GEORGIA DEFENSE LAWYER

A Magazine for the Civil Defense Trial Bar

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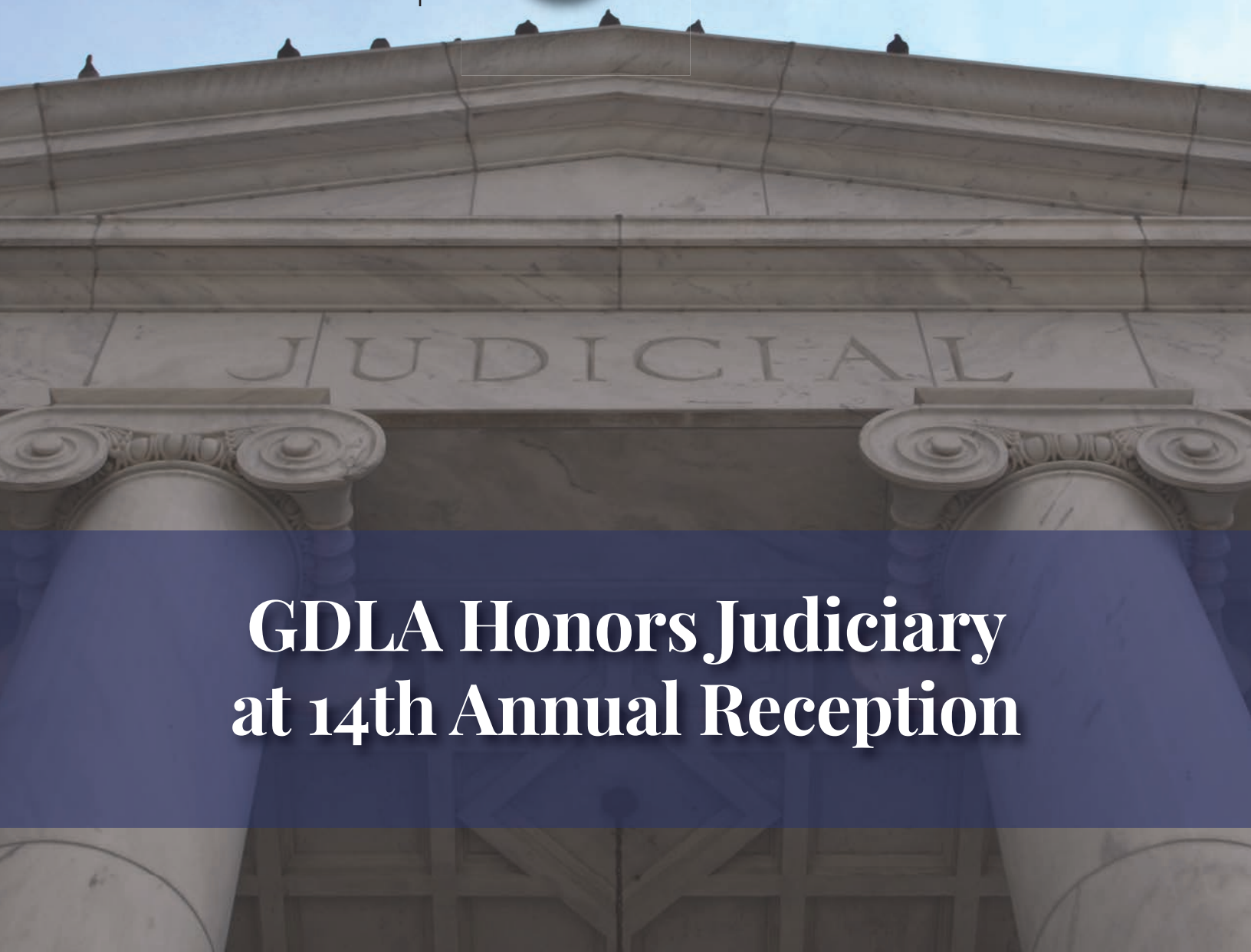

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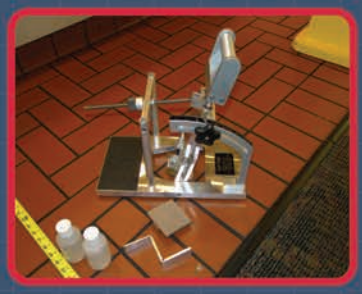


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Volume XIV, Issue I

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President's Message

Where did the year go? I am now even more respectful and appreciative of what my predecessors accomplished for the Georgia Defense Lawyers Association over the last 50 years. In 1967:

- Our Civil Practice Act was brand new;
- The AFL and the NFL were starting to merge;
- The New Orleans Saints played their first game;
- The Corporation for Public Broadcasting was launched;
- *The Newlywed Game*, *The Smothers Brothers Comedy Hour*, *Mr. Rogers' Neighborhood*, and *Mission: Impossible* premiered on TV;
- *The Jungle Book* and *The Graduate* were released;
- "I'm a Believer," "Happy Together," "Respect," "Release Me," and "Tell It Like It Is" were at the top of the charts;

... and Jack Capers, Dick Richardson, Ed Lane, John David Jones and Mead Burns had the foresight to form GDLA. Perhaps receiving their inspiration from the song titles cited above, they felt that it was important for civil defense attorneys to bond together to foster professionalism and collegiality.

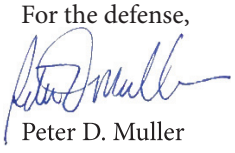
Since then, the organization has continued to evolve and strengthen, driven by its dedicated members and leaders. Substantive law sections were formed; a newsletter was conceived and eventually grew into a magazine; an array of loyal sponsors help us to achieve new heights; a vigorous trial academy was implemented; and a website was crafted to help us communicate and to share banks of documents.

Yes, over the years we have become more formal and more substantive at times, but the relationships among our members continue to form the core of our support for and love of the association. Those relationships are what keep our work from being "work." Our common goals and our commitment to the defense practice are what cause a person to write an amicus brief, chair a committee, organize a boot camp, or discuss a colleague's case at length for free.

As Past President Ted Freeman said in an interview for our history magazine, "We have come a long way in 50 years, and there is much for which we should be proud. But two things have not changed, and that is the character and reputation of the organization and its members. We still are made up of the finest defense lawyers in the state, and we still have members of integrity who genuinely care about each other."

GDLA has grown and changed for 50 years, but "The Beat Goes On" (1967 Billboard #83).

For the defense,



Peter D. Muller
Goodman McGuffey, Savannah

GDLA Leadership Changes

This edition of the magazine is traditionally in the works before our annual meeting takes place each June. As such, our leadership will have changed by the time you receive this and can be found on our website. The next issue will include a full report on our Golden Anniversary Annual Meeting at The Breakers in west Palm Beach, as well as the 2017-2018 Board of Directors and officers, including our 50th President Sally Akins of Ellis Painter Ratterree & Adams in Savannah.

Member News & Case Wins

MEMBER NEWS

Wilson Elser announced that **Tawana Johnson** has joined the firm's new Atlanta office as of counsel. Ms. Johnson focuses her practice on defending insureds and companies in all phases of litigation, including commercial disputes, contract litigation, medical malpractice, premises liability, products liability, personal injury claims, professional liability, construction litigation, employment litigation, and appeals.

Allison Ng, formerly with **Swift Currie McGhee & Hiers**, has joined **Greenberg Traurig** as an associate in the firm's Atlanta office. She focuses her practice on commercial litigation and products liability litigation with an emphasis on pharmaceutical, medical devices, and other consumer products.

Freeman Mathis & Gary announced **Michael J. Athans** joined the firm as a partner in the Atlanta office. He primarily focuses on insurance coverage, bad faith claim defense and defense of high-exposure tort claims. His litigation practice includes general liability, professional liability, directors and officers liability, employment practices liability, commercial property, commercial litigation (including shareholder litigation), products liability and environmental liability. He was previously with **Gilson Athans** in Atlanta.

James-Bates-Brannan-Groover in Macon announced the addition of **W. Donald Handberry**, formerly of Allstate Insurance Company and Anderson Walker & Reichert, to the firm's litigation practice group. He has extensive experience in defending clients in cases involving serious injury or death, including tractor trailer accidents, auto accidents, boating accidents, deck collapse, premise liability accidents, dog bites and accidents involving heavy equipment. **Dallas J. Roper**, formerly of Sell & Melton, has also joined the firm's litigation practice group, focusing mainly on insurance defense. She gained years of legal experience working as a legal secretary and law clerk prior to bar admission. She then practiced exclusively as a plaintiff's lawyer for five years and later spent three years handling a variety of civil litigation cases. In addition, **Jacqueline Kennedy-Dvorak** has joined the firm as an associate, focusing her practice on eminent domain, liability defense, and general civil litigation, and has experience in municipal, estate, farm/agriculture and employment law.

Julie John, the chair of **Drew Eckl & Farnham**, has been elected to the **National College of Workers' Compensation Lawyers**. Ms. John is the twenty-fifth Georgia attorney to be elected.

Owen Gleaton Egan Jones & Sweeney announced **David V. Hayes** was promoted to partner. He represents medical professionals, national retailers, publicly traded companies and governmental entities in state and federal courts across the Southeast.

Weinberg Wheeler Hudgins Gunn & Dial was chosen by ALM's *Daily Report* for the second straight year as Litigation Department of the Year, marking the third win after receiving it in 2014. The firm also announced it has promoted **Jackson A. (Jad) Dial**, **M. Alan Holcomb** and **Joshua S. (Josh) Wood** to its partnership in the Atlanta office. **Jad Dial** practice focuses on premises liability, transportation and legal malpractice. He has successfully represented national trucking companies and national property owners in high-profile cases. **Alan Holcomb** focuses his litigation practice in the areas of mass torts, product liability and commercial disputes. His practice takes him nationwide, including California, Illinois, Iowa, Maryland, Missouri, New York and Texas. He currently serves as national trial and coordinating counsel for a product manufacturer in cases involving allegations that exposure to the manufacturer's product caused irreversible lung disease in hundreds of workers and consumers, which received national media attention. He has consistently been recognized by *Super Lawyers Magazine* for his accomplishments in product liability and class action/mass torts. Mr. Holcomb is licensed to practice law in California, Georgia and Mississippi. **Josh Wood** practices in wrongful death, catastrophic injury, mass torts, product liability, premises liability, transportation, commercial and construction litigation. He is a member of the State Bar of Georgia and the Alabama State Bar, and has represented both corporations and individuals nationwide. He has been recognized by *Super Lawyers Magazine* in the area of civil litigation. Mr. Wood is a member of the Joseph Henry Lumpkin American Inn of Court.

Weathington McGrew in Atlanta announced the firm changed its name from **Weathington Smith.** The firm also announced that **Wayne D. (Dan) McGrew** and **Heather H. Miller** joined as partners. **Andrew M. Bagley** and **Samuel E. Britt III** joined as associates.The firm defends hospitals, physicians, nurses, and other healthcare providers in cases involving a wide array of claims, from malpractice to fraud. They also defend manufacturers of medical devices. In addition, they have represented clients, both within and outside of the medical industry, in lawsuits involving a broad array of other areas of the law, including premises liability, general commercial and contract disputes, and employment litigation.

CASE WINS

GDLA Board of Directors Member **Wayne S. Melnick** and **Matthew S. Grattan**, of **Freeman Mathis & Gary's** Atlanta office, recently won summary judgment on an underinsured motorist case. Prior to initiating litigation, Plaintiff settled his workers' compensation claim. In the settlement agree-

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ment, he agreed to release "all claims of any kind or nature whatsoever" against his employer and several different classes of releases including "employer's insurers." Plaintiff subsequently filed suit and made a underinsured motorist (UIM) claim against his employer's UIM policy as he was driving a company vehicle in the course and scope of his employment at the time of the accident. The UIM insurer was a different company from the workers' compensation insurer. Although Plaintiff argued that he never intended to release his UIM claim and submitted an affidavit supporting that position, Cobb State Court Judge David Darden sided with the defense and found the clear intent of Plaintiff was readily apparent from the release and as such Georgia law provided that there was no reason to look beyond the four corners of the release. Because the UIM insurer was readily identifiable as "employer's insurer," it fell within the scope of the release, and Plaintiff had released his UIM claims as part of his workers' compensation settlement.

Laura D. Eschleman, a partner in the Atlanta office of **Nall & Miller**, obtained a defense verdict for a physician's practice in Tuscaloosa, Alabama in March 2017. The allegations were based upon the physician owner of the practice's performance of an injection. The plaintiff alleged that the physician breached the standard of care in the physician's sterilization techniques in both preparing and delivering the injection; and, he argued the physician therefore negligently caused a post-injection infection. The patient claimed that in the days following the injection, he suffered severe pain, redness and swelling at the injection site and in the surrounding soft tissue. Rather than returning to his physician, he presented to the hospital with multiple complaints and was diagnosed and treated for cellulitis. The plaintiff further alleged he was at risk for sepsis, which required blood monitoring after his treatment and discharge from the hospital. Despite the plaintiff's contentions, a defense verdict was swiftly entered for the physician's practice, and the physician's record remains unblemished.

Brannon Arnold and **Anna Idelevich** of **Weinberg Wheeler Hudgins Gunn & Dial** in Atlanta obtained a defense verdict for CRST Dedicated, Inc. Plaintiff lost control of his Chevy Blazer while navigating an on-ramp to I-285N in wet conditions. Plaintiff spun out across several lanes of traffic and into the path of a tractor trailer owned by CRST. Despite the drivers efforts to brake and steer left, the defendant was unable to avoid colliding with Plaintiff's vehicle. Plaintiff suffered severe injuries, and the passenger in the Blazer was killed. Plaintiff alleged that the defendant-driver was fatigued and exceeding the posted speed limit in a lane prohibited for vehicles with more than six wheels. Plaintiff also alleged that the defendant-driver violated various state statutes and Federal Motor Carrier Safety Regulations. In addition, Plaintiff sued the Georgia Department of Transportation alleging that GDOT's negligent maintenance of the subject ramp caused or contributed to Plaintiff's loss of control. The defense argued that Plaintiff's loss of control was caused by improper steering and speed and poorly maintained tires and that the loss of control was the sole cause of the collision. In closing, Plaintiff's counsel asked the jury for $3.5 million in damages which was 10 times Plaintiff's claimed special damages of $350,000. The jury returned a defense verdict after less than two hours of deliberation.

Aynsley Meredith Harrow, a partner with **Insley & Race** in Atlanta, recently obtained summary judgment on behalf James Lingle, M.D. in a medical malpractice action arising out of treatment rendered to Plaintiff, a patient at Georgia Men's Health Clinic (the Clinic).

Plaintiff asserts that he went to the Clinic to enhance his sexual performance and stamina. Dr. Lingle was working at the Clinic as an independent contractor. Dr. Lingle took a medical history of Plaintiff, during which Plaintiff informed Dr. Lingle that he was sensitive to stimulants. Dr. Lingle also performed a physical examination of Plaintiff. Dr. Lingle approved Plaintiff to have a test injection of a vasoactive agent to stimulate an erection, which was administered by a technician at the Clinic. When he left the Clinic about an hour later, Plaintiff's erection had not subsided. The Clinic offered Plaintiff two pills, Sudafed and Terbutaline, both stimulants, to be used if his erection persisted for an undue length of time. Given his sensitivity to stimulants, Plaintiff declined the pills. Plaintiff alleges that he was not informed that he could receive a shot of phenylephrine to resolve his erection. Plaintiff also alleges that he was not advised to return to the Clinic or otherwise seek immediate treatment if his erection lasted over 3-4 hours as otherwise permanent injury might ensue. Plaintiff's erection did not subside during the course of the evening. He therefore contacted the Clinic multiple times that evening and spoke with a Clinic technician. Plaintiff tried the various means of relieving his erection recommended by the technician to no avail. The technician informed Plaintiff to return to the Clinic the next morning if his erection had not abated. Plaintiff alleged that the technician did not instruct Plaintiff to immediately go to the emergency room. When he awoke the next morning, Plaintiff's erection persisted and he was experiencing pain. Consequently, he went to the emergency room, where he was treated by urologist Michael Witt, MD. Plaintiff claimed that the delay in getting effective treatment caused permanent damage to his penis.

After the close of discovery, the defense filed a *Daubert* motion seeking to exclude the testimony of Plaintiff's treater and trial expert Dr. Witt and a motion for summary judgment, both of which were granted by Fulton County State Court Judge Wesley Tailor. Judge Tailor found Dr. Witt's opinions that the standard of care required Dr. Lingle to inform Plaintiff that stimulants might be necessary to treat a priapism and that resolution of a priapism might require irrigation and aspiration were grounded in informed consent and improper. Judge Tailor also agreed that Dr. Witt's opinion that the standard of care required Dr. Lingle to implement a patient monitoring

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system at the Clinic was unreliable, not grounded in facts in evidence and entirely speculative. Dr. Lingle was an independent contractor working at the Clinic. The Clinic, not Dr. Lingle, established policies and procedures, including those with respect to follow-up treatment of patients and hired individuals to treat priapisms. Plaintiff came forward with no evidence that Dr. Lingle had the legal or contractual right or responsibility to create or change the protocols established by the Clinic or to supervise the Clinic's staff. Further, there was no evidence in the record that the Clinic staff informed Dr. Lingle that Plaintiff was leaving the Clinic with an erection. Additionally, Dr. Witt cited to no medical authorities that support the proposition that a vasoactive drug injection is inappropriate for a male with a sensitivity to stimulants.

On May 12, 2017, after five days of trial, **Frederick N. (Fred) Gleaton** and **Laura M. Strong**, partners at Atlanta's **Owen Gleaton Egan Jones & Sweeney** obtained a defense verdict in the Superior Court of Fulton County for their client, an orthopedic surgeon practicing in Atlanta, who was sued along with a hospital co-defendant. The plaintiff alleged that the surgeon, as attending physician, and the resident physicians whom he supervised were negligent in prescribing ferrous sulfate, an iron supplement that contained red dye, to which the patient purportedly had an allergy. The patient refused blood products and required treatment for post-operative anemia. More than 30 hours after the last administration of ferrous sulfate, the patient developed angioedema at the sub-acute rehab facility to which she had been discharged. The defense team was able to show that (1) the standard of care did not require the physicians to know that some formulations of generic ferrous sulfate contained red dye as an inactive ingredient; and (2) food dyes do not cause angioedema or allergic reactions. The jury took approximately one hour and 45 minutes to reach a verdict for the all defendants.

The **Weathington McGrew** firm n Atlanta has had a considerable number of successful outcomes over the last few months, including the *Resurgens v. Elliott* case led by **Paul Weathington** and **David Hanson**, for which GDLA assisted with an *amicus curiae* brief (see article on page 14). Other wins follow here:

David Hanson obtained summary judgment for an OB/GYN doctor. The plaintiffs alleged that the doctor improperly performed a tubal ligation, resulting in wrongful pregnancy. Mr. Hanson argued that the two-year statute of limitations had expired, as the time frame began on date of surgery, not date of discovering pregnancy. The Superior Court of Bulloch County agreed and granted summary judgment.

Dan McGrew, **Andrew Bagley** and **Samuel Britt** obtained summary judgment for their OB/GYN client and his medical practice. The plaintiffs alleged the OB/GYN physician applied excessive lateral traction in the face of shoulder dystocia and caused the plaintiffs' son to sustain a brachial plexus injury. The defense team was able to show that the plaintiffs' lone expert's opinion impermissibly relied upon the doctrine of res ipsa loquitor, which is inapplicable to medical malpractice cases in Georgia. As a result, the plaintiffs' expert was excluded and the defendants were awarded summary judgment.

