related reporting violated any statute or regulation." *Id.*

In *Abbott v. BP Exploration & Production*, Inc., 851 F.3d 384, the relator alleged that an oil and gas company did not have all of the required documentation for its floating oil production facility located in the Gulf of Mexico. *Id.* at 386. Further, the relator contended that engineers did not approve many of the documents in existence as required by applicable regulations. *Id.* However, the court upheld the district court's grant of summary judgment on the FCA claims in favor of the company. *Id.* at 388. The court found that the investigating department's decision to allow drilling to continue at the facility despite the investigation into the relator's allegations was "strong evidence" that the regulatory requirements were not material. *Id.* Moreover, because the relator failed to rebut those facts, the court held that the relator failed to create a genuine dispute of material fact as to materiality to withstand summary judgment. *Id.*

Ninth Circuit: Both Conditions Required

Recently, in *United States ex rel. Campie v. Gilead Sciences, Inc.*, No-15-16380, 2017 WL 2884047 (9th Cir. July 7, 2017), the defendant drug producer allegedly concealed violations of FDA regulations and made false statements about its compliance with FDA regulations regarding certain drugs it manufactured. *Id.* at 895. The defendant submitted new drug applications to the FDA which represented that the active ingredient for those drugs were sourced from specific registered facilities when in fact the ingredient was manufactured at unregistered facilities. *Id.* at 895-96. The defendant eventually obtained FDA approval to use a facility that had been unregistered. *Id.* at 896. However, the defendant had been including products manufactured at that facility for two years prior to obtaining FDA approval and had falsified or concealed data in support of its approval application. *Id.*

> *"This data would have required the defendant to file adverse-event reports with the FDA and could have changed the drug's FDA label."*

The relators alleged that the defendant impliedly certified that the drugs were approved for distribution when it knew they were not by "selling its drugs to the Government and causing others to seek reimbursement for them." *Id.* at 899.

In reversing the district court's ruling dismissing relators' claims, the Ninth Circuit addressed the Supreme Court's clarification of the implied false certification theory of recovery under the FCA. The court interpreted *Escobar* to definitively require both conditions of implied false certification liability to be satisfied before a claim can be made. *Id.* at 901. The court also noted that four essential elements of an FCA claim must still be established—falsity, causation, knowledge, and materiality. *Id.* at 899, 901 (internal citations omitted). The court ultimately held the relators adequately plead falsity under the FCA because the defendant specifically misrepresented its compliance with FDA regulations through mislabeling and misbranding of nonconforming drugs and the defendant's false statements and omissions used to get FDA approval for those drugs were "'half-truths.'" *Id.* at 904.

The application of *Escobar's* "materiality" standard is likely to continue to be a relevant factor for analyzing FCA allegations based on the implied false certification theory. The guidance in *Escobar* regarding evaluation of the materiality standard under this theory and what evidence can be used to meet the "demanding" requirement is ripe for varying interpretation by lower courts. As the law in this area continues to develop, attorneys should keep an eye on what evidence courts will find to be necessary to establish an FCA implied false certification claim under *Escobar*. ◆

ENDNOTES

1 Both the tipper, who provides inside information, and the recipient, the "tippee," can be held liable for insider trading under certain circumstances.
2 *Id.* at 429.
3 773 F.3d 438, 452 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (2015).
4 137 S. Ct. 420, at 427-28.
5 *Id.*
6 See 15 U.S. Code § 78u–1 (Civil penalties for insider trading.)
7 Order of Stay, In re Environmental Protection Agency and Department of Defense Final Rule; "Clean Water Rule: Definition of Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015); State of Ohio, et al. v. U.S. Army Corps of Eng'rs, et al., Nos. 15-3799/3822/3853/3887 (6th Cir. Oct. 9, 2015).

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Life Care Plan

Continued from page 20

The Effective Rebuttal

A life care plan can fail in two respects. First, it can lack a sound medical foundation and thereby undermine the whole premise of a suit for damages or a rebuttal of damage claims. Second, it can fail to provide accurate costs of individual components of the plan even if the plan is based on a sound medical foundation. We will discuss each of these issues separately, as either can lead to highly inflated damage amounts that will be compounded over the remainder of an injured individual's life.

Effective rebuttal of a plaintiff plan can be as much about form as it is about substance. Defense counsel may assume that the best way to counter an exaggerated plaintiff life care plan is to introduce a realistic one. Logical as it may seem, this is not the most effective way to rebut inflated damages. One of the most common mistakes made in rebuttals is a failure to adequately address individual components of a plaintiff life care plan from a medical point of view. To avoid this mistake, a life care planner can use a "side by side" approach. This method involves a graphic reproduction of each item of a plaintiff plan paired with a statement by a medical expert that expresses either concurrence, agreement with modifications, or disagreement. The side-by-side approach allows for more effective cross-examination of the plaintiff's life care planner and other medical experts than reliance on a completely new life care plan. It also allows the defense to offer alternative options for future care in a format that is easy for readers to follow, and it usually mitigates damages.

