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A Magazine for the Civil Defense Trial Bar

Volume XIII, Issue III
Winter 2017

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INSIDE

GEORGIA DEFENSE LAWYER

FALL MEETING IN GREENVILLE

Hurricane Party!

50

IN EVERY ISSUE

HOLIDAY HAPPY HOUR

Spirits Were Bright!

54

FEATURES

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CASE LAW UPDATES

HAPPENINGS

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President's Message

One of the pleasures of being an officer of GDLA is having a front-row seat to the show—watching the programs flourish under the hard work of the chairs and other volunteers (plus our Executive Director, of course).

This year, the Amicus Committee would take the award for the most advancement by a veteran project. Under the guidance of chairs Marty Levinson and Garret Meader, we have had a surge in interest and productivity. Our members recognized the value of having GDLA urge its position on key issues, and the requests arrived in droves.

Thanks to the many volunteer authors and editors, we have filed 12 briefs in the Georgia and federal appellate courts over the last year or so. Filings included briefs in support of petitions for certiorari and certifying questions, and some of the diverse topics included apportionment, premises approaches, statute of limitations tolling, bad faith, and workers' compensation.

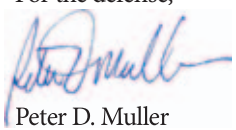
We expect another banner year for amicus briefs, so I hope that you will contact GDLA and offer to write a brief on a topic that interests you. It is a great opportunity for younger members to obtain appellate experience and to get involved. We also hope you'll remember GDLA as a potential advocate when you need amicus support.

Speaking of awards, we were thrilled that DRI—the premier nationwide defense organization—gave formal accolades to two of our own at its annual meeting in October. Jennifer Davis received the second annual SLDO Executive Director Award for her exceptional service to the defense bar, and Douglas Burrell obtained the Richard H. Krochock Award for exemplary leadership toward the DRI Young Lawyers Committee.

Thanks to the hard work of Vice President Dave Nelson, GDLA established its own Verdicts Database in the members only area of our website. Since it is searchable in a number of ways, including jurisdiction, case type, damages, attorney (plaintiff's and defense), experts and judge, we hope you will find it useful for serving your clients. Like so many of our projects, the creation of this database was made possible by the work of volunteers, but it will only be valuable if every member takes time to add their own verdicts. It's easy to do: just click "Add New Verdict" and help populate our database to make it a robust resource for the defense bar.

As I've passed the midpoint of my presidency, I look forward to other projects and committees having similar successes, and I urge you to visit our website, find an activity that interests you, and get involved.

For the defense,



Peter D. Muller
Goodman McGuffey, Savannah

Georgia Defense Lawyer Turns 25!

Notice anything different? We've given the *Georgia Defense Lawyer* a bit of a makeover to mark the 25th anniversary of this publication and the 50th year since GDLA's founding.

We've come a long way since 1992 when then-President Salty Forbes developed the concept for a GDLA newsletter. The first issue was 11 pages and produced on black and white copy paper. In recent years, we have won numerous Best Newsletter Awards from the State Bar of Georgia, as well as Apex Awards for Publication Excellence.

As GDLA's membership has grown, so has this publication and always with the goal of serving as a resource for the civil defense bar. We hope you'll find this latest evolution to be an improvement. We remind members that this is *your* magazine and we encourage you to contribute to its usefulness by authoring articles and case law updates, and sending your case wins and member news. We thank you in advance.

Member News & Case Wins

MEMBER NEWS

Longtime GDLA member **Craig C. Avery**, who was elected GDLA secretary in June of 2016, has moved from **Cowsert & Avery** in Athens to practice with his son on the other side of the "v" in Atlanta. The GDLA Executive Committee appointed **David N. Nelson** of **Chambless Higdon Richardson Katz & Griggs** in Macon to serve Mr. Avery's unexpired term as secretary. Filling Mr. Nelson's position as one of our four vice presidents is **George R. Hall** of **Hull Barrett** in Augusta. **Tracie Grove Macke** of **Brennan Wasden & Painter** in Savannah will serve Mr. Hall's unexpired term as a Southern District representative on the Board of Directors.

Eric Ludwig has joined the Atlanta office of **Bovis Kyle Burch & Medlin** as a partner. His practice areas include corporate services, product liability, business litigation and insurance defense. He is excited to work with GDLA Past Presidents Steve Kyle and Jimmy Singer, among others. Mr. Ludwig was formerly a partner at Hawkins Parnell Thackston & Young.

Drew Eckl & Farnham congratulates **Jennifer E. Parrott** on her admission into the 2016-17 American Bar Association Tort Trial & Insurance Practice Section (TIPS) Leadership Academy, which brings together a diverse group of 25 attorneys from across the nation who have been identified as emerging leaders. Ms. Parrott focuses her practice on general liability and insurance litigation, transportation/trucking law, personal injury, products liability and commercial litigation.

Waldon Adelman Castilla Hiestand & Prout is pleased to announce that **Kevin Reardon** and **Rakhi D. McNeill** have been named partners of the firm in Atlanta. Mr. Reardon's civil litigation practice includes insurance defense and insurance coverage issues. Ms. McNeill specializes in civil litigation including auto liability, premises liability, trucking liability and insurance coverage issues.