Heather Miller and **Samuel Britt** obtained summary judgment for their sub-contractor client in a subrogation action in a case pending in Gilmer County Superior Court. Plaintiff sought to recover amounts paid to its insured following a house fire, under the theory of negligent misrepresentation. Ms. Miller and Mr. Britt argued that Plaintiff failed to meet the criteria required in order to demonstrate negligent misrepresentation in Georgia.

Paul Weathington and **Lindsay Forlines** obtained a defense verdict in favor of a neurosurgeon in a one-week trial in Fulton Superior Court. Plaintiffs alleged that the defendant neurosurgeon negligently performed the at-issue lumbar spinal surgery, with allegations including improper entering of the spinal cord, overly extensive exploration, and misinterpretation of two post-operative MRIs. Incomplete informed consent was also a theme of Plaintiffs' trial. Plaintiffs requested upward of $5 million in damages for Plaintiff's alleged conditions, including a spinal leak, bowel and bladder dysfunction, and other neurologic deficits. The jury entered a defense verdict in favor of both the operating neurosurgeon and the practice, both represented by Mr. Weathington and Ms. Forlines.

Dan McGrew and **Heather Miller** successfully defended a neonatologist in a one-week trial in Fulton State Court. Plaintiff requested $30 million in damages for the death of an eight-day-old baby who died of complications associated with respiratory distress syndrome. After less than two hours of deliberation, the jury entered a defense verdict**.**

Dan McGrew and **Heather Miller** defended an OB/GYN in a medical malpractice suit filed in the State Court of Fulton County. Plaintiff alleged that during a hysterectomy, a ureter injury occurred which went undetected or repaired by the defendant physician. After deliberating for less than one hour, the jury returned a defense verdict in favor of the physician.

Heather Miller and **Andrew Bagley** recently obtained summary judgment in Chatham County in a premises liability lawsuit on behalf of their client, a nationwide recycling company. The court found that the Plaintiff assumed the risk of his actions, which warranted summary adjudication.

Dan McGrew and a colleague obtained a defense verdict in favor of an internal medicine physician in the Superior Court of Fulton County in a case alleging medical malpractice and wrongful death. Plaintiffs alleged that an internal medicine physician attending to a sub-acute rehabilitation patient discontinued the patient's Heparin medication prematurely and that the patient died of an acute pulmonary embolism as a result. The jury determined that the internal medicine physician met the standard of care and did not cause or contribute to the patient's outcome. ◆

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Hon. Susan Forsling has rapidly become one of the most requested mediators in Georgia. She was one of the most respected judges to sit on the Fulton County bench and has earned the right to be addressed as "judge"--but she will insist you call her Susan. Anyone who's worked with her will tell you that it is this combination of intelligence, experience and humility that makes Susan a successful mediator. She's also served as County Attorney for Fulton County, and partner in the law firm of Young & Murphy.

As a Team Leader at Miles, she has successfully mediated complex civil cases, including medical negligence, wrongful death, professional liability, commercial contracts, class actions and bad faith insurance claims. She has been recognized as a member of the National Academy of Distinguished Neutrals and the Georgia Academy of Mediators and Arbitrators, and she speaks regularly on effective mediation practices.

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Welcome, New GDLA Members!

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

Andrew M. Bagley
Weathington McGrew, Atlanta

Brandi E. Beale
Lueder Larkin & Hunter, Atlanta

Nicholas D. Bedford
Gray Rust St. Amand Moffett & Brieske, Atlanta

Robert Britton Beecher
Moore Clarke DuVall & Rodgers, Savannah

Tyler P. Bishop
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Taylor English Duma, Atlanta

Claire Cronin
Constangy Brooks Smith & Prophete, Macon

Michael T. Davis
Nall & Miller, Atlanta

Lindsay Forlines
Weathington McGrew, Atlanta

Abby C. Grozine
Carlock Copeland & Stair, Atlanta

David C. Hanson
Weathington McGrew, Atlanta

Jeanette Felicia LeRay
Hall Booth Smith, Atlanta

Wayne Dan McGrew
Weathington McGrew, Atlanta

Heather Horan Miller
Weathington McGrew, Atlanta

P. Shane O'Neill
Weinberg Wheeler Hudgins Gunn & Dial, Atlanta

Brad C. Parrott
Hudson Parrott Walker, Atlanta

Meghan Elizabeth Pieler
Swift Currie McGhee & Hiers, Atlanta

Ronald G. Polly, Jr.
Hawkins Parnell Thackston & Young, Atlanta

Robyn M. Roth
Fain Major & Brennan, Atlanta

Karen Lea Smiley
Hanks Brookes, Atlanta

Kristian Smith
Freeman Mathis & Gary, Atlanta

Mary Lillian Walker
Hudson Parrott Walker, Atlanta

IN MEMORIAM: Frank Love

By Bill Custer
Bryan Cave, Atlanta

Frank Love and I were together for over 47 years. One word more than any other defined Frank for me—humanity. In all our years together never once did I see him act selfishly to the detriment of another. Below is a summary prepared by another of Frank's long-time partners, Bill Custer.

-Robert Travis
President, GDLA, 2007-08

Our friend and colleague, Frank Love, Jr., passed away on January 24, 2017 at the age of 89. Frank was a long-time partner at Powell, Goldstein, Frazer & Murphy. Frank helped lay the foundation for the Georgia Defense Lawyers Association while serving as President during the early years of the organization from 1974-1975.

Frank was truly a legend among the litigators in Atlanta. Frank had a keen legal mind, all the instincts of a great trial lawyer, and an unparalleled joy for life that made him both a great friend and a great counselor. There are few lawyers who have received as many honors as Frank during their careers.

Frank received his law degree from Washington & Lee University in 1951. Thereafter, he joined the law firm of Powell, Goldstein, Frazer & Murphy. Frank retired from the same firm after nearly 50 years of service in 1998, but continued to maintain an office and continued to provide sound legal advice to upcoming generations of new lawyers.

During his career, Frank also served on the State Bar Board of Governors and as President of the State Bar of Georgia from 1982-1983. During his time as President of the State Bar, the Board of Governors enacted mandatory continuing education for lawyers, created the Georgia Bar Foundation, and created a mechanism to fund the latter organization through lawyer trust accounts. Frank also received the Tradition of Excellence Award in 1990 from the General Practice & Trial Section of the Bar, and the Distinguished Service Award from the Bar in 2003, the highest honor awarded by the State Bar of Georgia, for "conspicuous service to the cause of jurisprudence and to the advancement of the legal profession in the state of Georgia." Frank was also a member of the American College of Trial lawyers and a Distinguished Fellow of the Georgia Bar Foundation.

This truncated summary of the many honors Frank received during his life is hardly an adequate testament to Frank's strengths as both a lawyer and a person. Frank was at his best when smoking his pipe in his office, dispensing advice to clients and colleagues, steering associates in the right direction, and resolving legal disputes. Frank's deep, gravelly voice could be heard down the hall and that voice could be intimidating to some, but it was always a short-lived impression. The truth is that Frank just wore people down with his smile and his incredible charm and wit. He was a person who was impossible not to love and respect—whether you were a lawyer, a judge or a juror.

At Frank's memorial service, there were very few of his true peers in attendance. That is, I suppose, one of the unfortunate drawbacks of living such a long life. Most of the lawyers in attendance were generations younger than Frank. But if one looked out across the assembled crowd, it would have been clear that this group was Frank Love's true legacy and the one for which he would want to be remembered. Not the offices he held and not the many awards he received. The true legacy of Frank Love will live on in the countless lawyers whom he counseled and trained during his lifetime. ◆

Supreme Court Holds Surprise Witness May Be Excluded as Discovery Sanction: Aligns with GDLA Amicus Brief

The Court held that the trial court's ruling clearly reflected that omission of the witness from the pretrial order was not an independent ground for the trial court's ruling, but was "part and parcel of the trial court's finding that Elliott deliberately concealed the name of a known witness in discovery prior to trial."

On May 30, 2017, the Supreme Court of Georgia reversed the Court of Appeals and affirmed Fulton County State Court Judge Jane Morrison on an issue of key importance to litigators throughout the state. By doing so, they unanimously reinstated a 2015 trial verdict obtained by GDLA member Paul Weathington of Weathington McGrew in Atlanta on behalf of Resurgens Orthopaedics and one of its surgeons.

In *Resurgens v. Elliott*, Docket no. S16G1214, 2017 Ga. LEXIS 437, the Supreme Court held that the trial judge had not abused her discretion by excluding a treating nurse as a witness where the plaintiff had not identified the nurse as a potential witness in his discovery responses and had not listed the nurse as a "may call" witness in the parties' pretrial order.

Through its decision in this case, the Supreme Court appears to have modified the general rule that a continuance is the only appropriate remedy where a party fails to identify a non-expert witness in discovery or the parties' pretrial order. In handing down its decision in *Elliott*, the Supreme Court has provided for the exclusion of even non-expert witnesses who are not properly identified prior to trial under certain circumstances.

Elliott was a 2009 medical malpractice case in which the plaintiff alleged that the defendants had failed to timely diagnose and treat an abscess in the plaintiff's spinal cord, resulting in paralysis. When the case went to trial four years after it was filed, the plaintiff attempted to call a nurse whom he had not specifically identified as a potential witness in his discovery responses or the parties' pretrial order. The nurse's name appeared twice in the plaintiff's medical records, but the records did not clearly indicate that the nurse provided medical care to the plaintiff or was present at the time when the alleged malpractice was said to have occurred. The defendants objected to the plaintiff's attempt to call the nurse as a witness, and the trial court excluded the witness, finding that to allow the nurse to testify would result in unfair "surprise" or trial by "ambush." After a defense verdict, the plaintiff appealed and the Court of Appeals granted a new trial, holding that excluding the witness was error.

Weathington McGrew petitioned the Georgia Supreme Court for certiorari and asked GDLA to weigh in on that petition with an amicus brief. GDLA argued that the trial court properly exercised its discretion under O.C.G.A. § 9-11-37 and O.C.G.A. § 15-1-3. Cert was granted in September 2016.

On January 9, 2017, Weathington McGrew attorneys Paul Weathington and David Hanson argued in front of the Georgia Supreme Court that exclusion of Plaintiff's witness was an appropriate remedy for the trial court to exercise because Plaintiff intentionally withheld the witness' name during discovery.

In a unanimous opinion authored by Justice Carol Hunstein, the Georgia Supreme Court agreed, holding that O.C.G.A. § 9-11-37(d) permits a trial court to exclude a witness "where a party provides false or deliberately misleading responses to written discovery requests." The Court explained that "when a party receives a substantive answer to a discovery request, they are entitled to believe that answer, and they are not required to file a motion to compel or seek clarification of that substantive response in order to obtain sanctions should they later learn that the answer provided was false or intentionally misleading." 2017 Ga. LEXIS 437 at *12-13.

Thus, the Supreme Court held, "where a party has provided false or intentionally misleading responses to written discovery, **including deliberately suppressing the name of a material witness**, the aggrieved party may seek sanctions for the same, as **allowing such hidden evidence to be admitted at trial simply because it has some probative value rewards and encourages**

deceptive behavior." *Id.* at *14-15 (emphasis supplied).

The Supreme Court also implicitly held that listing "Plaintiff's treating medical providers," "any person named in the medical records," "any healthcare professional whose name appears in Plaintiff's records," and "other witnesses for the purposes of impeachment or rebuttal" was not sufficient to put the defendants on notice of the potential witness.

As a final note, the Supreme Court did not address the issue of whether the failure to list the nurse as a potential witness in the pretrial order served as an independent ground for excluding the witness from testifying. The Court held that the trial court's ruling clearly reflected that omission of the witness from the pretrial order was not an independent ground for the trial court's ruling, but was "part and parcel of the trial court's finding that Elliott deliberately concealed the name of a known witness in discovery prior to trial." *Id.* at *19.

The decision in *Elliott* serves as both a victory for fairness and good sense, as well as a cautionary tale about sloppiness in discovery responses and pretrial orders. If you plan to call a witness at trial, you had better name the witness specifically in interrogatory responses or the pretrial order, or risk the witness being excluded.

GDLA thanks Mark Wortham and Nathan Gaffney of Hall Booth Smith in Atlanta for the excellent brief they filed with the Supreme Court in this case. Thanks also goes to GDLA amicus curiae Chair Martin A. (Marty) Levinson of Hawkins Parnell Thackston & Young in Atlanta and Garret Meader of Drew Eckl & Farnham in Brunswick for their efforts on behalf of GDLA and the civil defense bar. ◆

GDLA Files Amicus Brief Defending Constitutionality of Apportionment Statute

On June 15, 2017, GDLA filed an amicus curiae brief in the Supreme Court of Georgia in *Cynthia Clure v. Johnson Street Properties, LLC*, Case No. S17X0812, which involves an attack on the constitutionality of Georgia's apportionment statute, O.C.G.A. § 51-12-33.

The trial court upheld the statute as constitutional, and the plaintiff has now sought to bring the matter to the Supreme Court of Georgia. The case concerns an incident in which the plaintiff, Clure, was injured when another tenant in the same apartment complex was pulling down a tree that had fallen on the roof of one of the apartments from an adjacent property. The defendant property owner filed a notice of intention to seek apportionment of fault to the owners of the adjacent property as nonparties. Clure moved for partial summary judgment, claiming in part that O.C.G.A. § 51-12-33 violates nonparties' constitutional rights to due process and equal protection. The trial court disagreed, and Clure sought to appeal the case to the Georgia Supreme Court for consideration of the constitutional issues raised.

Counsel for the defendant property owner sought the assistance of GDLA on the appeal through an amicus curiae brief. In its brief, GDLA made three primary arguments: (1) the plaintiff lacks standing to complain of the violation of another person's constitutional rights; (2) a finding of fault on the part of a nonparty by a jury pursuant to O.C.G.A. § 51-12-33 does not determine liability against the nonparty and therefore cannot violate the nonparty's procedural or substantive due process rights; and (3) O.C.G.A. § 51-12-33 treats all non-parties equally and, accordingly, does not merit an equal protection challenge.

GDLA thanks C. Shane Keith of Hawkins Parnell Thackston & Young in Atlanta, who authored the amicus brief, for his work on this important issue. ◆

GDLA Files Amicus Brief in Professional Negligence Case

On June 28, 2017, GDLA filed an *amicus curiae* brief in the Georgia Court of Appeals regarding the interpretation of a medical malpractice/professional negligence claim, as opposed to one for ordinary, or simple, negligence, and on the resulting expert affidavit and statute of repose bars to these claims.

The primary issue addressed concerned upholding the trial court's proper interpretation of claims against psychiatric inpatient health care institutions for failure to "control" a patient who, upon her discharge, killed two individuals, as claims for professional negligence requiring an expert affidavit and subject to the five-year medical malpractice statute of repose. Other, related claims against the institutions included allegedly discharging the patient pursuant to an internal policy whereby such patients were released upon the expiration of their health insurance, and allegedly mismanaging the provision of medical care at the facility pursuant to a written, management agreement.

GDLA filed its brief to argue that the trial court properly considered these claims as sounding in professional negligence; as such, they were subject to the expert affidavit requirement as well as the five-year statute of repose and were, in the absence of satisfaction of these requirements by plaintiffs, properly dismissed.

The companion cases are *Curles v. Psychiatric Solutions, Inc.*, Georgia Court of Appeals Case No. A17A1298, and *Kern v. Psychiatric Solutions, Inc.*, Georgia Court of Appeals Case No. A17A1299.

We thank the brief's author, Kristin Hiscutt of Bendin Sumrall & Ladner in Atlanta for her service to GDLA. ◆

Court of Appeals Sides with GDLA Amicus Brief in Defining Workers' "Comp" Regarding Medical Benefits

On June 20, 2017, the Court of Appeals issued an opinion in *Kendrick v. SRA Track, Inc., et al.*, Georgia Court of Appeals, Case No. A17A0094, and addressed the substantive issue dealt with in an *amicus curiae* brief filed by GDLA regarding whether workers' compensation statute O.C.G.A. § 34-9-221(h) defines "compensation" as to include medical benefits.

If so, an employer/insurer would be prohibited from controverting a case as an "all issues" case beyond the time frame contained therein where only medical benefits on a claim have been paid. Ultimately, the Court of Appeals agreed with the position taken by GDLA and found the plain language of O.C.G.A. § 34-9-221(h) only applies to claims when income benefits are being paid. The Court noted medical benefits are not mentioned anywhere in that code section. Likewise, both the Court of Appeals and Supreme Court of Georgia had previously interpreted the statute's reference to compensation as meaning income benefits only.

The case involves a motorcycle accident sustained by the employee on the way to a hotel at an out-of-town job site the day before his work was set to begin. After the accident, the insurer inadvertently sent the employee a prescription card, and the employee used the prescription card to obtain medications. Approximately one year after the accident, the employee filed a request for hearing, seeking income and other medical benefits, and the employer/insurer filed a controvert of the entire claim. The Trial Division denied the employee's claim, and the Appellate Division affirmed, which was affirmed by operation of law when no order was entered by the Superior Court. The Court of Appeals granted the employee's Application for Discretionary Appeal.

In *Kendrick*, the employer/insurer had only provided a prescription card to the employee but did not pay any form of income benefits. As such, the Court of Appeals agreed with GDLA and found O.C.G.A. § 34-9-221(h) did not apply to time bar the employer/insurer from controverting this workers' compensation claim. The *Kendrick* decision maintains current precedent such that employers who offer initial remedial treatment will not waive substantive rights and defenses, nor face overly burdensome time limitations, as a result of offering initial remedial medical treatment.

We thank the brief's co-authors, Ann McElroy and Crystal McElrath of Swift Currie McGhee & Hiers in Atlanta for their service to GDLA. ◆

GDLA Presents Law School Awards

Benjamin P. Stell (right) was this year's recipient of the Willis J. (Dick) Richardson Jr. Student Award for Outstanding Trial Advocacy at the University of Georgia School of Law. This annual award, sponsored by GDLA, honors the memory of one of GDLA's founding members. It was presented on April 3, 2017; Dean Peter B. Rutledge (left).

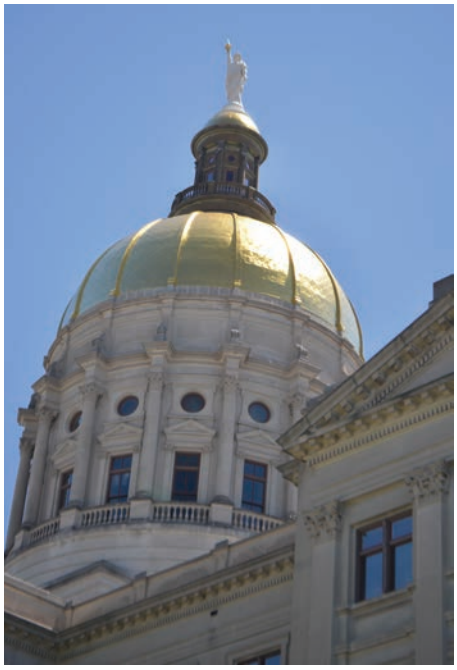
Anelise Codrington (left) was presented the GDLA Rusty Gunn Award during the Mercer Law School Student Dinner on May 11, 2017. This annual award, established by GDLA, honors the memory of long-time Board of Directors member Robert R. (Rusty) Gunn. It recognizes a student whose professionalism is her badge of honor, and who quietly leads with strength, intelligence and good humor. GDLA Board member Jason Logan (right) was at the ceremony to congratulate her.