A second effective rebuttal technique is a thorough appraisal of a plaintiff plan's costs for future medical care, therapies, and equipment. In many cases a life care plan is formally correct and based on a sound medical foundation, but the costs that it provides do not reflect actual fees and prices in the area where the injured individual is receiving treatment. Fees and prices can vary greatly from one geographic area to another. Often a life care planner will rely on minimum efforts in locating sources of information for a determination of costs, even though the costs given may not reflect real prices in the relevant area. A solid rebuttal always includes a thorough analysis of costs, and it should include "real" numbers based on information obtained from service providers in the area where the injured individual resides or receives treatment. Inadequate cost analysis often raises damage amounts even more than recommendations for unnecessary treatment do.

> *A subpoena of all of the plaintiff's pharmacy records should be standard procedure in the preparation of a rebuttal.*

The Devil is in the Details

Life care planning is a technically precise endeavor, relying on a multitude of data points for validity and reliability. This is true not only with respect to a plan's medical foundation, but also with regard to the expense data presented in it. One subject on which the defense should focus its attention following receipt of a plaintiff plan is the plaintiff's future pharmaceutical needs. In addition to home care/facility care costs, this is often one of the most expensive components of a plan, but it is also one of the easier ones to analyze. A subpoena of all of the plaintiff's pharmacy records should be standard procedure in the preparation of a rebuttal. In many cases the defense will be surprised to find that a majority of the prescriptions recommended have never been filled at a pharmacy. Additionally, pharmacy protocol may dictate that a recommended medication is not to be used in the quantity specified in the plan. This is invaluable evidence in the effort to mitigate damages, particularly when associated costs are projected over the injured individual's life expectancy.

Finally, it is essential for the defense to independently verify the legitimacy of the medical foundation of a plaintiff's plan. A thorough cross-examination of a plaintiff's medical experts may be insufficient to elucidate realistic damages, and the testimony of defense experts is necessary to discern the proper dollar amount. A life care planner, while unable in most cases to provide a medical opinion, can be a valuable resource in identifying potential high-dollar costs that may warrant the expense of hiring medical consultants. Additionally, a familiarity with peer-reviewed literature regarding a particular injury can be a deciding factor in the rebuttal of damages. Many medical opinions expressed in plaintiff life care plans are inconsistent with the published findings of researchers. Often times this gives the defense through the use of limiting motions a means by which exaggerated claims can be effectively rebutted. A good life care planner knows how to find such information effectively using research and pertinent literature. ◆

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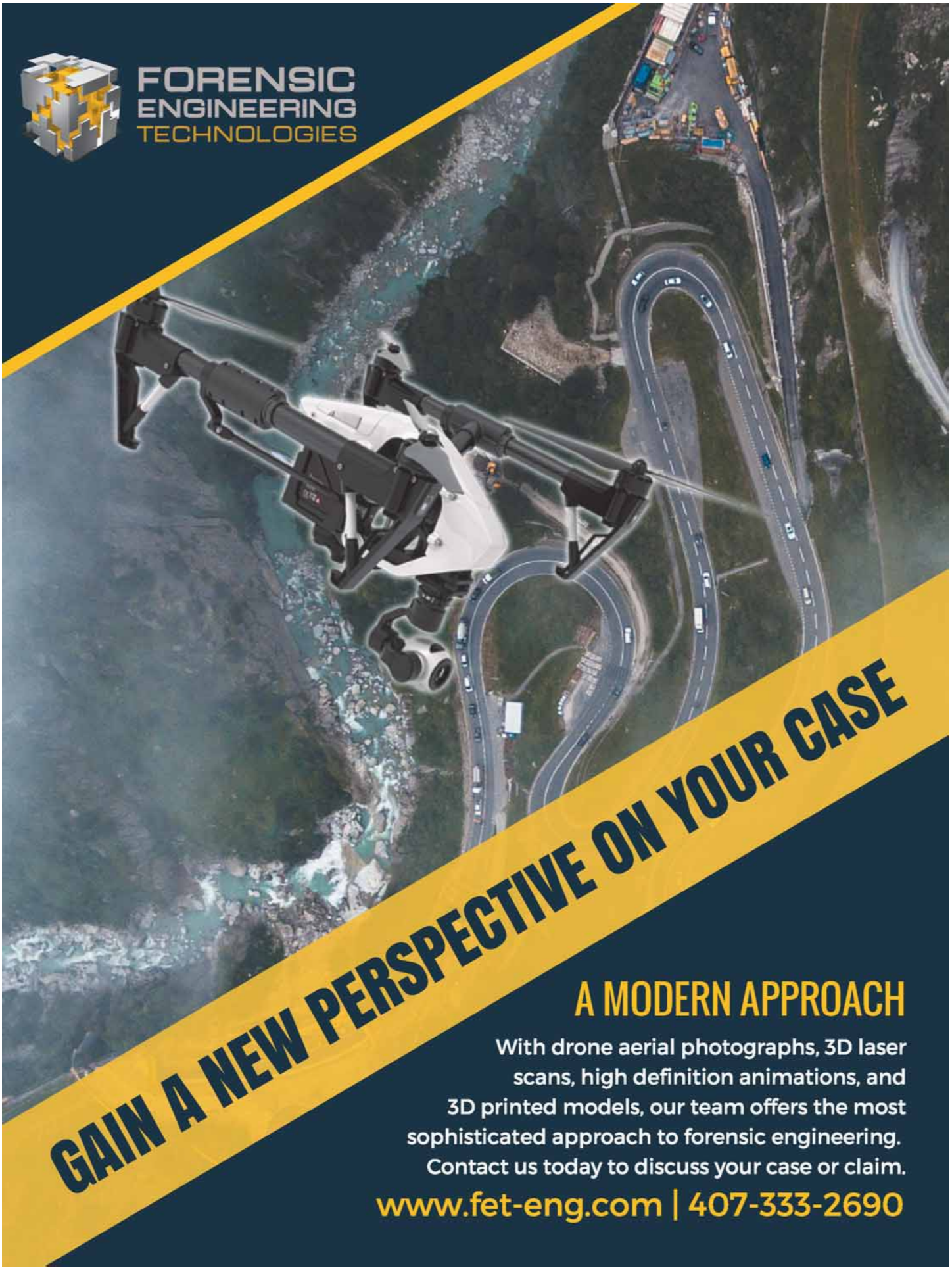
Steve Yuhas is a certified life care planner and a catastrophic injury case manager in the State of Georgia. Currently President of InQuis Global, he devotes a large portion of his time to a clinical rehabilitation practice in which he manages difficult traumatic brain injury, spinal cord injury, amputation and burn cases. Steve also serves as President of the International Association of Rehabilitation Professionals (IARP), an organization serving rehabilitation and life care planning professionals.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Seven Habits