What Happened Under the Gold Dome:
A Legislative Update

By Jacob E. Daly
Freeman Mathis & Gary, Atlanta

With only 40 legislative days per year, typically between January and March, the General Assembly is usually very active in trying to complete its legislative business for the year during those 40 days. The 2017 session was no exception, with 279 bills and resolutions having been passed.

Before this year's session began, there were rumors about the GTLA's attempting to have joint liability reinstated in tort cases, but those rumors turned out to be just that. Since the last major tort reform effort in 2005, there has not been much desire among members of the legislature to tackle significant, not to mention controversial, tort reform measures. But the type of legislation that is typically characterized as "tort reform" is not the only type of legislation of interest to GDLA. This year's session saw several bills of interest to GDLA enacted, and these bills are discussed below. Sometimes just as important as enacted legislation are the bills that are not enacted. Some of these bills are important precisely because they were not enacted and would have been unfavorable for clients represented by GDLA members, and others are important because they will remain under consideration in 2018. These unenacted bills of interest to GDLA are also discussed below.



PASSED AND SIGNED BY THE GOVERNOR

House Bill 1 – Liability for Space Flight Activities

According to the Space Foundation's 2016 Space Report, the size of the global commercial space industry in 2015 was $322.94 billion. In an effort to capitalize on this emerging industry, Camden County is seeking to develop an aerospace industrial park named Spaceport Camden that will include a vertical launch facility, a landing zone, a control center complex, a facility for visitors, and a launch viewing area. Once the Federal Aviation Administration's Office of Commercial Space Transportation gives final regulatory approval, which is expected in 2018, Spaceport Camden will have up to 12 launches of satellites and supplies—and possibly space tourists—per year, among other related activities.

The General Assembly enacted HB 1, which is known informally as the Georgia Space Flight Act, to help ensure Spaceport Camden's ability to compete in this industry. The act, which will be codified as a new article in the premises liability chapter of Title 51, *see* O.C.G.A. §§ 51-3-41 to -44, provides that a "space flight entity" is not civilly liable to any person for a "space flight participant injury" arising out of the inherent risks associated with any "space flight activities" occurring in or originating from Georgia, as long as the "space flight participant" signed the warning and agreement prescribed in the statute and gave written informed consent required by federal law, except that a "space flight entity" may be civilly liable for a "space flight participant injury" caused by its gross negligence or intentional conduct.

House Bill 192 – Business Judgment Rule

Broadly stated, the business judgment rule recognizes that officers and directors are fallible and that they will make mistakes, but it protects them from liability for making bad decisions as long as their decisions are made honestly and with the exercise of reasonable diligence. It reflects a reluctance by judges to question the business judgment of business people, who generally know how to manage their business affairs better than judges, especially since judges evaluate their decisions with the benefit of hindsight. Just three years ago, the Supreme Court issued an opinion comprehensively analyzing the scope of the business judgment rule in response to a certified question from the United States District Court for the Northern District of Georgia. *Fed. Deposit Ins. Corp. v. Loudermilk*, 295 Ga. 579 (2014). Georgia's common-law version of the business judgment rule differentiates between the decision-making process and the wisdom of the decision and provides that the former may be the basis of a claim but that the latter may not. *Id.* at 581-86. More specifically,

> [The business judgment rule] generally precludes claims against officers and directors for their business decisions that sound in *ordinary negligence*, except to the extent that those decisions are shown to have been made without deliberation, without the requisite diligence to ascertain and assess the facts and circumstances upon which the decisions are based, or in bad faith. Put another way, the business judgment rule at common law forecloses claims against officers and directors that sound in *ordinary negligence* when the alleged negligence concerns only the wisdom of their judgment,

> but it does not absolutely foreclose such claims to the extent that a business decision did not involve "judgment" because it was made in a way that did not comport with the duty to exercise good faith and ordinary care.

Id. at 585-86 (emphasis added).

The Supreme Court next analyzed whether Georgia's common-law version of the business judgment rule is consistent with the statutes that govern the care with which officers and directors of banks and corporations are required to perform their duties. *Id.* at 587-94. The Supreme Court determined that these statutes—*see* O.C.G.A. §§ 7-1-490 (bank officers and directors), 14-2-830 (corporate directors), and 14-2-842 (corporate officers) – are consistent with and do not supersede the common-law version of the business judgment rule. *Id.* at 591-94. Thus, the Supreme Court concluded that the business judgment rule, whether under the common law or a statute, insulates the wisdom of a decision made by an officer or a director from judicial review but allows claims based on ordinary negligence to challenge the process by which the decision was made. *Id.* at 596. In an important recognition of the separation of powers, the Supreme Court concluded its opinion in *Loudermilk* by observing that "[t]o the extent that more protection for officers and directors is desirable, the political branches may provide it." *Id.*

Rep. Beth Beskin, who represents the 54th District in the House, accepted the Supreme Court's invitation to provide more protection for officers and directors of banks and corporations. She was the primary sponsor of HB 192, which amends O.C.G.A. §§ 7-1-490, 14-2-830, and 14-2-842 by creating a presumption that officers and directors acted in good faith during their decision-making process and that they exercised ordinary care, provided that this presumption may be rebutted by "evidence that such process constitutes gross negligence by being a gross deviation of the standard of care of [an officer and/or a director] in a like position under similar circumstances." Thus, HB 192 strengthens the business judgment rule by changing the standard for potential liability from ordinary negligence to gross negligence. This, in turn, will enhance Georgia's reputation as a favorable state in which to do business.

A "livestock activity sponsor" is an entity, including its employees, that sponsors, organizes, or provides facilities for livestock activities.

Senate Bill 126 – Venue Under the Georgia Tort Claims Act

SB 126 amends the Georgia Tort Claims Act, specifically O.C.G.A. § 50-21-28, to allow venue in wrongful death actions to be in either the county where the tortious conduct occurred or the county where the decedent died.

House Bill 50 – Immunity for Injuries Caused by Livestock Activities

Existing law provides that equine activity sponsors, equine professionals, llama activity sponsors, and llama professionals are immune from liability for any injury that results from the inherent risks of equine or llama activities unless the person or entity that (1) provided the equipment or tack, knew or should have known that the equipment or tack was faulty, and such faulty equipment or tack caused the injury, or provided the animal and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the activity and to manage safely the particular animal based on the participant's representations of his or her ability; (2) owns, leases, rents, or otherwise possesses and controls the land or facilities where the participant was injured because of a dangerous latent condition that was known or should have been known to the person or entity and for which warning signs were not conspicuously posted; (3) acted or failed to act in a manner that constitutes willful or wanton disregard for the safety of the participant and such act or omission caused the injury; and (4) intentionally injured the participant. O.C.G.A. § 4-12-3(a), (b).

HB 50 extends this immunity to livestock activity sponsors, livestock professionals, and owners of livestock facilities. "Livestock" consists of swine, cattle, sheep, and goats, and a "livestock activity" is "any event in which participants are engaged in the grazing, herding, feeding, branding, boarding, milking, inspecting, or evaluating of livestock, or taking part in any other activity that involves the care or maintenance of livestock," as long as a fee is not charged or a fee is charged and used exclusively for specified purposes. A "livestock activity sponsor" is an entity, including its employees, that sponsors, organizes, or provides facilities for livestock activities. A "livestock facility" is a property or facility at which livestock activities are held. Finally, a "livestock professional" is an entity that owns livestock involved in livestock activities.

The same exceptions to immunity also will apply to livestock activity sponsors, livestock professionals, and owners of livestock facilities, plus one additional exception created by HB 50: there will be no immunity if the person or entity provided the livestock and failed to make reasonable efforts to determine the propensity of the particular animal to cause harm or to determine the ability of the participant to engage safely in the activity based on the participant's representation of his or her ability and based on the propensity of the particular animal to cause harm. Finally, HB 50 requires a warning sign, with statutorily prescribed language, color, and size, to be posted at or near where the livestock activities are conducted, just as the existing law requires for equine and llama activities. Also, if a livestock activity sponsor, a livestock professional, or an owner of a livestock facility enters into a contract with a participant for the provision of professional services, in-

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The E.U.'s General Data Privacy Regulation: What are the Primary Concerns for U.S. Companies in the European Market?

By Sam Crochet
Hall Booth Smith, Atlanta

As we all know, companies use, harvest, and benefit from the collection of our personal data—names, social security numbers, email addresses, telephone numbers, occupations, purchasing history, and more. They study, analyze, and trade this data to optimize efficiency and increase profits. Of course, with the rise in cyber attacks and data breaches, laws and consumer demand pressure companies to secure networks, scrutinize vendor usage—such as the security of one cloud processor versus another—and be transparent with collection practices.

Data privacy within the U.S. is controlled by a patchwork of state and industry-specific federal laws. However, U.S. Companies across several industries (hospitality, retail, banking, and even healthcare to name a few) are racing against the clock to satisfy increased requirements of the European Union's (E.U.) new General Data Protection Regulation (GDPR), which becomes effective May 25, 2018. The GDPR will replace the current Data Protection Directive, which was well-intentioned but inadequate in the face of growing technologies and cross-border data transfers. Though many domestic companies marketing to European citizens have safeguards to accommodate state/federal laws and the Data Protection Directive, there are notable changes and increased protections within the GDPR that these companies must accommodate or risk facing stiff financial penalties.

The GDPR is geographically expansive. Immediately, companies should understand the regulation broadly applies to the processing of E.U. residents' data regardless of the company's/processor's location. If a company markets its goods or services to E.U. residents beyond merely having a commerce-oriented website, than it will likely be controlled by the GDPR.[1] Practically speaking, app developers, e-commerce companies, and multinational corporations wishing to tap into the European market, regardless of whether they have european offices, employees, or equipment, will be subject to the regulation.[2]

U.S. companies controlling or processing customer data of E.U. residents face increased penalties for violating the new regulation. Fines can reach 4 percent of annual global revenue, or 20 million Euros *per violation*.[3] The regulation further grants European Supervisory Authorities the power to ban a company's data processing altogether.[4] Obviously, U.S. companies cannot afford to mishandle security of E.U. residents' data. As a result, domestic companies doing business abroad are undergoing operational reform regarding management of international customer-data. The requirements are as numerous as they are complex, causing in-house counsels and risk managers to painstakingly comb the articles and recitals or throw their trust in the hands of expensive third-party compliance vendors. However U.S. companies choose to navigate the GDPR, there are some primary concerns they must be sure to address. Again, while commentary on this subject could be extensive, U.S. companies are well advised to focus on a few key areas:

- Stricter Technical and Organizational Security Measures;
- Data Subject Consent;
- Portability and Right to be Forgotten;
- Consumer-Friendly Breach Notification Rules; and
- Cross-Border Transfers away from E.U. states.

1. Stricter Technical and Organizational Security Measures

Unlike the Data Protection Directive and most U.S. state/federal laws, the GDPR specifically outlines the steps companies should take to comply with the increased security requirement—(1) encryption and "pseudonymization" of personal data, (2) the ability to ensure confidentiality, integrity, and resilience of processing systems/services, (3) a contingency plan to restore/access data amidst a technical incident (such as a cyber attack or "ransomware" event), and (4) regular tests to evaluate effectiveness of technical/organizational security measures (i.e. a network "penetration test" or administrative fire drill).[5]

While many U.S. companies will not achieve full GDPR compliance by the May 18, 2018 deadline, the GDPR indicates a company's adoption of codes of conduct or certain certifications approved by the European Commission can help achieve compliance with security standards.[6] These tools act as a form of communication to consumers and from third-parties that signal approved safe practices. Of course, GDPR requires accreditation be given to such codes of conduct and certifications only after they demonstrate expertise within the area of security/privacy and establish procedures for issuing and reviewing membership. [7]Which certifications and

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Mediation: Suggestion on Approaches to Opening Sessions

By Bruce Barrickman
BAY Mediation & Arbitration Services

As both a practicing attorney and a mediator, I participate in opening sessions in mediation on a regular basis. As a mediator, I say in my opening comments that neither party is here to make the other party mad, but that both sides need to know from where the other side is coming so an informed decision about whether to settle or try the case can be made and so I can do my job as a mediator. In short, I lay it out that I am asking, as the mediator, for both sides to tell the other side the good, the bad and the uncertainties of the case. It is an open invitation for both sides to candidly, but constructively, lay out their positions.

Typically, Plaintiff's counsel goes into great detail about the fault issues, if any; the injuries Plaintiff sustained; the extensive treatment Plaintiff has received; the amount of medical expenses and lost wages; and why a significant amount of money is warranted. As a mediator, I have been seeing over the past few years more and more defense counsel respond to this information by saying they are sorry about the accident; are at the mediation in good faith; are here to try to get the case settled for a reasonable amount of money; and have come with an open mind.

Plaintiff's counsel never has a problem with utilizing the opening session to try to sway the defense-side client. They typically do not pull any punches and take the opportunity to shed the best light on their case. I understand the defense team and their client do not have the personal involvement in the case that a plaintiff has. I understand there is a concern about making the plaintiff angry and defensive. I understand there are times when you want to hold some, or many, of your cards to play them out as the mediation progresses. I understand there is some thought that Plaintiff will accept things better coming from the mediator as opposed to the defense attorney. All of these things are legitimate issues to consider, but should they trump your only opportunity to speak unfiltered to Plaintiff? You can even direct your comments to the mediator rather than the plaintiff, but you are still giving the plaintiff the opportunity to hear the defense's views of the case.

As an attorney at mediation, I typically present my position to the plaintiff and plaintiff's counsel in the opening session. If justified, I will use a PowerPoint presentation. A PowerPoint can be very effective in some cases, because Plaintiff not only hears, but sees, the information, inconsistencies, lack of physical damages to the vehicles and other hurdles with which they will be faced if the case goes to trial.

In opening session, I will talk about the things we are taking into consideration in evaluating the case; what questions and concerns we have about Plaintiff's case and position; what evidence we believe the jury will consider during trial and in jury deliberations; whether the venue is good or bad for the plaintiff and us; the time and expense involved in getting a case ready for trial and what hurdles each side must overcome in presenting their case to a jury. I do my best to present my comments in a constructive way. I tell them that they need to know from where we are coming, and that I feel I have a responsibility to let them know our position as opposed to having it come from the mediator. I do my best to present my comments while showing respect to the plaintiff's position and what they have, or feel they have, gone through. I try my best to not appear to be talking down to them or to appear I am judging them as a person. I try to present everything as what I think a jury will be considering and thinking about in arriving at a verdict if the case goes to trial.

I sometimes hold some things back to use as the mediation moves forward, but I typically will reveal most, if not all, of my arguments before the end of the mediation. Currently, very few cases go to trial and the best time to settle a case is at mediation and trial by ambush is hard to do with discovery and pretrial orders being as extensive as they are now. I truly do attend a mediation with the thought that if

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The Basics of Medical Billing

By Will Ronning
Coastal Medical Billing

Super Bill

Every time a patient receives professional health care services, the provider must document all services that were rendered in order to receive reimbursement. One step in this process is accomplished with a document, commonly referred to as a super bill. The super bill is what is used by a physician to inform the patient of the services performed and will be used by the physician's office to ultimately generate a claim to be paid by the patient, commercial insurer, government insurer or another third party.

Included on a super bill will be demographic information such as name, address, date of birth and insurance information. In addition, a super bill will have what are known as the International Classification of Diseases (ICD) codes and Current Procedural Terminology (CPT) codes. CPT codes and ICD codes have separate and distinct purposes. CPT codes identify the services rendered by the physician while the ICD codes list the diagnosis. Both the CPT and ICD codes help a physician complete the "story" of the patient's illness or injury. It is these codes that payers of health insurance claims use in order to determine how much of a claim they will allow and ultimately pay.

International Classification of Disease (ICD)

International Classification of Disease is the World Health Organization's standard diagnostic tool for epidemiology, health management and clinical purposes. The World Health Organization publishes the ICD codes and they are used worldwide for morbidity and mortality statistics, reimbursements and automated decision support. The ICD is designed as a health care classification system. The diagnostic codes classify diseases, including a wide variety of signs, symptoms,

abnormal findings, complaints, social circumstances, and external causes of injury or disease. The system is designed to promote international comparability in the collection, processing, classification, and presentation of these statistics.

Since the passage of the Medicare Catastrophic Act of 1988, physicians have been required to submit diagnosis codes for Medicare reimbursement. The Centers for Medicare and Medicaid Services (CMS) has designated ICD as the coding system physicians must use when diagnosing a patient. On October 1, 2015, the United States implemented the latest version of medical codes by updating to ICD-10. Last updated in 1977, ICD-10 increased the number of codes from approximately 13,600 diagnoses to more than 144,000.

Current Procedural Terminology (CPT)

The Current Procedural Terminology code set is maintained by the American Medical Association through the CPT Editorial Panel. The CPT code set describes medical, surgical, and diagnostic services and is designed to communicate uniform information about medical services and procedures among physicians, coders, patients, accreditation organizations, and payers for administrative, financial, and analytical purposes. The codes record the service levels for the procedures performed and account for supplies used to treat the patient during an encounter.

CPT codes are used by payers to determine the amount of reimbursement that a provider will receive. Since everyone uses the same codes to mean the same thing, CPT codes ensure uniformity. As the practice of health care changes, new codes are developed for new services, current codes are revised, and old, unused codes are discarded. Thousands of codes are in use, and they are updated annually. Development and maintenance of these codes is overseen by editorial boards at the AMA. CPT code examples include**:**

CPT Code	Description
72170	X-ray Pelvis
72100	X-ray Lower Spine
99214	Office Visit – Established Patient 25 minutes

The Story Behind the Numbers

For many patients and physicians it is often a mystery how a health insurance company determines the amount it will pay the physician for the services provided. Deductibles, co-pays and contracted allowables directly impact the patient's financial responsibility. For the physician, any increase or decrease in the allowable amount will impact the bottom line. Because many payers often base their allowable amounts upon a percentage of Medicare's allowable formula, or some variation thereof, an understanding of the Medicare formula is the starting point.

Medicare's Reimbursement Formula

Medicare's reimbursement formula is: (WRVU * Work GPCI) + (Non-Facility or Facility PERVU*PE GPCI) + (MRVU* MGPCI)] * CF

Each CPT code is assigned a Relative Value Unit (RVU). The RVU is a unit of measure designed to capture components of the patient's care. The theory is

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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that for each service provided, the relative value is quantifiable and is based upon three components. For each CPT code the three assigned components are: (1) Work RVU (WRVU), (2) Practice Expense RVU (PERVU) and (3) Malpractice Expense RVU (MRVU).

The Work RVU is defined as the relative level of time, skill, training, effort, judgment and stress required to provide a given service. The more complicated the procedure, the higher the WRVU will be. The WRVU accounts for approximately 52 percent of the total RVUs for each CPT code.

The Practice Expense RVU addresses the costs of maintaining a practice including rent, equipment, supplies and non-physician staff costs. The PERVU fee will vary depending on what type of a facility is used. A physician-run facility is reimbursed differently than a facility operated by a hospital. The PERVU accounts for approximately 44 percent of the total RVUs for each CPT code.

The Malpractice RVU is the smallest of the RVU values and represents payments for the professional liability expenses affiliated with the procedure. The MRVU accounts for approximately 4 percent of the total RVUs for each CPT code.