Continued from page 22

reality of our legal system? After listening to them, you may be able to come with some creative ideas that you can bring to the table to resolve those issues. In any event, working this through with your client in advance of the mediation may allow them to come up with some ideas of their own that can be addressed in caucus. At the very least, it will give you an opportunity to more fully explain to them the reality of our legal system, which the mediator can then reaffirm at the mediation conference.

3. Put First Things First

You know the game better than your client, be it plaintiff or defendant. You are the expert. Once you have had an opportunity to evaluate the claim and work through the evaluation with your client, and an endpoint is clear to you, it is time to map out a mediation strategy. I have been witness to numerous mediation strategies practiced by many excellent attorneys, and I have discovered that the following result in the most favorable settlements:

- Prepare your initial demand/ offer based upon a realistic range of possibilities that you have discovered through your initial evaluation. Starting too high or too low will frequently result in the opposing party taking offense and digging in their heels, making for a long day, and will ultimately make for an unhappy client when they have had to move "further than the other side" in order to reach a reasonable settlement.
- DO NOT RENEGOTIATE A PRIOR DEMAND UPWARD OR A PRIOR OFFER DOWNWARD AT THE START OF THE MEDIATION CONFERENCE. This is guaranteed to lengthen the mediation conference considerably, generally results in the opposing party digging in their heels and refusing to make reasonable compromises, and often results in an unsuccessful mediation at the end of the day.
- Make your first move the biggest one. With this move, send a message through the mediator that you are here in good faith, but that equally large future movements cannot be expected. It sets a good tone, and frequently brings the range of settlement options into focus quickly.
- Give yourself enough room to move comfortably. In my experience, this is not generally a problem. Most attorneys do this automatically. The trick is in being able to combine this practice with making a large first move.
- Always plan to respond with a least a small amount as a counter. While you may be disappointed with an offer/demand, a response of some kind sends two messages: (1) that you are willing to stay and listen; but, (2) that you have limited resources available.
- Splitting the difference works, but it works best when the gap is a small one. The parties are generally uncomfortable with the results if the split is agreed upon too soon in the process.

> *"Splitting the difference works, but it works best when the gap is a small one."*

4. Think Win/Win

The goal of a successful mediation is for all parties to walk away from the table comfortable that the resolution was a fair one, and that the needs of all parties have been addressed. With this attitude in place, the parties will make a commitment to follow through with the results, and the settlement will not fall apart at the end of the day.

Even though the parties, by definition, see things differently, if you (and by extension, your client) will make a commitment to try to understand each other's point of view, the mediator can more effectively assist you to work together toward a mutually beneficial resolution of the case. The key is to *replace competition with cooperation*—admittedly a difficult concept to adopt for those of us in an advocacy system.

There are several actions that you can take to effectuate this frame of mind and make the mediation work:

- First, educate your client to the position of the opposing party prior to the mediation conference. (I know that I am repeating myself here, but this is such an important element that it bears repetition.)
- Second, encourage your client to display courteous behavior at the opening conference. In conjunction with this recommendation, counsel is *strongly* encouraged to adopt a conciliatory attitude at the opening conference as well. If the opposing party believes that you are really listening to them, it gives the mediator a very effective tool to work with throughout the remainder of the day. In addition, if your opponent believes that you are really listening to them, they are much more likely to honestly listen to you. Explain to your client in advance the reason for this tactic, and let them know that you will be their strong advocate through the caucus process.
- Provide the parties a *safe* place to tell their stories in the opening conference. Once the stories have been told, the parties will be much more likely to listen to each other, and will not then require a trial in order to air their grievances. It is so often about being heard, about being really listened to. The mediator will provide that function, of course, but it helps tremendously if the parties feel that they are being heard by their opponent as well.