To take into account the costs associated with practicing medicine in different locations, each of the three RVUs is multiplied by a modifier known as the Geographic Practice Cost Index (GPCI). The GPCI reflects the costs associated with healthcare work, practice and professional liability insurance in a Medicare locality compared to the national average relative costs. What this means is that the same exact procedure done in Iowa pays less than one done in Savannah, which pays less than one done in Atlanta, which pays less than one done in Manhattan, NY. In the State of Georgia there are two localities, the Atlanta area and the rest of the state. The Atlanta area includes the following counties: Butts, Cherokee, Clayton, Cobb, DeKalb, Douglas, Fayette, Fulton, Gwinnett, Henry, Newton, Paulding, Rockdale and Walton.

The chart above illustrates the difference in the Medicare allowable fees for services rendered in Iowa, Savannah, Atlanta and Manhattan, NY for CPT 99213 by an independent physician in the office.

CPT 99213 OV - 15 minutes	**Work RVU**	**Practice Expense RVU**	**Malpractice RVU**	**Total RVU or CPT 99213**
Geographic Practice Cost Indices				Allowed amount
Iowa	1.000	.896	.493	63.22
Savannah	1.000	.899	.904	66.71
Atlanta	1.000	1.005	.943	70.93
Manhattan, NY	1.052	1.168	1.764	78.83

Allowables/Fee Schedules

After a claim is filed to the payer and it is determined that it is payable, the charge will then be compared with the particular provider's fee schedule to see what the allowable amount will be. The fee schedule for Medicaid, Medicare and Work Comp is set by statute and the allowable amount for the charge would be the same for similar providers. However, when a claim is submitted to a commercial payer, the allowable amount will differ by provider and by commercial payer. The allowed amount would be based upon what the commercial payer and provider agreed to when the provider became an "in-network provider."

The chart below illustrates the difference in the allowable fee based upon five different commercial payers for CPT Code 72170 - X-ray of Pelvis.

Applying Allowables to Individual Patient Plans

First, the allowable is determined and the billed charge will be reduced down to the allowable amount. This difference is the "Adjusted Amount." The payer then looks at the patient's

Commercial Payer	**CPT Code**	**Description**	**Physician Charge**	**Allowable**
BCBS	72170	X-ray Pelvis	99.00	36.53
Aetna	72170	X-ray Pelvis	99.00	38.69
United Health	72170	X-ray Pelvis	99.00	43.87
Humana	72170	X-ray Pelvis	99.00	33.72

The chart below illustrates the variance in the allowables across different payers for various CPT codes.

CPT Code	**Description**	**Physician Charge**	**Medicaid Allowable**	**Medicare Allowable**	**Average Commercial Allowable**	**Work Comp Allowable**
72170	X-ray Pelvis	99.00	25.41	30.27	38.16	72.13
7200	X-ray Lower Spine	127.00	32.74	38.55	48.19	89.51
99205	OV-New Patient 60 minutes	754.00	137.12	226.68	285.85	305.13
73721	MRI Joint of Lower Extreme	2,426.00	443.03	259.53	553.79	624.81
99214	OV-25 minutes	391.00	62.71	119.00	148.75	158.90
99214	OV-25 minutes	391.00	62.71	119.00	148.75	158.90
	Total	**$4,188.00**	**$763.72**	**$793.03**	**$1,223.49**	**$1,408.38**
	Percent of Charge		**18 percent**	**19 percent**	**29 percent**	**34 percent**

benefits to determine if they are responsible to pay anything on the claim. If so, the funds will be paid directly to the provider. If there is any patient responsibility, it will be determined as well and the provider will be responsible for collecting.

Example 1: The allowable amount for a 99214 is $148.75. The patient has a co-insurance amount due of $44.63. The payer will submit payment directly to the Provider in the amount of $104.12 and the provider will need to collect $44.63 from the patient so as to collect the full allowed amount of $148.75.

Example 2: The allowable amount for a 99214 is $148.75. The patient is not responsible for any amount due. The payer will submit payment directly to the provider for the full allowed amount of $148.75

Example 3: The allowable amount for a 99214 is $148.75. The patient has not met their full deductible amount. The payer will not provide any payment to the provider. The provider will need to collect the full allowed amount of $148.75 from the patient.

Example	CPT	Billed	Paid	Allowed	Coins	Deduct	Adjust
1	99214	391.00	104.12	148.75	44.63	0.00	242.25
2	99217	391.00	148.75	148.75	0.00	0.00	242.25
3	99214	391.00	0.00	148.75	0.00	148.75	242.25

The chart above illustrates the variance in how the allowables are applied to the patient's health plan benefits.

Conclusion

The above examples illustrate the need to thoroughly review medical bills, and employing an expert in this area can be a tremendous asset in accurately valuing the plaintiff's claim. ◆

Will Ronning is the President and Owner of Coastal Medical Billing, Inc., a GDLA Platinum Sponsor. As a 20-person regional medical billing service located in Savannah, they handle medical billing duties for 22 different practices, including 75 providers of various specialties. Mr. Ronning earned his B.B.A. in Risk Management and Insurance in 1993 from the University of Georgia, and his J.D. and M.B.A. in 2001 from Samford University. Prior to joining CMB in 2011, he was a partner with the Savannah law firm of Bouhan Williams & Levy. Mr. Ronning has been designated by the Healthcare Billing and Management Association as a Certified Healthcare Billing and Management Executive (CHBME).

Forensic Human Factors

By Jason Jupe, P.E.
Rimkus Consulting Group

What is Human Factors?

Human factors involves the application of what we know about people, their abilities, characteristics, and limitations to the design of equipment they use, environments in which they function, and jobs they perform. Human factors is a multidisciplinary field grounded in the behavioral and engineering sciences, synonymous with ergonomics where engineering and psychology meet.

Human factors professionals study how the limitations and capabilities of people, including memory, perception, reaction time, judgment, physical size, and dexterity, affect the way they interact with the environment, a product, or process.

What Questions Do Human Factors Experts Answer?

- Could they see it?
- Could they hear it?
- Were they distracted?
- Would they understand it?
- Does that decision make sense?
- Would someone else do that?
- Would they expect that?

When Should You Consider Retaining A Human Factors Expert?

Human Factors experts are frequently engaged in cases involving vehicle, pedestrian, bicycle, and motorcycle collisions; visibility and conspicuity of roadway hazards; open and obviousness of slips, trips, and falls; workplace injuries; lighting analysis; and sound measurements.

Transportation Accidents

Human factors experts are often called upon to assist vehicle accident reconstruction experts when difficult questions arise in the reconstruction process. For example, "How fast could someone respond? Could the driver see the pedestrian or hazard? What if the street lighting were different? Could the driver tell that the vehicle ahead was stopped? Was the driver distracted? Did the driver make a safe or smart decision? Did talking on the cell phone matter?" Typically, a human factors expert deals with everything that happens pre-impact and the accident reconstructionist deals with impact onward.

Construction Zone Accidents

Construction zone cases are common areas of practice. Did the construction zone provide the necessary information to guide the driver safely through the zone without conflict? Did it provide positive guidance?

Premises Liability Incidents

Human factors experts can evaluate design, construction, maintenance, and use of the premises, as well as in various products and transportation systems that played a role in the incident. The human factors expert can assess information-processing, such as eye scanning patterns, focus of attention, sensory cues, competing stimuli, task loading, user expectations, and impairments. Key questions for the expert include: "Was the alleged hazard open and obvious? Could the user see it, or hear it? Was the lighting sufficient? Would more light have made the hazard detectable?"

Products Liability Matters

Each year, thousands of fatal accidents arise from alleged product design defects, manufacturing defects, and failures to warn. Defects often times involve core human factors/ergonomics principles affecting a user's reasonable expectations about products and their use(s). The human factors/ergonomics approach in product cases focuses on the hierarchy of controls which specifies that dangerous features first be designed-out of the product, or second, protected by shields or guards. Warnings, instructions, and/or training addressing proper use and any foreseeable misuse are required if the other two options are not possible. ◆

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Using Social Media Forensics to Uncover Insurance Fraud

By Michael Horwith
U.S. Legal Support

The Big Picture

Facebook. WhatsApp. Instagram. Twitter. YouTube. Tumblr. Yelp. LinkedIn. Pinterest. Flickr. Reddit. Snapchat. Nextdoor. Google+. Vine. Swarm. Kik. Yik Yak. Periscope. SoundCloud.

Social media is ubiquitous and growing exponentially. Depending on the user, it also might be considered invasive and addictive. But, perhaps most importantly, it is a readily available and low cost repository of discovery data.

Here are a few mind-boggling numbers. Facebook claims 1.59 billion users. Facebook Messenger, 900 million users. Twitter has 320 million users, of which 100 million log in daily and send about 500 million tweets per day. Pinterest has 100 million active users, of which 85 percent are female.

Here's the key statistic: 78 percent of the U.S. population have at least one social network profile. The chances are pretty good that in whomever you are interested, there is some information in the cloud if you know how to find it.

The Deliverable

When you order a social media report, it should include a report of every page of every site found (search methods are much more extensive than a Google search) with the site contents and metadata for every page and page element. The report is delivered in searchable PDF form and can be added to a litigation review database such as Relativity.

The Social Media and Background Report includes:

- Verified copy of every page from the individual's social media site
- Metadata that identifies the page, the user, the internal user id, dates, urls, third party tags
- All third party reactions (likes, emoticons, etc.)
- All comments, identified by commenter, not just the comments that appear on the screen with the post

- Metadata for uploaded photos, including time and place of photos
- Search for criminal records through a database only available to law enforcement and private investigators
- Search for additional associations (such as friends on Facebook), addresses, and identification information
- Collections of Facebook include the complete account limited by privacy restrictions. Full account available with consent or subpoena.

Why Should I Review Social Media Content?

- It is the perhaps the simplest method to find a smoking gun to dispute fraudulent claims and track behavior that might influence your case.
- Because it is inexpensive. Relative to almost any insurance or damages claim, a social media investigation is so cost effective that it should be a standard practice.
- Because people post unexpected details about their lives, such as:
  - A workers' comp claim alleges lower extremity impairment. A search of the claimant's Facebook history shows him skiing in Colorado two weeks after the claim is filed.
  - An auto accident occurred seconds after a tweet is posted.
  - A claimant describes severe hearing loss while a YouTube is posted of her music performances.
  - A claimant states he was in an auto accident, but his Instagram account shows he made a proximate post from IP address hundreds of miles away from the accident scene.
  - An individual in an employment matter posts new job information and a competing web site before leaving her current position.
  - In an IP case a web site is posted that still has the logos from the site from which the content and images were stolen.

Why Not Just Take Screenshots?

The data is, after all, already in the public domain. Why not just call up the website in your browser and take screen shots as evidence?

- Professional Forensic Collectors will find data you won't, including:
- Automatic hyperlink following. The utilization of tools that can automatically drill into linked sites. For example, a person links a YouTube video of themselves waterskiing. A screenshot of the Facebook account only shows that a video was posted. A report would include the downloaded video from YouTube as well.
- Metadata capture and reporting. Every webpage has metadata associated with it, as does every Facebook posting, tweet, photo, video and message. A forensic collection report gives you the complete picture, with all the metadata.
- Defensible collections. A screenshot can be easily manipulated. What happens when the integrity of the data is challenged, especially after the suspect deletes the data from the cloud? Collections include electronic hash verification of every element of data collected, along with chain of custody and a collection report produced by testifying forensic experts.
- More extensive investigation of possible web presence. Social media experts use databases that are not

available to the general public, but only are available to licensed private investigators. Through those resources, forensic collectors can find data that is either unavailable or would be difficult to find by the general public.

- Independent Forensic Experts. Assuming the case goes to trial, independent computer forensic experts have experience testifying.

Case Law

In *Griffen v. State*, the Maryland State Court commented upon the need for social media evidence to be verifiable and defensible:

> The potential for fabricating or tampering with electronically stored information on a social networking site, thus poses significant challenges from the standpoint of authentication of printouts of the site, as in the present case.
>
> We agree with [the defendant] that the trial judge abused his discretion in admitting the MySpace evidence . . . The potential for abuse and manipulation of a social networking site by someone other than its purported creator and/or user leads to our conclusion that a printout of an image from such a site requires a greater degree of authentication than merely identifying the date of birth of the creator and her visage in a photograph on the site in order to reflect that Ms. Barber was its creator and the author of the "snitches get stitches" language.

In *State v. Eleck*, a Connecticut Appellate Court found that key evidence from a witness named Judway was inadmissible because the witness claimed her Facebook account was hacked, and that as a result the circumstantial evidence found by downloading the web pages was insufficient to authenticate the data. The Court said:

> We are not convinced that the content of this exchange provided distinctive evidence of the interpersonal conflict between the defendant and Judway. To the contrary, this exchange could have been generated by any person using Judway's account as it does not reflect distinct information that only Judway would have possessed regarding the defendant or the character of their relationship.

Real Life Examples of Social Media Uncovering Insurance Fraud

Following are three examples of fraud uncovered through social media forensics.

1. The Achilles Tendon Girl: A lifeguard at a pool injured her Achilles tendon while on the job. She claimed pain and suffering, and that she was unable to move around or enjoy life. Meanwhile she posted photos of herself on her social media pages, captured during the time she was "incapacitated," that painted a different picture. One of them showed her in a swimsuit seated on a sliding rock above a waterfall. Below is a map, created from the embedded GPS coordinates of her social media photos, documenting her travel while "incapacitated."

2. The Shut-In Guy: This was a workers' compensation claim for Post-Traumatic Stress Disorder (PTSD) resulting from stress from his previous job. Claimant said he was unable to work, and that he could not leave his house. However, social media forensics uncovered that he belonged to the closed Facebook group, "Chicago Uber Drivers," where he frequently posted advice to other Uber drivers regarding the best time and areas to drive in Chicago.

3. The Birth Injury Child: Claimant alleged that a child suffered a birth injury, and as a result the child, now a third grader, was unable to participate in sports or have a normal childhood. Social media forensics found social media postings from the parents bragging about their child's baseball and football camp participation, and a posting which disclosed that the child had run a 30-yard dash in 4.5 seconds, faster than any other child in the camp, including eighth-grade campers. His accomplishments were even featured (with photos) in the local newspaper's sports pages.

What Kind of Matters Benefit from Social Media Investigations?

As illustrated above, insurance defense is most often used for social media forensics. But social media collections may be used in many other instances including criminal defense, IP theft, corporate litigation, copyright infringement and jury pool analysis. In fact, in many cases it is the simplest, cheapest and most effective evidence that can be collected. ◆

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Product Liability Case Law Update

By Tyler P. Bishop
Balch & Bingham

PRODUCT DEFECT; EXISTENCE OF DUTY OF CARE; VENDOR AND MANUFACTURER: Trial court granted summary judgment for manufacturer and vendor of water piping that contained asbestos, finding they owed no duty to the Plaintiff because: (1) she was not a user or consumer of the pipe; and (2) they could not reasonably foresee she would have been affected by their product. Court of Appeals reversed Plaintiff's design defect and failure to warn claims against manufacturer, concluding manufacturer failed to prove the absence of evidence of a design defect as a matter of law.. Supreme Court affirmed reversal on the design defect claim. The Court reversed and reinstated summary judgment on the failure to warn claim, holding it was "unreasonable to impose a duty on [manufacturers] to warn all individuals in [Plaintiff]'s position, whether those individuals be family members or simply members of the public who were exposed to asbestos-laden clothing, as the mechanism and scope of such warnings would be endless."

Certainteed Corp. v. Fletcher
300 Ga. 327 (2016).

Plaintiff Marcella Fletcher brought negligence claims against CertainTeed Corporation, alleging exposure to asbestos caused her to develop malignant pleural mesothelioma. Plaintiff alleged she was exposed to asbestos while laundering her father's clothing. Plaintiff's father worked with water pipes containing asbestos. CertainTeed manufactured the pipes.

Plaintiff advanced two theories: (1) negligent design; and (2) negligent failure to warn. The trial court granted CertainTeed's motion for summary judgment on both claims. The Georgia Court of Appeals reversed on both claims, holding "CertainTeed failed to carry its burden of showing plainly and indisputably an absence of any evidence that its product as designed was defective under the risk-utility analysis," and that whether CertainTeed had a duty to warn third parties such as Plaintiff was a jury question.

The Georgia Supreme Court affirmed in part and reversed in part.

First, the Court held the Court of Appeals correctly reversed the trial court's judgment with respect to the defective design claim. The Court held the design defect claim was governed by the risk-utility analysis set forth in *Banks v. ICI Americas, Inc.*, 264 Ga. 732 (1994), rather than *CSX Transp. v. Williams*, 278 Ga. 888 (2005). CertainTeed relied on *CSX*'s holding an employer's duty to maintain a safe workplace did not apply to third party non-employees who come into contact with asbestos-tainted work clothing. The Court held Plaintiff's design defect claim addressed the reasonableness of product design and whether the manufacturer failed to adopt a reasonable, alternative design that would have reduced the foreseeable risks of harm presented by the product, not the duty owed by an employer to third party non-employees in the workplace. Therefore, the Court held *CSX* did not apply to the design defect claim, CertainTeed failed to demonstrate the absence of any evidence the product was defective under the risk-utility analysis, and the court of appeals correctly reversed the grant of summary judgment on Plaintiff's design defect claim.

Next, the Court reversed the Court of Appeals' ruling on the failure to warn claim and reinstated the trial court's grant of summary judgment to CertainTeed. The Court held the duty in failure to warn cases arises when a manufacturer knows or reasonably should know of nonobvious, foreseeable risks in the normal use of its product. The duty extends to purchasers, consumers, and reasonably foreseeable users and third parties. Whether the duty arises is a question of law and is not governed solely by the foreseeability of harm. However, the Court noted it was bad public policy to impose a duty which could not be feasibly implemented or a duty which would have no practical effect even if feasibly implemented. Accordingly, the Court declined to impose the duty to warn on CertainTeed. The Court held the imposition of a duty to warn third parties such as Plaintiff was unreasonable for two reasons. First, the warning could not be systematically distributed or made available to the individuals which it targeted, namely, family members of workers exposed to asbestos on the job or other members of the public exposed to asbestos-workers. Second, imposing the duty to warn third parties such as Plaintiff would place the onus on workers, rather than

Continued on page 59

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Workers' Compensation Case Law Update

By Thomas Whitley
Drew Eckl & Farnham, Atlanta

The affirmative defense of willful misconduct in workers' compensation claims has seen several dramatic changes in the last few years. On February 27, 2017, the Georgia Supreme Court breathed some additional life into this defense in *Chandler Telecom, LLC v. Burdette*. This article examines the relevant statutory authority and historical interpretation of the willful misconduct defense, before and after *Burdette* and provides recommendations on application of the defense moving forward.

Statutory Authority

Any examination of case law must be grounded in statute whenever applicable. O.C.G.A. § 34-9-17 states that "no compensation shall be allowed for an injury or death due to the employee's willful misconduct, including intentionally self-inflicted injury, or growing out of his or her attempt to injure another, or for the willful failure or refusal to use a safety appliance or perform a duty required by statute." Willful misconduct is an affirmative defense; it must be shown that the willful misconduct of the employee is the proximate cause of the injury by a preponderance of the evidence. *Commc'ns, Inc. v. Cannon*, 174 Ga. App. 820 (1985).

History of *Burdette*

In *Chandler Telecom, LLC v. Burdette*, the Claimant, Burdette, was injured when he fell while descending from the top of a cell tower. Evidence presented at the hearing demonstrated that Burdette had been specifically directed by his supervisor to descend from the tower in a certain manner, and he was not allowed to use a method called "controlled descent," which is similar to rappelling. Towards the end of the workday when his accident occurred, Burdette announced that he wanted to descend using the prohibited "controlled descent" method. Another worker, who was the on-site lead, testified that immediately before his descent, he told Burdette to climb down because they did not have a safety rope and that Burdette might lose his job for failure to follow policy. The on-site lead then repeated this warning several more times. Despite the admonition, Burdette began a controlled descent and ultimately fell, suffering a serious injury to his ankle, leg, and hip. The testimony showed that the fall was Burdette's fault rather than an equipment malfunction.

The ALJ refused to award compensation to Burdette because he had engaged in "willful misconduct." The State Board affirmed the ALJ's decision and that decision was appealed by Burdette to the superior court, which affirmed the Board's findings. Burdette appealed to the Georgia Court of Appeals, which reversed the lower court's decision and held that the ALJ and Board had erred in finding Burdette's workers' compensation claim barred due to Burdette's willful misconduct.

The Georgia Court of Appeals relied on precedent to support its rationale, primarily relying on Georgia Supreme Court decisions and *Wilbro v. Mossman*, 207 Ga. App. 387 (1993). The Court of Appeals found no meaningful distinction between Burdette's claim and the *Wilbro* decision. The *Wilbro* Claimant was a store clerk who fell from a shelf and injured her head and back. The evidence presented at the hearing demonstrated that the clerk had been instructed not to restock while standing on shelves, and that she had been reminded by a coworker not to stand on the shelves. The *Burdette* Court, quoting *Wilbro*, found that the Claimant had not engaged in willful misconduct, noting that "the conduct was at most a violation of instructions and/or the doing of a hazardous act in which the danger was obvious, **but was not conduct that was criminal or quasi-criminal in nature**." (Emphasis added.)

This interpretation left a very narrow avenue to pursue a willful misconduct defense essentially stripping its application to instances where a Claimant acted in a quasi-criminal manner. The *Burdette* Court noted that it felt bound by stare decisis to rule in a manner consistent with *Wilbro*.

***Chandler Telecom, LLC v. Burdette* in the Georgia Supreme Court**

On February 27, 2017, the Georgia Supreme Court reversed the Georgia Court of Appeals. It framed the central issue of the case as "whether an employee may—in deliberate disobedience of his Employer's explicit prohibition—act in a knowingly dangerous fashion with disregard for the probable consequences of that act, and still recover workers' compensation when injured by this disobedient act." The Court concluded that recovery may be barred in such circumstances. In so ruling, the Georgia Supreme Court highlighted a misapplication of O.C.G.A. § 34-9-17 (a), which it believed the Court of Appeals had mistakenly applied in cases subsequent to *Wilbro* .

The Supreme Court focused on the application of *Aetna Life Ins. Co. v. Carroll*, 169 Ga. 333, 342 (1929) – a seminal case—as the basis for its reversal. As mentioned above, the Court of Appeals based its decision on language from *Wilbro* that the conduct in question was not criminal or quasi-criminal in nature,

and thus could not qualify as willful misconduct. This was in error. The Supreme Court noted that the *Carroll* decision "explicitly stated that 'criminal or quasi-criminal' meant simply 'the intentional doing of something either with the knowledge that it is likely to result in serious injury or with the wanton and reckless disregard of its probable consequences.'". Thus, while the "mere violation of instructions or the mere doing of a hazardous act in which the danger is obvious cannot constitute willful misconduct," it "does not mean that the **intentional** violation of rules cannot ever constitute willful misconduct." (Emphasis added.) Instead, in such cases, the "finder of fact must determine whether such an intentional act was done with the knowledge that it was likely to result in serious injury, or with the wanton and reckless disregard of its probable consequences."

In reversing the Court of Appeals and remanding the case to the Board, the Georgia Supreme Court clarified the standard. The Court stated that "an intentional violation bars compensation only when done either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its probable injurious consequences."

Conclusion and Recommendations

Burdette revives the willful misconduct defense to allow considerations of actions outside the strict confines of criminal or quasi-criminal conduct. While the standard put forward by the Georgia Supreme Court will still not be easy to meet, it does open the door for a more viable willful misconduct defense under certain circumstances, namely where a claimant acts with extreme disregard to his own health and safety. This means that in situations like *Burdette*, when a claimant ignores an employer's rules with disregard to his own personal safety, an employer should consider asserting a willful misconduct defense.

Moving forward, especially in a situation where an employee engages in high-risk work, clearly delineated guidelines for the activity of employees should be helpful. These guidelines would serve a dual purpose, to both instruct employees in best safety practices for potentially dangerous work and to highlight the danger of an employee's failure to act in this manner. Implementing clear guidelines should help limit accidents, which is obviously desirable for employees and employers. However, if an accident occurs when an employee has acted in contradiction to clearly expressed safety guidelines, a willful misconduct defense might be available.

The likelihood of success for this defense will also depend, in part, on the clarity and reasoning behind such employer rules and guidelines. The standard notes that intentional violation of rules can be willful misconduct if an employer can show that the conduct in question was done with knowledge of the risk of serious injury or with reckless disregard to that risk. While it is difficult to predict how the standard will be applied in practice, the ability to show knowledge of a workplace rule and its purpose prior to violation, perhaps through orientation with safety guidelines required to be read and signed by an employee, will likely be important in successfully asserting the willful misconduct defense. ◆

Trial & Mediation Academy Continues to Train Tomorrow's Leading Litigators

Lawyers from across the state made the annual trek to Callaway Gardens for the Melburne D. (Mac) McLendon Trial & Mediation Academy held January 19-21, 2017.

The seminar again kicked off with a welcome reception for faculty and students to gather informally on Wednesday evening, before the seminar commenced the next morning.

The students were guided through the two-and-a-half day experience by a distinguished faculty led by Chair William T. (Bill) Casey, Jr. of Hicks Casey & Morton, Marietta; Vice-chair Carrie L. Christie of Rutherford & Christie, Atlanta; GDLA Past President Jerry A. Buchanan of Buchanan & Land, Columbus; Philippa V. Ellis of Owen Gleaton Egan Jones & Sweeney, Atlanta; Anne D. Gower of Gower Wooten & Darneille, Atlanta; William D. (Billy) Harrison of Mozley Finlayson & Loggins, Atlanta; C. Bradford (Brad) Marsh of Swift Currie McGhee & Hiers, Atlanta; GDLA Immediate Past President Matthew G. Moffett of Gray Rust St. Amand Moffett & Brieske, Atlanta; and Jeffrey S. Ward of Drew Eckl & Farnham, Brunswick

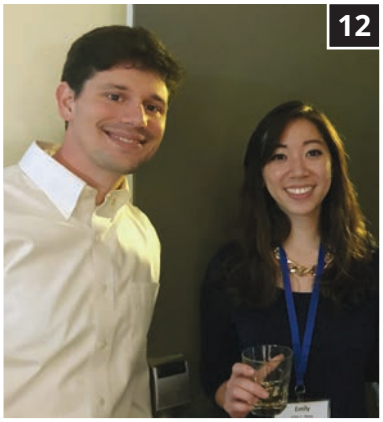
Two of GDLA's Platinum Sponsors were again on-hand to offer wisdom with respect to the mediation component of the seminar. Tom Harper of BAY Mediation & Arbitration Services and John Miles of Miles Mediation & Arbitration Services participated in a panel discussion addressing best practices in mediations.

Again this year, Platinum Sponsor R&D Strategic Solutions participated as Maithilee K. Pathak, Ph.D., J.D., not only taught the portion on voir dire, but also offered tips on each aspect of trial as the seminar progressed.

Trial & Mediation Academy employs a modified mock trial format to teach litigation skills. In advance of the seminar, students are given a case to study and begin preparing aspects of the trial. Following faculty instruction and demonstrations, students disperse into breakout groups to work on their skills from opening statements to cross and direct examinations to closing.

The first day concluded with a reception and dinner, sponsored by BAY and Miles, featuring a keynote address by Fulton State Court Judge Eric A. Richardson, who was back again to discuss professionalism and the Golden Rule from a new judge's perspective.

The next Academy is set for January 17-20, 2018, at Callaway Gardens, so save the date. Trial & Mediation Academy is an exceptional learning opportunity not only for those early in their careers, but also for experienced attorneys who find themselves needing to brush up on their courtroom skills. Students could repeat the program each year and undoubtedly learn something new. Even the faculty professes to gain new trial tips and strategies every time—and some have been teaching for over 20 years. ◆



Pictured are: 1. Christina Balanis, Brittany Fleming, Christy Curreli and Kristin Malcolm; 2. Patrick Barkley, Jonathan Porter and Zack Thompson; 3. faculty members Brad Marsh, Carrie Christie and GDLA Past President Jerry Buchanan; 4. Fulton County State Court Judge Eric Richardson, Tawana Johnson and Amy Dowis; 5. Daedrea Fenwick, Jackie Smith and Gillian Crowl; 6. faculty member Anne Gower and Margaret Loutit; 7. faculty members Matt Moffett—GDLA Immediate Past President—and Billy Harrison; 8. faculty member Jerry Buchanan and Charlie Carmichael; 9. BAY Mediation's Tom Harper; 10. Miles Mediation's John Miles; 11. R&D Strategic Solutions' Maithilee Pathak; 12. Eric Connelly and Emily Wang; 13. Faculty member Jeff Ward; 14. Donovan Potter and Taylor Hooven; 15. Trial & Medication Academy Chair Bill Casey; 16. Faculty member Philippa Ellis.

Board of Directors Holds Winter Meeting

Pictured at the Board's Winter Meeting are: 1. President Peter Muller; 2. Diversity Chair and Board member Candis Jones; 3. Past President Bob Travis; 4. Board member Jamie Weston and Legislative Chair Jake Daly; 5. GDLA member and DRI Secretary-Treasurer Douglas Burrell and Past President Kirby Mason; 6. DRI Executive Director John Kouris.

As is tradition, the GDLA Board of Directors held its Winter Meeting the day after the judicial reception, convening at State Bar Headquarters on February 3, 2017. We were again honored to have DRI Executive Director John Kouris join us for a report on the state of the national defense bar and DRI's efforts in that regard. GDLA is the state affiliate for DRI. For a complete meeting report, please see the Board Meeting Minutes tab in the members only area of our website.

Executive Committee: President Peter D. Muller, Goodman McGuffey, Savannah; President-Elect Sarah B. (Sally) Akins, Ellis Painter Ratterree & Adams, Savannah; Treasurer Hall F. McKinley III, Drew Eckl & Farnham, Atlanta; Secretary David N. Nelson, Chambless Higdon Richardson Katz & Griggs, Macon; Immediate Past President Matthew G. Moffett, Gray Rust St. Amand Moffett & Brieske, Atlanta; Past President Kirby G. Mason, Hunter Maclean Exley & Dunn, Savannah; Vice Presidents: James D. (Dart) Meadows, Balch & Bingham, Atlanta; Jeffrey S. Ward, Drew, Eckl & Farnham, Brunswick; George R. Hall, Hull Barrett, Augusta; Pamela N. Lee, Swift Currie McGhee & Hiers, Atlanta; Directors: Candis R. Jones, Gray Rust St. Amand Moffett & Brieske, Atlanta; Martin A. (Marty) Levinson, Hawkins Parnell Thackston & Young, Atlanta; Jason D. Lewis, Chambless Higdon Richardson, Macon; Wayne S. Melnick, Freeman, Mathis & Gary, Atlanta; Erica L. Morton, Hicks Casey & Morton, Marietta; James Purcell, Fulcher Hagler, Augusta; Ashley Rice, Waldon Adelman Castilla Hiestand & Prout, Atlanta; James S.V. Weston, Trotter Jones, Augusta; C. Jason Willcox, Moore Clarke DuVall & Rodgers, Albany; Past Presidents: N. Staten Bitting, Jr., Fulcher Hagler, Augusta; Jerry A. Buchanan, Buchanan & Land, Columbus; W. Melvin Haas III, Constangy Brooks & Prophete, Macon; Edward M. (Bubba) Hughes, Ellis Painter Ratterree & Adams, Savannah; Walter B. McClelland, Mabry & McClelland, Atlanta; Robert M. Travis, Bryan Cave, Atlanta; Committee Leaders: Judicial Chair David C. Marshall, Hawkins Parnell Thackston & Young, Atlanta; Legislative Chair Jacob E. (Jake) Daly Freeman Mathis & Gary, Atlanta; DRI: John Kouris, DRI Executive Director; Douglas K. Burrell, DRI Secretary-Treasurer, Drew Eckl & Farnham, Atlanta; GDLA: Jennifer M. Davis, Executive Director. ◆

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GDLA Honors its Past Presidents

GDLA Past Presidents were honored at the second annual luncheon held on February 3, 2017, at the Capital City Club downtown. This year's event was particularly special, since GDLA was founded 50 years ago. President Peter Muller welcomed everyone, after which several former leaders shared memories from their terms in office.

Those present are pictured above. On the front row (l-r) are GDLA Past Presidents: Eugene P. (Bo) Chambers, Jr., 1981-82, Chambers & Aholt, Decatur; J. Bruce Welch, 1992-93, Hawkins Parnell Thackston & Young, Atlanta; Edward M. (Bubba) Hughes, 2010-11, Ellis Painter Ratterree & Adams, Savannah; Morton G. (Salty) Forbes, 1991-92, Forbes Foster & Pool, Savannah; Robert M. (Bob) Travis, 2007-08, Bryan Cave, Atlanta; William G. (Bill) Scrantom, Jr., 1972-73, Page Scrantom Sprouse Tucker & Ford, Columbus; Walter B. McClelland, 2001-02, Mabry & McClelland, Atlanta; N. Staten Bitting, Jr., 2009-10, Fulcher Hagler, Augusta; and Wilbur C. Brooks, 1990-91, Retired, Duluth. On the back row (l-r) are current President Peter D. Muller, Goodman McGuffey, Savannah, with Past Presidents W. Melvin (Mel) Haas III, Constangy Brooks Smith & Prophete, Macon; Kirby G. Mason, 2014-15, Hunter Maclean, Savannah; Warner S. Fox, 2006-07, Hawkins Parnell Thackston & Young, Atlanta; Albert H. Parnell, 1979-80, Hawkins Parnell Thackston & Young, Atlanta; Jerry A. Buchanan, 2002-03, Buchanan & Land, Columbus; David T. Whitworth, 1994-95, Whitworth & McLelland, Brunswick; Patrick (Pat) . Rice, 1989-90, Hull Barrett, Augusta; James E. (Jimmy) Singer, 2008-09, Bovis Kyle Burch & Medlin, Atlanta; and George E. Duncan, Jr., 1999-00, Dennis Corry Smith & Dixon, Atlanta. ◆

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GDLA Honors Judiciary at 14th Annual Reception

GDLA held its 14th Annual Judicial Reception on February 2, 2017 at the State Bar Center in Atlanta. Pictured enjoying the evening are (identified left to right unless otherwise noted): *1. Jodene White, Matthew Hurst, Celeste Gaines, Court of Appeals Judge Tripp Self and Marcia Stewart; 2. President Peter Muller and U.S. District Court Judge Mark Cohen; 3. DeKalb State Court Judge Johnny Panos and Sherrie Brady; 4. Dave Root, State Board of Workers' Compensation Chairman Frank McKay and Past President Mel Haas; 5. DeKalb State Court Judge Al Wong and Jake Daly; 6. Erica Morton and Cherokee State Court Judge Dee Morris; 7. Robert Luskin, Elissa Haynes and DeKalb State Court Judge Mark Jacobs; 8. Gillian Crowl, Chris Johnson, Immediate Past President Matt Moffett, Nicole Leet and Candis Jones; 9. Lindsay Ferguson and Fulton Superior Court Judge Henry Newkirk; and 10. Court of Appeals Judge Lisa Branch and President-Elect Sally Akins.*

11. Donovan Potter, Fulton Superior Court Judge Belinda Edwards and Crystal McElrath; 12. Shane Keith, DeKalb State Court Judge Kevin Ross and Marty Levinson; 13. DeKalb Superior Court Judge J.P. Boulee, John McKinley and Bridgette Eckerson; 14. Dart Meadows and U.S. District Court Judge Steve Jones; 15. Past President Lynn Roberson, DeKalb State Court Judge Dax Lopez and Anandhi Rajan; 16. Fulton Superior Court Judge Robert McBurney and Past President Warner Fox; 17. George Hall and Past President Bob Travis; 18. Fulton County Superior Court Judge Kelly Ellerbe, Speer Mabry and Jimmy Scarbrough; 19.Past President Bubba Hughes and DRI Executive Director John Kouris; 20. Philippa Ellis and U.S. District Court Judge Leigh May; 21. Fulton State Court Judge Jay Roth, Court of Appeals Judge Carla McMillian and President Peter Muller; 22. Past President Walter McClelland, Scott Masterson and DeKalb State Court Judge Stacey Hydrick.

Data Privacy Regulations

Continued from page 19

codes of conduct to use are still unclear, although it appears some well known "seals" will be honored (*EuroPriSe*, for example, evaluates security practices of organizations and grants the right to display its seal).[8] Equally important as actual compliance is the angle that adoption of certain codes of conduct and certifications will almost certainly be viewed as a mitigating factor in the evaluation of penalties/fines by European Supervisory Authorities. Throughout the rollout of GDPR compliance, U.S. Companies should assume *effort* will be well-received by Supervisory Authorities in any subsequent investigation.

2. New Consent Rules

The GDPR requires companies to give consumers the chance to "opt in" (an affirmative selection) to data collection practices.[9] This is a stark shift from the former regime and the opposite of many U.S. state/federal laws. For example, silence, pre-ticked boxes, or inactivity will not trigger consumer consent. Importantly, when the data processing has multiple purposes, consent must be obtained for *each* purpose.[10] Regarding presentation of the "opt in" request, it must be clear, concise and not unnecessarily "disruptive to the use of the service" for which it is provided.[11] Additionally, Article 7 gives consumers the right to withdraw consent at any time.

U.S. companies should also pay close attention to the age of their data subjects, as the GDPR requires parental consent for the collection of personal information from residents under the age of 16.[12] This is a higher age limit than related state/federal laws, such as the Children's Online Privacy Protection Rule (COPPA), impose.[13] Parental consent is especially important to those app makers and marketers using social media. Both start-up and revolutionary app owners alike must consider the consequences of the GDPR's parental consent rule in order to avoid crushing fines and remain operationally efficient during the GDPR rollout. Additionally, companies should investigate whether they possess more sensitive data as specified under Article 9, which requires *explicit consent* from the consumer. Examples of sensitive data may be genetic and biometric data, data which reveals racial or ethnic origins/political opinions, and data concerning one's sex life or orientation.[14]

3. Increased Control of Data for Consumers

The GDPR provides consumers a "right to portability" and "right to erasure."[15] The former requires companies to assist consumers in transferring their personal data to another controller, even if that controller is a competitor.[16] For example, consumers can more conveniently change internet service providers when their data and profile are accessible and "portable." The "right to erasure" (sometimes called the "right to be forgotten") allows consumers to delete their personal data from a company or cloud database in some scenarios, such as when (1) the data is no longer necessary to serve its original purpose for being collected, (2) the consumer withdraws consent, or (3) the

data reveals racial or ethnic origin, political/religious opinions, or genetic data.[17]

4. Consumer-Friendly Data Breach Notification Rules

Perhaps no section of the GDPR reflects increased consumer protectionism as much as the new data breach notification rules. U.S. companies will face higher exposure to data breach reporting requirements for E.U. data than in the U.S. since the definition of "personal data" is easier to meet under the GDPR. Article 4 defines "personal data" as "any information relating to an identified or identifiable natural person." This could feasibly be IP addresses, online cookies, mobile device IDs, names, photographs, and/or email addresses.[18] This definition places a higher burden on U.S. companies operating under the GDPR since state/federal reporting laws often require the data in question to include a full name in addition to a social security, driver's license, or financial account number.[19] Domestic companies should immediately analyze the scope of the data they collect to determine how vulnerable they are to the GDPR's definition of "personal data." It is highly advisable to practice "pseudonymization" (referenced above) as data is only "personal" under the GDPR if it can be related to an identifiable person.[20] By de-humanizing data, a company can generally avoid the obligations of the GDPR, costly breach reporting requirements, and the public relation storm that often follows a data breach.