Continued on next page

5. Seek First to Understand, Then to be Understood

As I stated above, a conciliatory opening can work wonders in a mediation. Providing the parties with a safe place to tell their stories, and then really listening to them, is a key to making the process work. Plaintiffs want to be heard—whether by a jury, a judge, or a mediator. They need to be heard by their opponent as well. Encourage your client to really listen to the stories told at the opening, and to listen without judgment. Listen as a bystander would listen, as a juror would listen, and put aside your own prejudices. You will frequently be surprised at what you hear in that setting.

In order to create an environment in which your client will feel most comfortable reaching a settlement, you should make every effort to have all of the parties in the room that your client is listening to *outside* of the conference room, if at all possible. In the case of plaintiffs, it helps to have the key family members, perhaps the minister, or even the family doctor, in the room. Depending upon the type of case, that might work for the defendant as well. If an adjuster is involved in the case, having their client available is extremely helpful, particularly if that client is an active participant in settlement negotiations. A rule of thumb: If the party wants to make a phone call and discuss the settlement with someone else before agreeing to it, that someone else should have been in the room all along. I know that it isn't always possible, and sometimes it makes the process somewhat less than "wieldy", but it makes for settlements that stick.

6. Synergize

There are several levels of communication that are possible in the mediation process. You can communicate from a defensive posture, effectively a win/lose position. With this approach, someone always walks away mad. Or, you can communicate from a respectful posture, which will result in a compromise solution. This is, of course, an acceptable result of mediation, with both parties walking away grumbling but content with the resolution. But you can also communicate through a synergistic posture, a win/win position, and both parties can walk away from a mediation conference with a positive attitude, genuinely happy with the results all around.

The synergistic model requires that everyone have an open mind to all of the possibilities, that they be willing to work *together* to reach a resolution. Does this happen often in mediations? Not in my experience. A respectful approach is generally the best that I see. But on those rare occasions when I am a participant in a settlement where the parties are all trying to reach a resolution that they can all live with; the results are remarkable. The defendant can feel good about what they have given, and the plaintiffs feel good about what they have received. When the parties are not strangers, when they will be working or living in proximity in the future, this is the approach that the best advocates take. It is what the best lawyers do for their clients.

Solutions reached by a consensus effort can be much more effective than those proposed by either party individually coming into a mediation. The mediator, as a neutral party, can help to identify those possibilities, but it is the attorneys who make it work. The old adage that *"two heads are better than one"* is absolutely applicable to a mediation—it presents our legal system's best opportunity to fix what's broken, which is, after all, the goal.

7. Sharpen the Saw

Continue to educate yourself, through each new mediation and with every case that you try. Compare notes with your fellow attorneys. Ask questions and do not be afraid to take suggestions from your mediators. Stay plugged in to your community. Listen—constantly listen. Creativity is the key to a successful attorney, and to a successful advocate in mediation. ◆

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Alleged Mat Slips

Continued from page 24

ant mats be used in commercial workplace applications—excluding residences and construction zones. This standard is focused on safe work environments for employees wearing footwear, and it provides no guidelines on how to actually determine if a mat is slip resistant. A1264 standards are not codified (to the author's knowledge), though language from them have been borrowed by OSHA for regulations; A1264.2 is a voluntary standard.

c. The ASTM F1637 *Standard practice for safe walking surfaces*[2] is broadly targeted to pedestrians wearing footwear, and though it says mats shall have slip resistant backings, it also provides no method for verification of slip resistance. This standard is not codified, although it is often cited by experts in litigation.

d. The National Floor Safety Institute (NFSI) B101.6 *Standard guide for commercial entrance matting in reducing slips, trips and falls*[3] (which was an ANSI standard until that designation was withdrawn in January 2017) does indirectly provide a method for testing mat traction; however, it is a technically deficient method.

i. The B101.6 standard references a separate NFSI test method entitled 101-C *Test method for measuring dry TCOF of floor mat backing materials*[4]. The acronym TCOF stands for Transitional Coefficient of Friction. The 101-C document asserts that successfully passing its test requirements demonstrates that a mat has sufficient traction for humans in normal ambulation. This is a significant assertion—implying that a mat is safe for humans if it passes the test; the necessary traction value to be achieved (per 101-C) is a TCOF of 0.5.

ii. NFSI will (for a $795 fee) provide a "Certification" that a floor mat is "High-Traction," if it passes the 101-C traction requirement. The mat is sent to NFSI and they purportedly conduct testing on it. Currently there are over 200 mats (from various manufacturers) listed on NFSI's website page as "High-Traction" products.

iii. The technical deficiencies with the 101-C test method are myriad. First, it specifies that either of two different TCOF testers (known as *tribometers*) can be used to test for the 0.5 passing value—but the two tribometers operate differently and will provide different measurement results when testing the same sample. Second, the 101-C test method provides no guidance or limitations on what types of mats can be tested, implying that everything from a thick woven sisal mat to a thin ribbed rubber mat to a terrycloth bathmat can all be tested reliably; in the world of *competent* traction testing, this is

technically unsupportable. Third, both tribometers specified in 101-C will malfunction when testing softer foam, fabric, and textile mats; the tribometers were not designed for such usage. Fourth, the 101-C test method has no published reliability analysis that documents error rates for repeatability and reproducibility. Fifth, and most importantly, 101-C has no reliable correlation to actual human slip events; as such, the "passing" TCOF value of 0.5 has no technical foundation that would be relevant to premises liability cases.

e. As to bathmats specifically, the ASTM D13.63 standards committee on textile home furnishings has been working (for several years) on a draft bathmat performance standard; the future standard may eventually include minimum traction requirements. Such requirements could take the form of an "absolute" traction requirement (a specific measurement value, reliably based on human slip research), but the requirement could also be simply based on "comparative" traction (one mat compared to other mats)—which would likely not be relevant to human slips.

Conclusion

The complexities of providing an "absolute" traction requirement for mats are significant; only through reliable correlation to human slips can a "safe" threshold be established. This is one major reason that codes and standards (in general) do not tend to assert "safe" traction thresholds. Mat manufacturers and property holders alike would benefit from reliable benchmarks in this area, but currently there are none.

Floor traction, the presence of contaminants, and human gait dynamics all add further complexity—as does the question of expectation: should the human reasonably expect that a particular mat they encounter may slip unless they step on it in a particular way? The answers to such questions will, of course, depend upon the specifics of the case. ◆

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ENDNOTES

[1] ANSI A1264.2. Provision of slip resistance on walking/working surfaces. Washington DC; American National Standards Institute, 2012.
[2] ASTM F1637. Standard practice for safe walking surfaces. West Consho-hocken, PA; ASTM International, 2010.
[3] NFSI B101.6. Standard guide for commercial entrance matting in reducing slips, trips and falls. Southlake, TX: National Floor Safety Institute, 2012.
[4] NFSI 101-C. Test method for measuring dry TCOF of floor mat backing materials. Southlake, TX: National Floor Safety Institute, 2010.

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Service of Process

Continued from page 18

preting the word to exclude service, and it does not create the same superfluity problem. *See id.* at *6.

The Court further found three extratextual sources supporting this reading. One, the Convention's drafting history strongly suggests the drafters understood service by postal channels was permissible. *See id.* at *6-7. Two, in the 50 years since the Convention was adopted, the Executive Branch has consistently maintained the Hague Service Convention allows service by mail. *See id.* at *7. And three, other signatories to the Convention have consistently adopted this view. *See id.* at *7-8.

The Court cautioned its conclusion does not mean the Convention affirmatively authorizes service by mail, but "Article 10(a) simply provides that, as long as the receiving state does not object, the Convention does not 'interfere with ... the freedom' to serve documents through postal channels." *Id.* at *8. "In other words, in cases governed by the Hague Service Convention, service by mail is permissible if two conditions are met: first, the receiving state has not objected to service by mail; and second, service by mail is authorized under otherwise-applicable law." *Id.* The Court vacated the judgment of the Texas Court of Appeals, which had concluded the Convention prohibited service by mail outright and remanded for consideration whether Texas law authorizes the methods of service used by the plaintiff.

As to the "two conditions" that must be satisfied in order to effect international service by mail, first, Italy has not objected to service by mail under Article 10(a*). See, e.g., Blue_Underground Inc v. Caputo*, CV 14-1343-GW(PJWX), 2014 WL 12573679, at *3 (C.D. Cal. Sept. 8, 2014); *Shoham v. Islamic Republic of Iran*, 922 F. Supp. 2d 44, 50 (D.D.C. 2013); *The Knit_With v. Knitting Fever, Inc.,* No. CIV. A. 08-4221, 2010 WL 2788203, *7 (E.D. Pa. July 13, 2010).

Second, service by mail must be "authorized under otherwise-applicable law," meaning "the law of the state where the action is pending [must] authorize the particular method of service employed." *The Knit With*, 2010 WL 2788203 at *7; *see also Valdez v. Takata Corp.,* No. CV 09-533 LH/DJS, 2010 WL 11505704, at *4 (D.N.M. June 24, 2010) ("Affirmative authorization for such service [abroad by mail], and any requirements as to how it must be accomplished, must come from the law of the forum in which the suit is filed, in this case from the United States' Federal Rules of Civil Procedure."); *Kita v. Superior Court,* No. B239971, 2013 WL 164707, at *6 (Cal. App. Jan. 16, 2013) (validity of plaintiff's service upon defendant in Japan "by ordinary mail must [be determined by reference to] California law" where case was filed in California state court).