In the event of a data breach involving E.U. residents' data, U.S. companies will have to report the event to European Supervisory Authorities within 72 hours of obtaining notice of the breach.[21] This is more precise than many state laws, which generally include a "reasonable time period" or "without undue delay" standard. Further, whereas notification to the European Supervisory Authorities turns on whether there is "risk" to the consumer, notification to *consumers* turns on whether there is "high risk."[22] Therefore, U.S. companies will be forced to determine whether a breach's risk to a consumer meets this high standard, at which point it would have to provide immediate notice without undue delay. This ambiguity could trouble domestic companies struggling to respond in the hours and/or days following a data breach. The GDPR does offer some clarity, indicating "high risk" may incorporate severe vulnerabilities such as threat of discrimination, identity theft or fraud, financial loss, and/or damage to reputation.[23] Therefore, under the GDPR, U.S. companies will be more likely to report a breach to a public institution than directly to an E.U. resident, which is typically not the case under U.S. state/federal laws.

5. Third-Country (Cross Border) Transfers

Often times, a U.S. company will seek the assistance of a European vendor to process payments, manage HR responsibilities, or provide cloud servicing. Unless contractually restricted, these third-party processors can seek further support from non-E.U. based organizations as long as they first establish appropriate safeguards.[24] Such a scenario triggers significant implications under the GDPR. Primarily, U.S. companies will be liable for GDPR violations of their vendors, including the non-E.U. vendors.[25] While the new cross-border data transfer rules somewhat mirror those of the current Data Protection Directive—such as the approval of transfers to countries deemed "adequate" by the European Commission[26]—the GDPR states European Supervisory Authorities shall now approve uniform "binding corporate rules" (BCR) and standard contractual clauses to simplify this process. BCRs or standard clauses should be implemented by U.S. companies and E.U. vendors to enforce safeguards among all participating parties in a data transfer away from the E.U. and protect the U.S. company from potential penalties.[27] Importantly, the GDPR requires BCRs to expressly confer enforceable rights on consumers with regard to the processing of their personal data. Notwithstanding the use of BCRs and standard clauses to facilitate transfers to non-E.U. organizations, U.S. companies are free to negotiate cross-border transfer issues directly with their E.U.-based processors ahead of time to set expectations and limit liabilities.

6. Conclusion

Given the increased obligations and significant penalties for U.S. Companies violating the GDPR, it is paramount to update technical and administrative security, policies for obtaining consent, and breach reporting practices.

Along the same lines, when collecting, transferring, and entrusting data to/from third-parties, U.S. companies can reduce liability through adopting E.U.-approved codes of conduct, certifications, BCRs, and/or standard contractual clauses. Even if full GDPR compliance is not on a company's radar by May 2018, organizations have a financial incentive to address the foregoing issues as E.U. investigators will consider the level of *effort* the company exhibits in their decision to levy penalties. ◆

Sam Crochet is with the Atlanta office of Hall Booth Smith. His practice includes the defense of local and national businesses in premise liability and auto accident lawsuits. He also counsels and defends healthcare and retail clients regarding data privacy/cybersecurity matters. Additionally, Sam is heavily involved in the firm's intellectual property practice group, specifically handling copyright litigation and trademark registration/counselling matters.

ENDNOTES

[1] GDPR Article 3.
[2] "A Primer on the GDPR: What You Need to Know." Bowman, Courtney, December 23, 2015.
[3] GDPR Article 83(5). It should be noted consumers have a right to judicial remedy against companies and processors under the GDPR.
[4] GDPR Article 58.
[5] GDPR Article 32; GDPR Recital 49.
[6] GDPR Articles 40-42.
[7] GDPR Article 43(a)-(c).
[8] *www.european-privacy-seal.eu/EPS-en/Home*.
[9] GDPR § 32.
[10] *Id.*
[11] *Id.*
[12] GDPR Article 8.
[13] COPPA § § 312.2/312.3 generally require parental consent for children under the age of 13.
[14] Large scale collection of "sensitive data" requires companies to undergo a "data protection impact assessment" to identify possible vulnerabilities related to processing this type of data.
[15] GDPR Article 18.
[16] *Id.*
[17] *Id.*; GDPR § 65.
[18] "What is Personal Data?" Brining, Philip. April 20, 2016, <*www.dataprotectionpeople.com*>.
[19] Ariz. Rev. Stat. Ann. § 44-7501; Cal. Civ. Code § 1798.80 et seq.; N.Y. Gen. Bus. Laws § 899-aa.
[20] GDPR Article 4.
[21] GDPR Article 33.
[22] GDPR Article 34. U.S. Companies are used to conducting a "risk of harm" analysis in deciding whether to report a data breach to a state agency, federal department, or consumer. The GDPR only requires notification to consumers in the event of a "high risk" to the rights and freedoms of natural persons.
[23] GDPR Recital 75
[24] GDPR Article 46 states "a controller or processor may transfer personal data to a third country or an international organization only if the controller or processor has provided appropriate safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available."
[25] GDPR Article 83.
[26] GDPR § 103.

Board Holds Spring Meeting at King & Prince

The GDLA Board of Directors held its Spring Meeting on St. Simons island at the King & Prince Resort from March 31 to April 2, 2017. The weekend commenced with a reception in Wesley Cottage, after which everyone enjoyed dinner on the oceanfront lawn. Fireworks concluded the spectacular evening. The Board met on Saturday morning, and then the group adjourned to enjoy the island—from deep sea fishing to biking to golfing to poolside relaxing and more. That evening was another cocktail reception, and then the group dispersed to dinner on their own.

Minutes were not approved at press time, but will be posted with prior Board minutes in the members only area of our website.

Those present were **Executive Committee:** President Peter D. Muller, Goodman McGuffey, Savannah; President-Elect Sarah B. (Sally) Akins, Ellis Painter Ratterree & Adams, Savannah; Immediate Past President Matthew G. Moffett, Gray Rust St. Amand Moffett & Brieske, Atlanta; Past President Kirby G. Mason, Hunter Maclean, Savannah; **Vice Presidents:** James D. (Dart) Meadows, Balch & Bingham, Atlanta; George R. Hall, Hull Barrett, Augusta; Pamela N. Lee, Swift Currie McGhee & Hiers, Atlanta; **Directors:** William T. (Bill) Casey, Jr., Hicks Casey & Morton, Marietta; Candis R. Jones, Gray Rust St. Amand Moffett & Brieske, Atlanta; Martin A. Levinson, Hawkins Parnell Thackston & Young, Atlanta; Jason C. Logan, Constangy Brooks Smith & Prophete, Macon; Tracie G. Macke, Brennan Wasden & Painter, Savannah; Wayne S. Melnick, Freeman Mathis & Gary, Atlanta; James W. (Jim) Purcell, Fulcher Hagler, Augusta; **Past Presidents:** N. Staten Bitting, Jr., Fulcher Hagler, Augusta; Morton G. (Salty) Forbes, Forbes Foster & Pool, Savannah; Theodore (Ted) Freeman, Freeman Mathis & Gary, Atlanta; W. Melvin (Mel) Haas III, Constangy Brooks & Prophete, Macon; Edward M. (Bubba) Hughes, Ellis Painter Ratterree & Adams, Savannah; Steven J. Kyle, Bovis Kyle Burch & Medlin; Atlanta; Walter B. McClelland, Mabry & McClelland, Atlanta; Lynn M. Roberson, Miles Mediation, Atlanta; **GDLA:** Jennifer M. Davis, Executive Director. ◆

Pictured above and on the next page at the Board's Spring Meeting are: 1. Marty Levinson and President-Elect Sally Akins; 2. (l-r) Past President Salty Forbes and his wife, Lee, with Greer Ward and Vice President Jeff Ward; 3. Past President Mel Haas and President Peter Muller; 4. Past President Lynn Roberson and her husband, Henry Newkirk; 5. Vice President George Hall (left) and Bill Casey (right) reel in a big one with the guide's help during a deep sea fishing trip; 6. Immediate Past President Matt Moffett (left) also aided in the big catch (please hold the lawyer/shark jokes!); 7. (front row, l-r) Past Presidents Steve Kyle, Kirby Mason, Salty Forbes and President Peter Muller; (back row, l-r) Past Presidents Matt Moffett, Staten Bitting, Ted Freeman, Mel Haas, Lynn Roberson, President-Elect Sally Akins and Past President Walter McClelland; 8. Candis Jones and Demetrius Smith with Frank Mason and Past President Kirby Mason; 9. Vice President George Hall, Past President Steve Kyle and Jim Purcell; 10. Debbie Hughes and Past President Bubba Hughes, Past President Walter McClelland and Kathy McClelland, President-Elect Sally Akins and Mary Peironnet (Mary's husband, Past President Ted Freeman, did not make the photo).


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Dr. Fuentes is a founding partner of R&D Strategic Solutions, LLC. He has specialized in jury behavior and decision-making and the evaluation of complex evidence for more than 25 years.

GDLA Wins Second Prize at MBLC Cook-off

The Multi-Bar Leadership Council (MBLC) held its Sixth Annual Taste of MBLC Diversity Celebration & Cook-Off competition on Saturday afternoon, April 24, 2017 at Grant Park in Atlanta, despite threatening storms.

Our dessert, ice cream sandwiches, was awarded second prize! GDLA chefs Zach Matthews of Swift Currie McGhee & Hiers, who chairs our Young Lawyers Section, and Candis Jones of Gray Rust St. Amand Moffett & Brieske, who chairs our Diversity Committee, prepared everything for the delectable dessert from scratch. Ms. Jones also decorated our table to resemble an ice cream parlor.

Competitor bar associations were judged in three categories—appetizers, entrées and desserts—with first and second prizes being awarded. These real-life judges channeled their inner celebrity food critic to judge the culinary creations: DeKalb Superior Court Judge Asha Jackson and Fulton Superior Deputy Chief Judge Alford Dempsey.

The MBLC was created in 2001 by then-Atlanta Bar Association President Seth Kirschenbaum to foster and improve relationships among local bar association members. Certainly the cook-off fulfilled that mission by adding a competitive spirit to the camaraderie!

Including GDLA, MBLC member organizations are: Atlanta Bar Association, Cobb County Bar Association, DeKalb Bar Association, DeKalb Lawyers Association, Gate City Bar Association, Georgia Asian Pacific American Bar Association, Georgia Association for Women Lawyers, Georgia Association of Black Women Attorneys, Georgia Hispanic Bar Association, Georgia Trial Lawyers Association, Gwinnett County Bar Association, Henry County Bar Association, North Fulton Bar Association, Sandy Springs Bar Association, South Asian Bar Association of Georgia, State Bar of Georgia Diversity Program, State Bar of Georgia Young Lawyers Division, South Asian Bar Association of Georgia, and Stonewall Bar Association. ◆

Pictured are: 1. Our wnning chefs, Candis Jones and Zach Matthews, proudly display our second place trophy; 2. Zach and Candis deliver our dish to (center) Judge Asha Jackson and Judge Alford Dempsey for tasting; 3. Demetrius Smith, Candis and Zach serve up our winning dessert at the GDLA Ice Cream Parlor; 4. Our homemade ice cream cookie sandwiches were a hit in the heat; 5. Marielle Rice, future GDLA member and daughter of Ashley Rice, was a tremendous help on our winning team.

Skits & Suds Overflow in Atlanta and Savannah

The GDLA Education Committee hosted its most popular seminar in Atlanta and Savannah just in time for members to beat the annual CLE hours deadline. "Skits & Suds" is a happy hour CLE that features distinguished GDLA members, judges, and ethics gurus reacting to and commenting on everyday ethical and professionalism dilemmas lawyers will likely face. The evening also included a beer and wine reception for networking.

Prior skits have included an auto accident in Springfield with The Simpsons™ characters, a slip and fall at a nightclub involving the "cast" of "The Savannah Shore," and a fact pattern based on the reality cooking competition, Chopped!, where law firm partner "chefs" were given various ethical and professional "ingredients" during three different rounds to "cook" the best response for handling.

This year's skit, "Overruled!," was a variation on the last version. GDLA member contestants were Jennifer Adair of Dennis Corey Smith & Dixon, Brannon Arnold of Weinberg Wheeler Hudgins Gunn & Dial, Brian Johnson of Drew Eckl & Farnham, and Shane Keith of Hawkins Parnell Thackston & Young. Education Chair Andy Treese of Freeman Mathis & Gary emceed, as did then Vice-Chair Lara Percifield, before she left her firm (and GDLA) to clerk for Judge Paige Reese Whitaker.

After each round covering a different area of issues, our competition judges—Fulton Superior Court Judge Robert McBurney and State Bar General Counsel Paula Frederick—eliminated one contestant by declaring them overruled. The last one standing was Jennifer Adair, making her our "Overruled! Grand Champion Atlanta."

The Savannah version took place the following week on March 30, 2017, at Moon River Brewing Company, with these contestants vying to be "sustained" as the winner: Lisa Higgins of Drew Eckl & Farnham, Tracie Macke of Brennan Wasden & Painter, and State Bar President Pat O'Connor of Oliver Maner. Andy Treese again emceed the event. Competition judges were: Chatham State Court Judge Greg Sapp, Chatham Superior Court Judge Tim Walmsley, and Savannah Law School Associate Professor Kellyn McGee. Savannah took the kids' soccer team approach and declared everyone a winner!

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

ATLANTA

Pictured at the Atlanta edition of Skits & Suds are: 1. contestants Brian Johnson, Brannon Arnold, Jennifer Adair and Shane Keith; 2. Education Chair Andy Treese; 3. Jennifer Adair and Jan Sigman; 4. Jad Dial, Alan Holcomb and Josh Wood; 5. Gillian Crowl, Megan Quisao and Myada Baudry; 6. There are always lots of laughs at this ethics and professionalism CLE, as State Bar General Counsel Paula Frederick and Judge Robert McBurney prove; 7. Paula Frederick and Ben Harbin; 8. Tina Cheng, Mike Davis, Will Carter and Lorrin Mortimer; 9. Jim Cook and Charley Beans.

SAVANNAH

Enjoying Skits & Suds in Savannah are: 1. Judge Tim Walmsley, GDLA member and State Bar President Pat O'Connor, Judge Greg Sapp and President-Elect Sally Akins; 2. Catherine Bowman, Past President Kirby Mason and Chris Phillips; 3. Lisa Higgins and Tracie Macke; 4. Dan Hoffman and Andy Treese; 5. Pat O'Connor, Tracie Macke, Lisa Higgins, Judge Greg Sapp, Judge Tim Walmsley and Prof. Kellyn McGee.

GDLA and DRI Young Lawyers Hold Joint Happy Hour

Pictured at the event are: 1. Brett Tarver, Heather Howard, Rebeca Ojeda and Vanessa Vogler; 2. Leah Fox Parker and Irvin Hernandez; 3. Peyton Bell, Elizabeth Googe and GDLA Past President Ted Freeman, who serves as DRI State Representative for Georgia; 4. ESI's Heather Uhrinek, Sarah Dumbacher and William Pate.

The Young Lawyers Committees of DRI and GDLA held a joint DRI/GDLA Young Lawyers Happy Hour at RiRa Irish Pub in Midtown Atlanta on May 4, 2017. The event was organized by Brett Tarver of Jones Day in Atlanta, and sponsored in part by GDLA's Platinum Sponsor Engineering Systems, Inc. (ESI). DRI members who have not been members of GDLA within the past five years, and otherwise qualify for membership, are eligible for a free year of GDLA membership. ◆

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Legislative Update

Continued from page 18

struction, or rental of equipment, tack, or livestock, the same language on the mandatory warning sign must be included in the contract. A livestock activity sponsor, a livestock professional, or an owner of a livestock facility that does not comply with the requirements relating to warning signs and notices will forfeit the immunity provided by HB 50.

House Bill 197 – Fair Business Practices Act

HB 197 amends the Fair Business Practices Act by adding a new statute, O.C.G.A. § 10-1-393.15, that requires any person who mails a solicitation for services to obtain a copy of an "instrument conveying real estate" – such as a deed to secure debt, a mortgage, a deed under power, and a lien—to include the following statement in at least 16-point Helvetica font at the top of and at least 2 inches apart from any other text on the solicitation: "THIS IS NOT A BILL OR OFFICIAL GOVERNMENT DOCUMENT. THIS IS A SOLICITATION." No other text on the solicitation may be larger than this statement. The failure to comply with these requirements shall be considered an unfair or deceptive act or practice.

House Bill 292 – Immunity for Firearms Instructors

HB 292 adds a new statute, O.C.G.A. § 51-1-55, that immunizes an instructor who lawfully instructs, educates, or trains a person in the safe, proper, or technical use of a firearm from civil liability for injuries caused by the person's failure to use the firearm properly or lawfully. The new statute defines "firearm" as a handgun, rifle, shotgun, or other similar weapon that is not a "dangerous weapon," which is defined by the criminal code to include rocket launchers, bazookas, recoilless rifles, mortars, hand grenades, and the like.

House Bill 126 – The Judicial Qualifications Commission Improvement Act of 2017

The Judicial Qualifications Commission was created by a 1972 amendment to the Georgia Constitution. The JQC went about its business for decades without much controversy, but all that changed in the last few years. According to the final report of the House of Representatives Special Study Committee on Judicial Qualifications Commission Reform, the JQC had "lost its ability to perform its constitutional duties" because of "due process imbalances; conflicts of interest by certain board members, such as coercive and retaliatory investigatory practices; intentional leaks to the media of ongoing JQC investigations; a total lack of transparency; appointment of members by an organization unaccountable to the people of Georgia; and other abuses of power."

> *"The primary change implemented by HB 126 relates to the composition and basic organization of the JQC."*

These problems were caused by how the JQC was structured, both constitutionally and statutorily, and so the General Assembly began the process of reconstituting the JQC in 2016 by passing a resolution to have a proposed constitutional amendment put on the ballot and by passing a bill (HB 808) that would become effective on January 1, 2017, if the voters ratified the proposed constitutional amendment. The voters ratified Amendment 3, as the proposed constitutional amendment was known, on November 8, 2016, and so HB 808 (codified as O.C.G.A. § 15-1-21) became effective on January 1, 2017. Due to a drafting error, Amendment 3 provided that the JQC in existence on June 30, 2017, is abolished. Thus, the General Assembly had to recreate the JQC as of July 1, 2017, which is what the Judicial Qualifications Commission Improvement Act of 2017 accomplished, along with further improvements recommended by the Special Study Committee.

The primary change implemented by HB 126 relates to the composition and basic organization of the JQC. Before January 1, 2017, the Constitution required the JQC to consist of seven members, two of whom were to be judges selected by the Supreme Court, three of whom were to be lawyers elected by the State Bar Board of Governors, two of whom were to be non-lawyer citizens appointed by the Governor, and all of whom had to be confirmed by the Senate. All seven members participated in the investigation and adjudication of complaints.