> *Accordingly, it appears service by registered mail is generally considered a proper means of serving a foreign defendant abroad.*

Authorized Methods for Service Abroad in Cases Filed in Federal Court

With regard to cases filed in federal district courts, Federal Rule of Civil Procedure 4(h)(2) provides that a foreign corporation may be served "at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual" (except personal delivery). Thus, a plaintiff must comply with the requirements of Rule 4(f). *See The Knit With*, 2010 WL 2788203 at *4.[2]

Rule 4(f)(1) provides that a foreign corporation may be served abroad "by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention …." Some courts have held that, because Article 10(a) of the Hague Convention allows for service by mail, to comply with Rule 4(f)(1), a plaintiff may simply send the summons and complaint directly to the defendant by registered mail or private mail delivery service. *See, e.g., Ghostbed, Inc. v. Casper Sleep, Inc.,* 315 F.R.D. 689, 692 (S.D. Fla. 2016) (granting plaintiff permission to serve defendant in Cayman Islands "via international mail" pursuant to Rule 4(f)(1) and Hague Convention); *Zelasko v. Comerio*, No. CIV.08-366-MJR, 2008 WL 2755463, at *1 (S.D. Ill. July 14, 2008) (plaintiff's sending untranslated complaint and summons directly to defendant corporation by "registered certified mail," rather than through central authority for process in Italy, was proper under Article 10(a) of Hague Convention and Rule 4(f)(1)); *Schiffer v. Mazda Motor Corp.*, 192 F.R.D. 335, 339 (N.D. Ga. 2000) (service of untranslated complaint and summons on Japanese corporation directly by registered mail, without going through central authority, held permissible under Article 10(a) of Hague Convention and Rule 4(f)(1)); *EOI Corp. v. Med. Mktg. Ltd.,* 172 F.R.D. 133, 143 (D.N.J. 1997) (service of summons and complaint via DHL delivery directly to private residence of corporate defendant's managing director was sufficient to comply with Hague Convention and Rule 4(f)(1)); *R. Griggs Group Ltd. v. Filanto Spa*, 920 F. Supp. 1100, 1107 (D. Nev. 1996) (mailing of summons and complaint directly to defendant corporation's president at corporation's offices in Italy via Federal Express was sufficient service under Hague Convention and Rule 4(f)(1)).

Other courts, however, have held that, because the Hague Convention does not affirmatively *authorize* service by mail, service by mail is not an "internationally agreed means" of service under Rule 4(f)(1), and a plaintiff must go through the foreign country's central authority to serve a defendant abroad under Rule 4(f)(1). *See Brockmeyer v. May,* 383 F.3d 798, 804 (9th Cir. 2004); *In re Coudert Bros. LLP*, No. 16-CV-8237 (KMK), 2017 WL

1944162, at *8 (S.D.N.Y. May 10, 2017) ("because service via mail on a defendant residing in a country that is a signatory to the Hague Convention is not … an 'internationally agreed means of service,' Rule 4(f)(1) cannot serve as the basis for service of process" by registered mail).

But other provisions of Rule 4(f) do appear to authorize serving a defendant abroad by registered mail. *See Brockmeyer*, 383 F.3d at 804-07; *The Knit With*, 2010 WL 2788203 at *8. First, Rule 4(f)(2)(C)(ii) authorizes service by "using any form of mail that the clerk [of the federal district court in which the action is pending] addresses and sends to the [defendant] and that requires a signed receipt." *See Brockmeyer*, 383 F.3d at 808 ("Service by international mail is affirmatively authorized by Rule 4(f)(2)(C)(ii), which requires that service be sent by the clerk of the court, using a form of mail requiring a signed receipt."); *Ghostbed, Inc.,* 315 F.R.D. at 693 (approving of service via international mail under Rule 4(f)(2) and directing plaintiffs to deliver documents to clerk's office for service); *Ballard v. Tyco Int'l, Ltd.,* No. CIV. 04-CV-1336-PB, 2005 WL 1863492, at *4 (D.N.H. Aug. 4, 2005) (service abroad by mail is authorized only if done by clerk of federal district court in which suit is filed); *cf. The Knit With*, 2010 WL 2788203 at *8, 11 (plaintiff's counsel's serving corporate defendant by Federal Express directly to Italy was ineffective under either Hague Convention or Rule 4(f)).

Second, Rule 4(f)(3) allows service "by other means not prohibited by international agreement, as the court orders." *See Brockmeyer*, 383 F.3d at 808-09 ("Service by international mail is also affirmatively authorized by Rule 4(f)(3), which requires that the mailing procedure have been specifically directed by the district court."). This means of service requires prior authorization from the court in which the action was filed.

Third, Rule 4(f)(2)(A) allows service "as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction." *See Brockmeyer*, 383 F.3d at 808. The U.S. Department of State lists the following as the conditions for service of process in Italy:

> Requests [for service of process of U.S. documents in Italy] should be completed in duplicate and submitted with two sets of the documents to be served, and translations, directly to Italy's Central Authority for the Hague Service Convention. … The Italian Central Authority has informed the Hague Conference for Private International Law that only judicial officers working for the Italian courts may serve documents in Italy (Article 10(b and c)). Private attorneys or individuals are not authorized to effect service in Italy. International service of process by registered mail is allowed in Italy, but this method will only record delivery to an address and not to a person.

https://travel.state.gov/content/travel/en/legal-considerations/judicial/country/italy.html; *see also The Knit With*, 2010 WL 2788203 at *9.

Accordingly, it appears service by registered mail is generally considered a proper means of serving a foreign defendant abroad. But whether a plaintiff may send the complaint and summons directly to the defendant or is required to have the clerk of court do so will depend on the jurisdiction in which the particular action is filed. A foreign entity should look to the forum court's precedents and interpretations of Rule 4(f) and the Hague Convention to determine whether the plaintiff has properly served them.

Authorized Methods for Service Abroad in Cases Filed in State Court

Each state has its own set of procedural rules that set forth the proper methods of service of complaints filed in the state's courts. In the event the foreign entity is sued in state court, they should look to the particular state's courts' interpretations of its procedural rules governing service to determine whether the plaintiff has properly effectuated service.

In Georgia, for instance, O.C.G.A. § 9-11-4(f)(3) is very similar to Federal Rule of Civil Procedure 4(f) and authorizes various means by which "service upon persons in a foreign country" may be effected. O.C.G.A. § 9-11-4(f)(3)(A) authorizes service of process on a person in a foreign country "[b]y any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention …." Under O.C.G.A. § 9-11-4(f)(3)(B)(iii)(II), such service may be made by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court in which the action has been filed to the party to be served. O.C.G.A. § 9-11-4(f)(3)(C) authorizes such service "[b]y other means not prohibited by international agreement as may be directed by the court." And O.C.G.A. § 9-11-4(f)(3)(B)(i) authorizes service "[i]n the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction."

While there do not appear to be any Georgia cases directly addressing the question, it is doubtful service may be effected upon persons in a foreign country by regular first-class mail. O.C.G.A. § 9-11-4(f)(3) does not authorize such service, and, because it is patterned after Federal Rule of Civil Procedure 4(f), federal cases barring service abroad by regular first-class mail will be persuasive in arguing against the propriety of such service under O.C.G.A. § 9-11-4(f)(3) in Georgia state court actions.

In addition, as an alternate method of serving a corporation, O.C.G.A. § 14-2-504(b) provides that, if a corporation has no registered agent in Georgia, "the corporation may be served by registered or certified mail or statutory overnight delivery, return receipt requested, addressed to the secretary of the corporation at its principal office." *See Rovema Verpackungsmaschinen v. Deloach*, 232 Ga. App. 212, 214 (1998)

(plaintiffs could have served German corporate defendant, which had no agent for service of process in Georgia, in Germany pursuant to Hague Convention or any other acceptable means under Georgia law, including serving German defendant's registered agent or corporate secretary at its principal office pursuant to O.C.G.A. § 14-2-504). Under the court's holding in *Deloach*, it appears service upon a corporation in a foreign country may be effected by registered mail.

If a foreign corporation is not registered to do business in Georgia but is subject to Georgia's long-arm jurisdiction, it "may be served with a summons outside the state in the same manner as service is made within the state by any person authorized to make service by the laws of the … country in which service is made or by any duly qualified attorney, solicitor, barrister, or the equivalent in such jurisdiction." O.C.G.A. § 9-10-94; *see also Deloach*, 232 Ga. App. at 213. ◆

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ENDNOTES

1 The *Water Splash* case originated in the Texas state court system.

2 It appears generally accepted that service by regular first-class mail is ineffective. *See, e.g., Brockmeyer v. May*, 383 F.3d 798, 804 (9th Cir. 2004) ("no part of Rule 4(f) authorizes service by ordinary international first class mail"); *Ballard v. Tyco Int'l, Ltd.*, No. CIV.A.04-1336, 2005 WL 1863492, at *1 (D.N.H. Aug. 4, 2005) (plaintiffs' mailing copy of summons and complaint by regular mail directly to defendant's place of business in London ineffective under Rule 4(f)).

Premises Liability

Continued from page 28

he or she has successfully negotiated on a previous occasion. *Amerson v. Kelly*, 219 Ga. App. 377, 378, 465 S.E.2d 470 (1995).

The Court explained the necessity rule as follows:

> The necessity rule applies in the context of a landlord-tenant relationship where the tenant is required to traverse a known hazard in order to enter or leave his home. Under that exception, when the dangerous area is a tenant's only access or only safe and reasonable access to his home, the tenant's equal knowledge of the danger does not excuse the landlord from liability for damages caused by a failure to keep the premises in repair. Thus, the necessity rule exception tempers the equal or superior knowledge rule when there is no other means of safe ingress and egress to the leased premises.

Flores, 259 Ga. App. at 337-38 (2) (footnotes and punctuation omitted). *See also Hull v. Mass. Mut. Life Ins. Co.*, 142 Ga. App. 269, 270, 235 S.E.2d 601 (1977) ("To hold otherwise, we would make the appellant a captive in her own apartment...forcing her to abandon her very means of livelihood until such time as the appellee found it convenient to remedy the dangerous situation.").