Amendment 3 transferred the power to provide for the composition, manner of appointment, and governance of the JQC to the General Assembly, and so HB 808 slightly modified the composition and manner of appointment of members of the JQC. Under HB 808, the JQC of January 1, 2017-June 30, 2017 still consists of two judges, three lawyers, and two non-lawyer citizens, but it changed who could appoint some of these members. The two judges are still appointed by the Supreme Court, but the three lawyer members are now appointed—one each—by the President of the Senate, the Speaker of the House, and the Governor. The appointees of the President of the Senate and the Speaker of the House must come from a list of at least ten nominees provided by the State Bar Board of Governors. The Governor is not subject to this restriction, and his appointee is the chairman. The two non-lawyer citizens are appointed—one each—by the President of the Senate and the Speaker of the House. Amendment 3 did not change the requirement that all members are subject to Senate confirmation. Nor did Amendment 3 change the practice of all members participating in both the investigation and the adjudication of complaints.

HB 126 amends O.C.G.A. § 15-1-21 by increasing to ten the membership of the JQC and by creating two panels: a seven-member investigative panel and a three-member hearing panel. The investigative panel will be responsible for investigative, prosecutorial, and ad-

ministrative functions; promulgating rules; selecting an executive director, who must be an active member of the State Bar, may not otherwise practice law, and may not be a judge; and authorizing the employment of additional staff as may be necessary. The seven members of the investigative panel will consist of one lawyer appointed by the Governor, two judges appointed by the Supreme Court, one lawyer and one non-lawyer citizen appointed by the President of the Senate, and one lawyer and one non-lawyer citizen appointed by the Speaker of the House. The members of the investigative panel will select a chairperson and a vice chairperson.

The hearing panel will be responsible for adjudicating formal charges filed by the investigative panel; making recommendations to the Supreme Court as to disciplinary and incapacity orders; and issuing formal advisory opinions, which shall be subject to review by the Supreme Court, regarding the Georgia Code of Judicial Conduct. The three members of the hearing panel will consist of one non-lawyer citizen appointed by the Governor, one judge appointed by the Supreme Court, and one lawyer appointed by the Supreme Court. The judge will serve as the presiding officer.

Other noteworthy provisions in HB 126 include the following:

- **Terms and Term Limits**—Each member has a four-year term, except that some of the initial terms are shorter so that turnover in membership will occur on a staggered basis. No member may serve more than two full four-year terms.
- **Removal of Members—**A member may be removed for cause by a unanimous vote of all the appointing authorities for the panel on which the member sits. "Cause" is defined as indictment for or conviction of a felony or any offense involving moral turpitude, misconduct, malpractice, malfeasance, misfeasance, nonfeasance, incapacity, failure to attend three or more panel meetings or hearings in a one-year period without good and sufficient reason, and abstaining from voting, unless recused.
- **Rules for Governance**—The investigative panel shall promulgate rules for the JQC's governance that comport with due process. Such rules, which must be approved by the Supreme Court, shall allow for a full investigation of a judge only upon the approval of the investigative panel. Neither the executive director nor an individual member may initiate such an investigation. If a member receives information relating to the conduct of a judge, he or she must provide such information to the executive director for appropriate action.
- **Confidentiality—**Before formal charges are filed against a judge, the investigative panel and the JQC's staff must keep confidential all information about a disciplinary or incapacity matter, except that if a judge and the investigative panel agree on a disposition other than by a private admonition or a deferred discipline agreement, a report of the disposition shall be filed and publicly available in the Supreme Court. After formal charges are filed and served, all pleadings, information, hearings, and proceedings about an incapacity matter shall be confidential. However, after formal charges are filed and served in a disciplinary matter, all pleadings and information shall be available to the public and all hearings and proceedings shall be open to the public, unless they could be sealed or closed as provided by law. With respect to administrative and other matters, all records and information shall be available to the public and all meetings shall be open to the public, with certain exceptions.

HB 605: Upon the required showing of negligence or gross negligence, the court would have been allowed to assess a civil penalty against the defendant and to award actual damages to the victim, if he or she had intervened in the lawsuit.

MAYBE NEXT YEAR

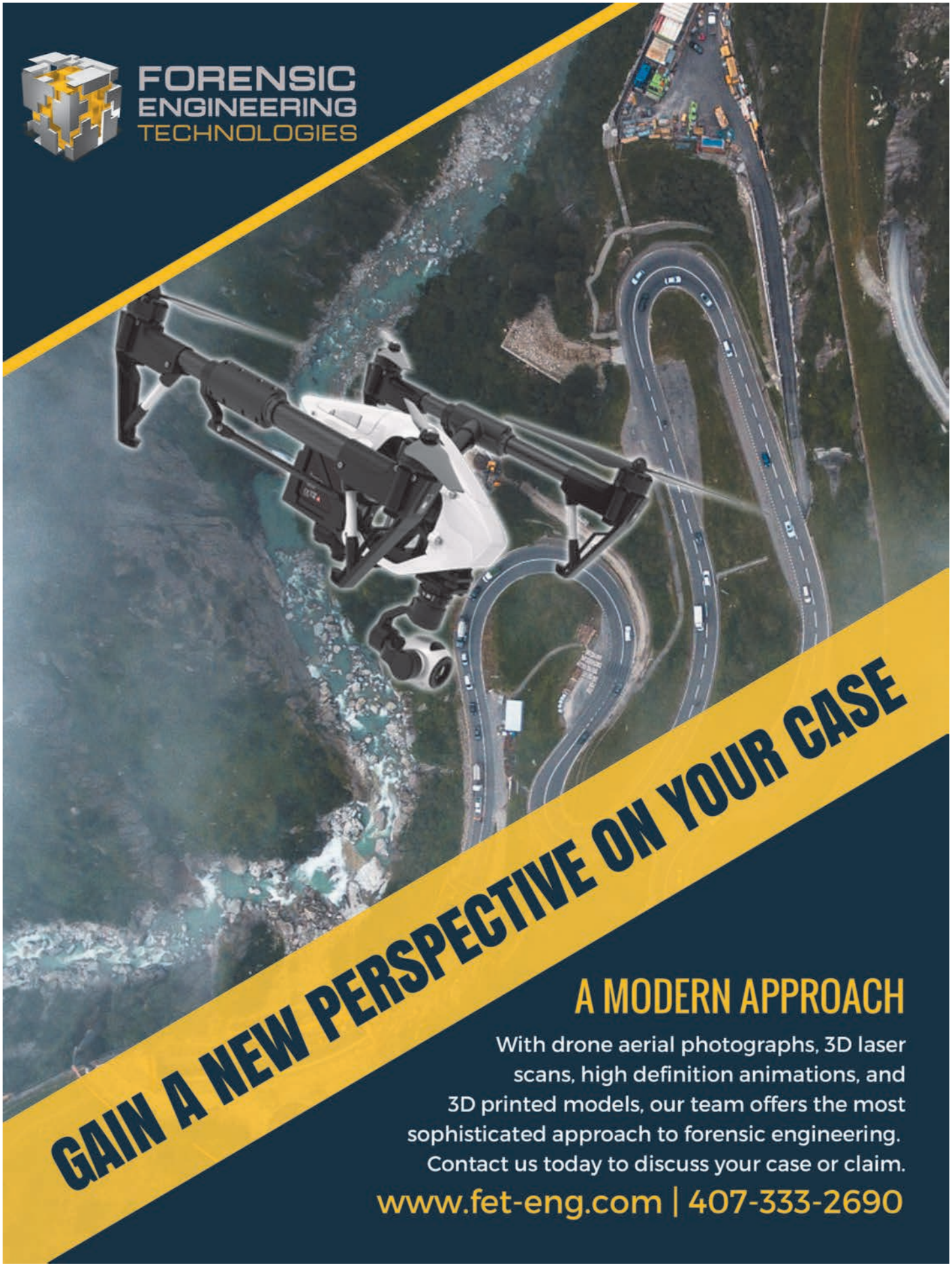
House Bill 15 – E-Filing

HB 15 would have mandated e-filing in civil cases filed in the superior and state courts beginning on January 1, 2018. Although the House overwhelmingly passed HB 15 by a vote of 168-5, the Senate passed a substitute bill only two days before the end of the session that made e-filing voluntary rather than mandatory. The House did not accept the Senate's substitute bill, and so the bill was sent to a conference committee on the last day of the session, but the conference committee was not able to reach an agreement. The State Bar legislative team has indicated that it intends to continue working on this issue in anticipation of the 2018 session.

House Bill 605 – Hidden Predator Act of 2018 (Statute of Limitations)

HB 605 would have amended O.C.G.A. § 9-3-33.1 by increasing the time for a victim of childhood sexual abuse to file a civil lawsuit against the perpetrator of such abuse. Current law allows such a lawsuit to be filed on or before the victim's 23rd birthday (or within two years from the date when the victim knew or had reason to know of the abuse and that the abuse resulted in injury to the victim as established by medical or psychological evidence). HB 605 would have extended that time to the victim's 38th birthday, while retaining the same two-year discovery rule. In addition, HB 605 would have provided for a two-year revival period following July 1, 2018, during which victims of childhood sexual abuse whose claims were barred by the statute of limitations that was in effect on June 30, 2018, could file a civil lawsuit.

Finally, HB 605 would have authorized the Attorney General to file a civil lawsuit, as provided for in O.C.G.A. § 9-3-33.1, against a person or entity that caused injuries as a result of childhood sexual abuse. Upon the required showing of negligence or gross negligence, the court would have been allowed to assess a civil penalty against the defendant and to award actual damages to the victim, if he or she had intervened in the lawsuit. Any civil penalty, less the costs and expenses incurred by the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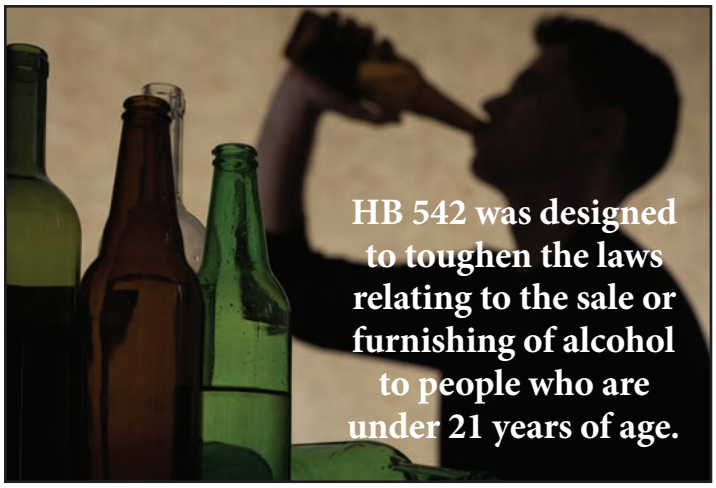

Attorney General, would have been paid into the state treasury and reported to the chairpersons of the House and Senate Appropriations Committees for possible appropriation into the Safe Harbor for Sexually Exploited Children Fund.

House Bill 498 – Broadcasts of Accident or Trauma Scene

HB 498 would have created a cause of action in tort against a broadcaster that broadcasts the depiction of an accident or trauma scene in a way that would give personally identifiable visual information or identification of a victim at such a scene.

House Bill 542 – Alcohol Liability

HB 542 was designed to toughen the laws relating to the sale or furnishing of alcohol to people who are under 21 years of age.

First, HB 542 would have amended O.C.G.A. § 3-3-23 by prohibiting any person from (1) organizing or helping to organize a social gathering at which he or she knew or should have known that alcohol would be furnished to people who are under 21 years of age, or (2) allowing a social gathering to be organized on his or her property or in his or her vehicle or vessel. A person would not be guilty of violating this prohibition if he or she (1) took reasonable action to prevent the violation, such as controlling access to alcoholic beverages, controlling the quantity of alcoholic beverages, supervising and monitoring the consumption of alcoholic beverages, and verifying the age of people who appear to be under 21 years of age; or (2) took immediate and effective action to stop the violation as soon as it was discovered and reported the violation to the appropriate law enforcement agency.

Second, HB 542 would have amended O.C.G.A. § 51-1-18 by expanding the cause of action provided to the custodial parents of an underage child who was sold or furnished alcohol. The custodial parents would have been given a cause of action against a person who served or allowed alcohol to be furnished to the underage child under circumstances when he or she knew or should have known that alcohol would be sold, furnished, served, or allowed to be furnished.

Finally, HB 542 would have amended the dram shop act, O.C.G.A. § 51-1-40, by significantly changing the elements of a dram shop claim. The first element of a dram shop claim is that the consumer was underage or was noticeably intoxicated when served alcohol. The second element is that the alcohol provider must have known that the consumer would soon be driving a motor vehicle. Under HB 542, the second element would have been eliminated in cases involving an underage consumer. Another important change is that HB 542 would allow an underage consumer to recover for his or her own injuries, whereas current law prohibits any consumer from recovering for his or her own injuries.

Senate Bill 138 – Patient Compensation Act (Medical Malpractice)

This bill, known as the Patient Compensation Act, would replace the current system of medical malpractice litigation with a Patient Compensation System housed in the Department of Community Health and governed by an eleven-member Patient Compensation Board. This Patient Compensation System, which would be the exclusive remedy for people who have sustained a covered medical injury, "is intended to significantly reduce the practice of defensive medicine, thereby reducing health care costs, increasing the number of physicians practicing in this state, improving patient safety, and providing patients fair and timely compensation without the expense and delay of the court system."

To obtain compensation for a medical injury resulting from medical treatment provided on or after the effective date, a person must submit a verbal application through a toll-free 1-800 telephone number that provides certain information. Within 10 days after receipt of a complete application, the Office of Medical Review must determine whether it constitutes a medical injury with damages. If it does not, the Office of Medical Review must notify the applicant of the rejection and his or her right of appeal. If it does, the Office of Medical Review must immediately notify each provider that rendered care. Each provider has 15 days to decide whether to support the application. If a provider supports the application, the Office of Medical Review must review the application within 30 days to validate it. If the Office of Medical Review determines that the application is valid, an administrative law judge must then determine an award of compensation in accordance with a compensation schedule. If the Office of Medical Review determines that the application is not valid, it must immediately notify the application of the rejection.

If the Office of Medical Review determines that the application constitutes a medical injury with damages, but the provider does not support the application, it must complete an investigation within 60 days. Within 15 days after the completion of the investigation, the chief medical officer must allow the applicant and the provider access to the records, statements, and other information obtained during the investigation. Within 30 days after the completion of the investigation, the chief medical officer must convene an independent medical review panel to determine whether the application constitutes a medical injury. The independent medical review panel must make a written determination within 10 days.

If it determines that the application constitutes a medical injury, the Office of Medical Review must immediately notify the provider of the decision and the right of appeal. The provider will then have 15 days to file an appeal. If the independent medical review panel determines that the application does not constitute a medical injury, the Office of Medical Review must immediately notify the applicant of the decision and the right of appeal. The applicant will then have 15 days to file an appeal.

If the independent medical review panel determines that the application constitutes a medical injury, and all appeals have been exhausted, an administrative law judge must determine an award of compensation in accordance with a compensation schedule within 30 days after the independent medical review panel makes its decision or after all appeals of its decision has been exhausted, whichever is later. Any compensation awarded to the applicant must be offset by past and future collateral source payments. The administrative law judge must notify the applicant and the provider of the amount awarded and the right of appeal. The applicant must file an appeal within 15 days. The Patient Compensation System must pay the amount awarded to the application within 15 days after either the applicant accepts the award or an appeal is concluded. Compensation is to be paid from an account funded by annual contributions by licensed providers practicing in Georgia, the amount of which depends on which of nineteen categories the provider is in. The range of annual contributions in the first year would be $3,100-$25,300.

Importantly, because an application under the Patient Compensation System is not a claim or demand based on medical malpractice, a provider who is named in an application shall not be found to have committed medical malpractice and shall not be reported to the Georgia Composite Medical Board or other regulatory board.

House Bill 256 – Appeals of the Denial of Immunity

For several years the Court of Appeals allowed the denial of a motion based on an immunity to be directly appealable under the collateral order doctrine. In 2016, the Supreme Court overruled this line of authority and held that the denial of a motion based on an immunity can be appealed only by following the procedures for interlocutory appeals set forth in O.C.G.A. § 5-6-34(b). *Rivera v. Washington*, 298 Ga. 770, 775-78 (2016). Because the procedures for interlocutory appellate review are statutory, the Supreme Court noted that the General Assembly can change those statutes if it determines that they are inadequate to protect the interests of those who assert an immunity. *Id.* at 778. HB 256 attempted to do just that by amending O.C.G.A. § 5-6-34(a) to include orders denying immunity among the rulings that are directly appealable, but it never made it out of the House Judiciary Committee.

House Bill 371 – Sovereign Immunity for Cities

Georgia's counties and cities are both entitled to sovereign immunity, but cities are entitled to a lesser degree of sovereign immunity than counties. HB 371 would have amended O.C.G.A. § 36-33-1, the general statute governing sovereign immunity for cities, to provide that cities are immune from liability for damages "to the same extent that counties are immune."

In addition, HB 371 would have amended O.C.G.A. § 36-33-1 to provide that the purchase of liability insurance does not waive the sovereign immunity of counties and cities engaged in a joint undertaking (that involves at least one county and at least one city) unless sovereign immunity has been waived for all of them. HB 371 did not make it out of the House Judiciary Committee.

O.C.G.A. § 9-3-99 – Tolling of Limitations Period for Tort Claims Arising From a Crime

O.C.G.A. § 9-3-99 provides that the limitations period for a tort claim that arise from a crime and that is brought by the victim of the crime is tolled from the date the crime was committed until the prosecution of the crime has become final or otherwise terminated, as long as such time does not exceed six years. For years, the Court of Appeals interpreted this statute to apply only to tort claims brought against the perpetrator of the crime, including in one case in which GDLA submitted an *amicus curiae* brief advocating such an interpretation. *Columbia County v. Branton*, 304 Ga. App. 149 (2010).

In 2016, however, the Court of Appeals overruled its precedent on this issue and held that this interpretation is contrary to the plain language of the statute. *Harrison v. McAfee*, 338 Ga. App. 393, 397 (2016) (en banc). The Court of Appeals explained that "[t]he General Assembly knows how to limit the sort of civil defendants to which a statute applies, when it wishes to do so, [b]ut it did not do so here, leading us to conclude that it did not intend to limit the statute's reach to claims against only a certain subset of civil defendants." *Id.* at 399 (citations omitted). The Court of Appeals recognized that its decision will have a significant impact on personal injury lawsuits brought by crime victims, but it noted that changing what may be viewed as an undesirable result "is a matter properly addressed by the General Assembly rather than the courts." *Id.* at 402 (internal quotation marks omitted).

The defendant in *Harrison* filed a petition for writ of certiorari with the Supreme Court, and once again GDLA submitted an amicus curiae brief advocating the previous interpretation of the statute. Unfortunately, the Supreme Court denied the petition on April 17, 2017, and so *Harrison*'s interpretation of the statute remains the law. Although this issue was not the subject of a bill in the legislature this year, it has become a legislative issue now that recourse in the courts has been exhausted. Hopefully there will be a legislator who is willing to take up this issue next year. Amending this statute to overrule Harrison should not be controversial since the caption of the bill that created this statute specifically stated that one purpose of the bill was to provide for tolling of the limitations period "in certain tort actions brought by victims of crimes *against the persons accused of such crimes*." (Emphasis added.) ◆

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Product Liability

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manufacturers, to warn of the manufacturer's product. The Court held the court of appeal's rationale to the contrary was error.

Justice Hunstein, joined by Chief Justice Thompson and Justices Benham, Blackwell, and Hines held "[W]e think it unreasonable to impose a duty on CertainTeed to warn all individuals in [Plaintiff]'s position, whether those individuals be family members or simply members of the public who were exposed to asbestos-laden clothing, as the mechanism and scope of such warnings would be endless." Therefore, the Court reversed.

FEDERAL CIVIL PROCEDURE; FEDERAL COURTS; JURY CHARGES & VERDICTS: Jury returned special verdict form finding no design defect, no fraudulent misrepresentation, and no fraudulent concealment but apportioning fault and awarding $662,500 in compensatory damages for negligent misrepresentation and $2,500,000 in punitive damages in the first "bellwether" trial in multi-district hip replacement device litigation. Trial court instructed the jury to reread the instructions and reevaluate the special verdict form twice, revised the special verdict form, recharged the jury, dismissed a juror who refused to continue deliberating, and instructed the jury to resume deliberations. The jury then returned a verdict finding the hip replacement device was defectively designed and awarded $1,000,000 in compensatory damages and $10,000,000.00 in punitive damages. The United States Court of Appeals for the Eleventh Circuit affirmed, holding the trial court did not abuse its discretion and acted "in a neutral and non-biased manner in acknowledging and addressing the [first,] inconsistent verdict."

***Christiansen v. Wright Med. Tech., Inc.*, ___ F.3d ___, No. 16-12162, 2017 WL 1046088, at *1 (11th Cir. Mar. 20, 2017).**

Plaintiff Robyn Christiansen underwent hip replacement surgery involving a metal-on-metal hip replacement device manufactured by Defendant Wright Medical Technologies, Inc. Plaintiff subsequently claimed metal debris from the device caused physical impairment and pain. Plaintiff sued Wright Medical, alleging its hip replacement device was defectively designed. Plaintiff advanced strict liability and negligence theories as well as claims for fraudulent misrepresentation, negligent misrepresentation and fraudulent concealment. Plaintiff's hip replacement took place in Utah, and thus Utah products liability law governed. The case proceeded to trial and was the first "bellwether" trial of over 500 cases in multi-district litigation concerning the hip replacement device.

The jury began deliberations after an eight-day trial. The jury returned a verdict on the second day of deliberations. The verdict form contained several special interrogatories for each claim. The first question on the form, Question 1A, stated: "Do you find by a preponderance of the evidence that Wright Medical's hip replacement device was defectively designed? If you answer NO to Question 1A, stop, and sign and date this form. If you answered YES to Question 1A, proceed to Question 1B." The jury answered "No.," and the foreperson signed and dated the bottom of the first page of the special verdict form. However, the jury did not stop there. It made nine other findings on the verdict sheet, awarded $662,500 in compensatory damages for negligent misrepresentation and $2,500,000 in punitive damages and apportioned fault. Wright Medical moved the court to accept the jury's finding of no design defect in the first question and enter judgment in its favor. The court denied the motion, concluding the jury did not understand the instructions on the verdict form.

The district judge reviewed the verdict sheet in the presence of the jury, determined the findings were inconsistent, and instructed the jury to return to the jury room, reread the instructions and reevaluate whether it had properly completed the verdict form. The court then informed counsel it intended to have the jury complete the form again.

The court ordered the jury to resume deliberations. Shortly thereafter, the jury informed the court it did not understand the verdict sheet and requested further explanation. The court revised the special verdict form with the

consent of counsel and clarified that the jury should not complete the entire form if it answered "No" to the first question and found the product's design was not defective. The court also reinstructed and recharged the jury.

After half a day of deliberations, a juror submitted a note to the court, indicating another juror would not "look at the evidence through the perspective of the law." A few hours later, the foreperson also submitted a note to the court, stating "We are unable to provide a verdict and complete the verdict form. We have one juror that has decided no longer to participate in the jury and the process to reach a unanimous verdict."

The court interviewed the insubordinate juror in the presence of counsel. The court then discussed the matter with counsel outside the presence of the juror. The juror admitted he understood the special verdict form's instructions, but would not follow them because he thought it would "lead to the wrong result." The court determined the juror was unwilling to follow the special verdict form's instructions and dismissed the juror without objection.

The court determined the juror was unwilling to follow the special verdict form's instructions and dismissed the juror without objection.

The seven remaining jurors returned to the jury room and returned a verdict thirty minutes later. This verdict answered "Yes" to the first question regarding the existence of a design defect and awarded $550,000 in compensatory damages for the defect, $450,000 for negligent misrepresentation, and $10,000,000 in punitive damages. This verdict assigned no fault to Plaintiff.

The court polled the jury after reading the verdict and accepted the verdict as unanimous. Wright Medical filed a post-trial renewed motion for judgment as a matter of law or, in the alternative, a motion for new trial and to amend the judgment. The court reduced the punitive damages award to $1,100,000 and denied other relief sought by Defendant.

Wright Medical appealed, asserting the district court erred in failing to grant judgment as a matter of law in its favor based on the jury's finding on the original verdict form there was no design defect. Alternatively, Wright Medical asserted the district court should have granted a new trial.

The United States Court of Appeals for the Eleventh Circuit affirmed. Under Federal Rule of Civil Procedure 49, the district court has authority to identify an inconsistency on a general verdict form with special interrogatories, and enter judgment, order further deliberations, or order a new trial. The court held a court's rulings under Rule 49 were irreversible absent an abuse of discretion and the threshold question of inconsistency was subject to plenary review as a mixed question of law and fact. The court, citing recent precedent, established "[a] verdict is inconsistent when there is no rational, non-speculative way to reconcile two essential jury findings." *Id.* at *5 (quoting *Reider v. Philip Morris j1*

A, Inc., 793 F.3d 1254, 1259 (11th Cir. 2015)). The court held the question of reconciliation is determined by assessing whether the jury's answers reflect a "logical and probable decision on the relevant issues[.]" *Id.* (quoting *Burger King Corp. v. Mason*, 710 F.2d 1480, 1489 (11th Cir. 1983)).

The court held the jury's findings on the first verdict form awarding and apportioning damages for negligent misrepresentation of a non-defective product were inconsistent. It "reject[ed] Wright Medical's invitation to ignore th[e] inconsistency on the theory that the jury's response to Question 1A is controlling and any additional responses have no legal effect."

The court also held the trial court did not abuse its discretion in ordering further deliberations rather than granting a new trial, citing *Dietz v. Bouldin*, 579 U.S. ___, 136 S. Ct. 1885, 1890-92 (2016). There, the United States Supreme Court affirmed a trial court's decision to recall a jury for further deliberations after identifying an inconsistency in the verdict and after a juror had left the courthouse. "In the normal course, when a court recognizes an error in a verdict before it discharges the jury, it has the express power to give the jury a curative instruction and order them to continue deliberating." *Id.* at *6 (quoting *Dietz*, 136 S. Ct. at 1892). Thus, the court held the district court "acted in a neutral and non-biased manner in acknowledging and addressing the inconsistent verdict"

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and did not abuse its discretion in re-instructing, recharging, and reordering the jury to continue deliberating. The court affirmed on the ground any inconsistencies between the first and second verdicts could be attributed to the jury's failure to understand the instructions on the first verdict form.

The Honorable Harvey Bartle, III, United States District Judge for the Eastern District of Pennsylvania, sitting by designation, authored the opinion which was joined by the Hon. Jill A. Pryor and Hon. Charles R. Wilson.

IMPLIED PREEMPTION; FEDERAL CIVIL PROCEDURE; MOTION TO DISMISS STANDARD: State-law strict products liability claim for pedicle screws which failed to hold vertebrae in place after spinal fusion surgery was not preempted by 21 U.S.C. § 360(k) "premarket notification" regulations for Class II medical devices under the Medical Device Amendments of 1976. Plaintiffs' Amended Complaint adequately stated a claim under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 566 U.S. 622 (2009), despite its failure specify whether the claim was predicated upon a manufacturing defect or a design defect. United States District Court for the Middle District of Georgia denied manufacturer's motion to dismiss.

***Kaku et al. v. Alphatec Spince, Inc.*, No. 7:16-CV-9(HL) (M.D. Ga. Mar. 28, 2017)**

Plaintiff Jessica Kaku and her husband Emilliano Kaku sued Defendant Alphatec Spine, Inc., manufacturer of four Zodiac® polyaxial pedicle screws implanted into Ms. Kaku's vertebrae during a transforaminal lumbar interbody fusion ("TLIF"). Ms. Kaku underwent the spinal fusion surgery as treatment for lower back and sciatic pain. The pedicle screws were meant to hold her spine in place during the period of post-surgery vertebral fusion. Plaintiffs alleged two screws broke within six weeks of Ms. Kaku's surgery when she turned in her office-chair to pitch debris into a trash can. Ms. Kaku had a second surgery approximately three months later to remove the three screws.

Plaintiffs Kaku sued Alphatec under a strict products liability theory. Plaintiffs' Amended Complaint also asserted claims for loss of consortium, punitive damages, and attorneys' fees. Alphatec moved to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), asserting three grounds for dismissal: (1) failure to state a claim for strict products liability; (2) implied preemption; and as the remaining claims were derivative of the underlying tort claim, (3) failure to state a claim for loss of consortium, punitive damages, and attorneys' fees.

... the court also noted that while "bald assertions" of defective design and unreasonable danger would not meet the Twombly/Iqbal standard, Plaintiffs' specific allegations that the defect rendered the screws "incapable of serving their intended purpose" allowed the court to draw the reasonable inference that either a manufacturing defect or a design defect caused the harm.

Hon. Hugh Lawson, United States District Judge for the Middle District of Georgia, denied Alphatec's motion to dismiss. First, the court held Plaintiffs adequately stated a claim for strict products liability. To state a claim for strict liability, Plaintiff must allege: (1) Defendant manufactured the allegedly defective product; (2) the product was not merchantable and reasonably suited for its intended use when Defendant sold it; and (3) causation. Georgia law recognizes three types of product defects: manufacturing defects, design defects, and marketing or packaging defects.

Alphatec claimed Plaintiff failed to identify which type of product defect it alleged formed the basis of its claim, forcing Alphatec to guess at potential claims and address them piecemeal. Alphatec further claimed this failure fell short of the pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 566 U.S. 622 (2009).

The court disagreed. First, the court noted Plaintiffs' Amended Complaint alleged the pedicle screws were designed to hold vertebrae together during the fusion process, two of the screws implanted in Ms. Kaku failed to do so, and "were incapable of serving their intended purpose." Next, the court also noted that while "bald assertions" of defective design and unreasonable danger would not meet the *Twombly/Iqbal* standard, Plaintiffs' specific allegations that the defect rendered the screws "incapable of serving their intended purpose" allowed the court to draw the reasonable inference that either a manufacturing defect or a design defect caused the harm. Thus, the court held Plaintiffs' strict liability claim satisfied the *Twombly/Iqbal* plausibility standard and declined to dismiss on this ground.

Alphatec also claimed the strict liability claim failed because it relied on the theory of res ipsa loquitur. The court again disagreed, noting the inferences which form the core of the res ipsa loquitur doctrine are applicable in

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products liability cases insofar as "the [P]laintiff is not required to eliminate all other possibilities or prove the case beyond a reasonable doubt." The court held that while Plaintiffs would be required to prove the screws were implanted in Ms. Kaku without being substantially altered, the fact Alphatec did not have exclusive control of the screws before the alleged defect became apparent did not bar Plaintiff's recovery. Therefore, the court also declined to dismiss on this ground.

Second, the court held Plaintiffs' strict liability claim was not preempted by implication. The pedicle screws were subject to regulation under the Medical Device Amendments of 1976 ("MDA"). The MDA classifies devices into one of three categories based on the device's risk of harm to the public. The pedicle screws are designated as "Class II" devices and are therefore subject to regulation under 21 U.S.C. § 360(k). 21 U.S.C. § 360(k) imposes a limited form of regulation upon Class II devices by requiring manufacturers of new products to submit a "premarket notification" to the Federal Food and Drug Administration ("FDA") prior to marketing the product. The focus of the premarket notification is to ascertain the proposed device's equivalency to a preexisting device. "If the FDA concludes on the basis of the [premarket] notification that the device is 'substantially equivalent' to a pre-existing device, it can be marketed without further regulatory analysis." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 478 (1996).

The MDA also includes an express preemption clause. The MDA preempts any state law "which is different from, or in addition to, any requirement applicable under [federal law] to the device, and . . . which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device[.]" 21 U.S.C. § 360(k)(a). The FDA interprets Section 360k to mean:

> State or local requirements are only preempted when the [FDA] has established specific counterpart regulations or there are other specific requirements applicable to a particular device under the act, thereby making any existing divergent State or local requirements applicable to the device different from, or in addition to, the specific [FDA] requirements.
>
> 21 C.F.R. § 808.1(d).

Alphatec argued Plaintiffs' strict liability claim was preempted because it would impose duties inconsistent with the MDA. Specifically, Alphatec claimed Plaintiffs' strict liability claim was preempted because it imposes a duty to "create an 'indestructible' pedicle screw that could not fracture or cause injury[,]" and this duty imposed requirements different from, and in addition to, the federal regulation of the screws as Class II medical devices.

The court disagreed, citing United States Supreme Court precedent *Medtronic, Inc. v. Lohr*, on appeal from the United States Court of Appeals for the Eleventh Circuit. *Lohr* held the federal premarket notification requirements were not sufficiently concrete to trigger preemption. The court also disagreed that Plaintiffs' claims would impose a duty to create an "indestructible" pedicle screw.

Alphatec attempted to distinguish *Lohr*, arguing it was an express preemption case. Alphatec claimed the facts before the court more closely resembled *PLIVA v. Mensing*, 564 U.S. 604 (2011) and *Mut. Pharmaceutical Co. v. Bartlett*, 133 S. Ct. 2466 (2013). *PLIVA* concerned whether and to what extend generic drug manufacturers could change their labels after FDA approval to comply with state law requiring "stronger" labeling. The Court in *PLIVA* held the state-law labeling requirements were preempted because they imposed a duty on manufacturers to take certain actions which were prohibited by federal law. Similarly, the Court in *Bartlett* considered whether state-law design defect claims which turned on the adequacy of a drug's warning were preempted by federal labeling law under *PLIVA* and found such state-law claims were preempted.

Alphatec argued *PLIVA* and its progeny stand for the proposition preemption is triggered where: (1) state law requires additional action before marketing a product; and (2) the only unilateral step a manufacturer can take is to seek approval from the FDA to comply with state law.

Alphatec posited Plaintiffs' imposition of a duty to manufacture an indestructible pedicle screw imposed requirements different from and in addition to those imposed under Section 360k, which focuses on determining the equivalency of new products to products already on the market rather than safety. Alphatec further reasoned Plaintiffs' strict liability claim was preempted by 21 C.F.R. § 807.81(a)(3). 21 C.F.R. § 807.81(a)(3) requires a premarket notification to the FDA 90 days before a manufacturer introduces an altered market into the market if, among other things, the change would significantly affect the safety of the device. Alphatec argued the changes necessary to bring the pedicle screws in compliance with state law under Plaintiffs' claim would force Alphatec to make unilateral design alterations to improve safety which were disallowed under federal law outside 21 C.F.R. § 807.81(a)(3)'s 90-day premarket notification period.

First, the court held Plainitffs' claim did not require Alphatec to design an indestructible screw. Second, the court held *Lohr* clearly established the premarket notification requirements did not trigger preemption. Additionally, the court noted that while 21 C.F.R. § 807.81(a)(3) "concerns a situation where safety is inherently at issue, unlike the premarket notification submission," whether any changes to the pedicle screws would affect their safety is a question of fact improperly resolved by a motion to dismiss. Thus, the Court could not "say it was impossible for [Alphatec] to comply with both state and federal law[,]" and declined to dismiss Plaintiffs' complaint on preemption grounds. As the court did not dismiss Plaintiffs' strict products liability claims, it also declined to dismiss Plaintiffs' derivative claims for loss of consortium, punitive damages, and attorneys' fees. ◆

Mediation: Opening Sessions

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things are handled properly by the attorneys, the defendant and the mediator, the case can be settled for a reasonable amount of money.

Is this a tight rope walk? Yes. Could it backfire? Yes. Is this the approach that everyone should take? No. Is this an approach everyone should consider? Yes. Why do I say this? If you do it properly, no one can present your position like you can. Doing this forces you to prepare for the mediation, and the plaintiff and plaintiff's counsel will know you will be prepared for trial if it comes to that. If you do not lay these things out, you will spend a significant amount of time telling the mediator what needs to be conveyed to Plaintiff. Also, if the mediator does not know from where you are coming, he or she cannot do her job. I always use a mediator that is recommended by plaintiff's counsel. If I can convince the mediator about our position and give the mediator the information to support our position, that goes a long way to getting the case settled. I find if this is done properly, the plaintiff may very well appreciate that you have shot straight with them and have taken the time to talk with them in an informative and non-demeaning manner.

As a mediator, I have seen this approach handled well. When it is not handled well, I end up spending a lengthy period of time trying to get Plaintiff off the ceiling and to think about the case in as non-emotional way as possible. There is no cookie cutter way to handle a mediation or a trial. You must consider the case, consider the plaintiff and consider the emotional issues in the case. If you are going to lay your case out in opening session, you definitely need to have the mediator set it up that he or she is asking all parties to lay their cards on the table. You also need to let plaintiff's counsel know ahead of time that is what you intend to do, so he or she can discuss this with the client and prepare them for your comments. Hopefully, you are working with an attorney that knows it does neither side any good for their client to get angry. This makes it incumbent upon you to be constructive and non-confrontational in your comments, so plaintiff's counsel does not feel like he or she has opened their client to being unfairly attacked.

I understand why many attorneys don't say much in opening session. It is the safest approach and only you can decide what you feel comfortable doing and whether you can walk that fine line of telling the plaintiff what they need to hear without alienating them. You face these same issues when you are deciding how you are going to approach the trial of a case. All I can say is give it some thought, be aware of your abilities and limitations and be open to walking the tight rope. Done properly, it can be very effective and can go a long way to getting a case settled at mediation.

As a final thought, as a mediator and as an attorney, if there are good attorneys on both sides and a good mediator, and there are not significant client control issues with the plaintiff, I also talk about both sides getting to their "crunch point" in three or four moves. I find there is the same gap for the mediator to deal with whether there are fifteen moves or three moves. This approach can save a lot of time and money and can lead to smooth landings because both sides do not have to guess how many moves it is going to take to get to the "bottom line". Obviously, if you do this, you need to think carefully and strategically about what your three or four incremental moves will be to get you to the crunch point. Unfortunately, this is really a topic for another article, because I do not have sufficient space to go into any detail about this approach.

I hope you will consider my suggestions the next time you are preparing a case for mediation. I have seen many cases successfully resolved because the lawyers and the mediator were not afraid to really discuss with the parties the pros and cons of the case. You may be surprised with how much better a mediation goes when you choose not to be safe. ◆

Bruce Barrickman has been a civil litigator for 39 years and a mediator and arbitrator for 19 years. He is a partner in the law firm of Barrickman Allred & Young and is a founder of BAY Mediation & Arbitration Services in Atlanta. He frequently mediates all types of cases, including those involving bad faith, commercial, construction, insurance coverage, labor and employment, personal injury, premises liability, professional negligence, trucking and wrongful death. BAY Mediation is a GDLA Platinum Sponsor.

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