However, the Court held that the necessity rule did not apply because the plaintiff could not demonstrate a landlord-tenant relationship with the defendants. The Court further held:

> But the necessity rule exception only applies to situations involving landlords and tenants. *See Shansab v. Homart Dev. Co., Inc.*, 205 Ga. App. 448, (4) (422 SE2d 305) (1992) (declining to extend the necessity rule to employees of a tenant located in the proprietor's building); *Hart v. Brasstown View Estates, Inc.*, 234 Ga. App. 389, 391 (506 SE2d 896) (1998) (necessity rule does not apply to innkeeper-guest relationship) (physical precedent only); *Grier v. Jeffco Mgmt. Co.*, 176 Ga. App. 158, 159-60 (335 SE2d 408) (1985) (the necessity exception applies in landlord-tenant cases, but not when the parties have a business owner-customer relationship).

Vinings Run et al. v. Stuart-Jones, 2017 WL 2774576, ___S.E.2d.___ (June 27, 2017).

Accordingly, because the plaintiff had equal knowledge of the allegedly unsafe conditions of which she complained, and because the necessity rule did not apply, the Georgia Court of Appeals held that the trial court erred in denying summary judgment to the defendants. ◆

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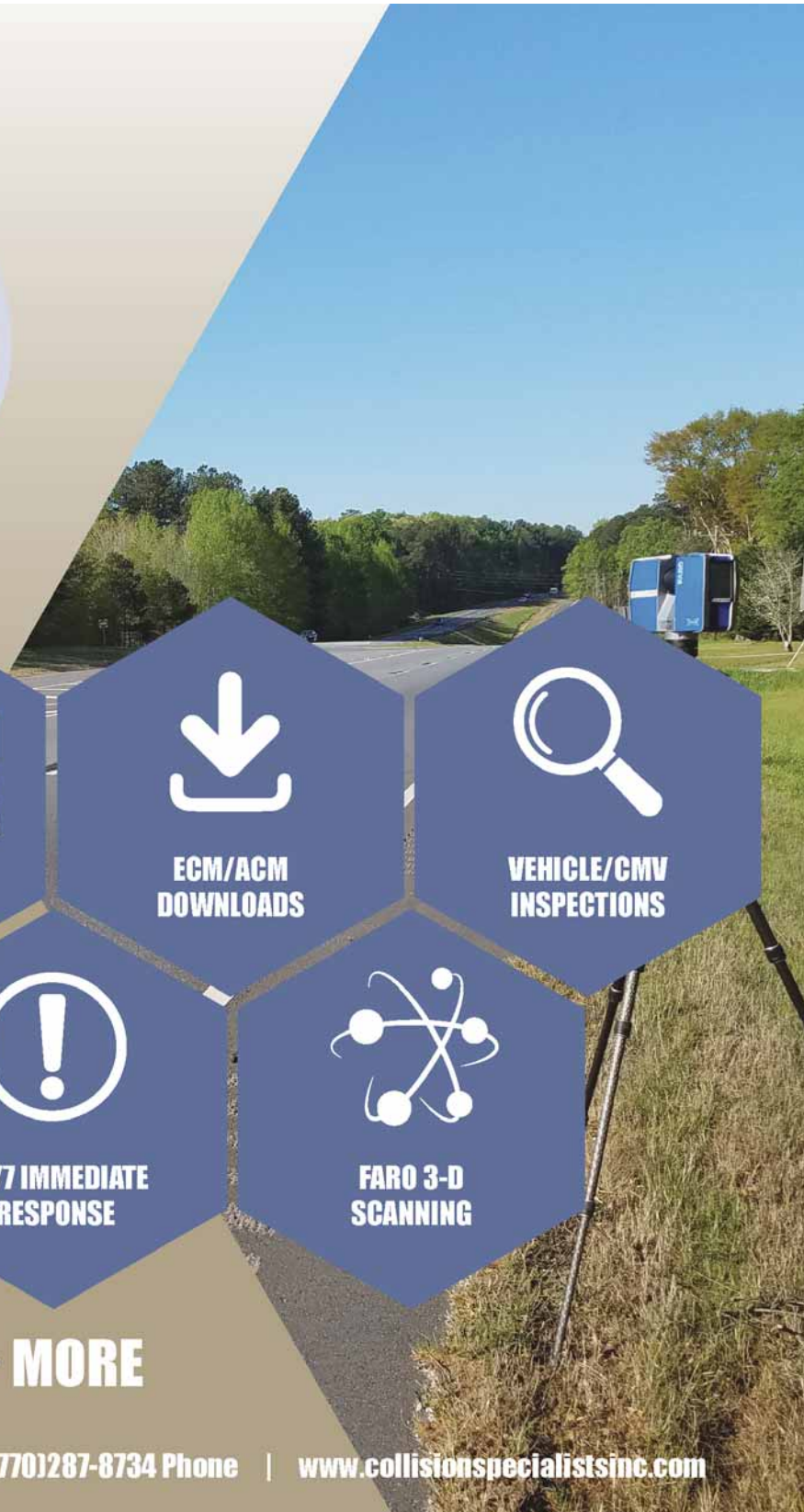

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