J. Anderson (Andy) Davis, a partner at **Brinson Askew Berry** in Rome, and GDLA Vice President **George R. Hall**, a partner at **Hull Barrett** in Augusta, were inducted as fellows of the **American College of Trial Lawyers (ACTL)** during its 2016 Annual Meeting in Philadelphia, Penn. Founded in 1950, the college is composed of distinguished trial lawyers from the U.S. and Canada. Fellowship is extended by invitation only to those with 15 years' minimum experience and diverse backgrounds who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality.

Lorrin E. Mortimer, formerly with Downey & Cleveland, has joined the civil litigation firm of **Insley & Race**. Her practice is focused on general insurance defense, including premises liability, automobile negligence, and medical malpractice. She also continues to maintain her growing trusts and estates practice and her corporate counsel role for multiple physicians' groups in the Atlanta area.

Jonathan J. Kandel has joined the Atlanta office of **Swift Currie McGhee & Hiers** in the firm's litigation practice group. He will continue to focus primarily on commercial litigation handling appellate, insurance coverage and general litigation claims. Prior to joining Swift Currie, Mr. Kandel was with McMickle Kurey & Branch.

Lynn Blasingame Olmert, formerly with Carlock Copeland & Stair, has joined **McAngus Goudelock & Courie** as a member in the firm's Atlanta office. She will maintain a general civil defense practice focusing on workers' compensation defense litigation.

Kimberly Sheridan formerly with Fain Major & Brennan, has joined **Vernis & Bowling** as the managing attorney of the Atlanta office. She will maintain a civil defense litigation practice that includes automobile liability, premises liability (including slip and fall and negligent security), trucking litigation, products liability and employment defense.

Brennan Wasden & Painter announced that **Andrew A. Murdison** has joined the firm's Augusta office. Formerly with Fulcher Hagler in Augusta, Mr. Murdison focuses his practice on medical malpractice defense, general insurance defense, and business and contract disputes.

CASE WINS

Partners **Callie D. Bryan** and **Robert C. Norman** at **Jones Cork** in Macon obtained a victory for their client, a private probation supervision company. In 2015, the plaintiff, on behalf of himself and all others similarly situated, filed a complaint in the U.S. District Court, Southern District, seeking a declaratory judgment that O.C.G.A. Section 42-8-100, et seq. is unconstitutional, and a claim for money had and received, claiming that the private probation supervision company defendant unlawfully collected probation supervision fees. This is one of many cases that have been filed by the same attorneys, seeking to invalidate the Georgia statute and abolish the private probation supervision industry in Georgia. The District Court granted Defendant's motion to dismiss the constitutional claims based on lack of standing and the state law claim for money had and received based on a failure to state a claim upon which relief may be granted. The Eleventh Circuit affirmed. Plaintiff's Petition for Rehearing En Banc was denied. On October 3, 2016, the U.S. Supreme Court denied Petitioner's Petition for Certiorari.

Wayne S. Melnick, GDLA Board member and partner at **Freeman Mathis & Gary** in Atlanta, successfully obtained summary judgment for the City of Adairsville, Ga., two Adairsville police officers and one civilian employee after the city police department obtained an arrest warrant against the wrong person and that person was later shot inside his home while resisting arrest on that warrant's execution by a different law enforcement agency's SWAT team.

Plaintiff pawned two firearms in Adairsville. The pawn shop then turned the pawn tickets over to the City of Adairsville Police Department so the city could check to see if the guns were stolen or if the seller was a convicted felon. The Field Terminal Operator (civilian employee) obtained a "hit" on the short form criminal background check and obtained the associated long form. The long form she obtained, however, was not for Plaintiff, but for Plaintiff's brother who had a long criminal history and had used Plaintiff's name, birthdate, and social security number in the past. Although the birthdates and social security numbers listed did not indicate which was the correct one for the brother, plaintiff's name was delineated as an "AKA" on the brother's form.

The investigating officer, a major, then took the form provided by the civilian employee and went to the pawn shop to investigate. When there, he obtained both a picture of the seller and his telephone contact information, and placed the firearms on a "police hold" with instructions that the pawn shop was not to return the firearms to the plaintiff even if he redeemed the pawn. The pawn shop was also told it was to instruct plaintiff to contact the major if and when plaintiff did return.

The major tried to contact the plaintiff via telephone, but the number was incorrect. After obtaining additional telephone contact information from the pawn shop for plaintiff's sister, the major again tried to contact the plaintiff, but the messages he left were never returned. After consulting with the police chief, the major obtained two warrants against plaintiff for possession of a firearm by a convicted felon.

Approximately three weeks after the warrants were taken, plaintiff's wife had him committed under a mental health warrant. Upon his release from that warrant later that day, plaintiff was returning home and was dropped off on the way to his house by his sister. The sister called plaintiff's daughter who was concerned for him (due to his health conditions) and the daughter called the county 911 to do a well-being check on her father. The county was not the same county in which Adairsville is located. During that call, the daughter mentioned that she was concerned for her mother's safety because her father had been violent towards her mother in the past. When the county dispatcher relayed the well-being call to the officers, it was relayed as being a well-being check on the plaintiff's wife, not the plaintiff.

County officers arrived at the plaintiff's home and saw someone in the house run upstairs when they were outside. Even though the officers confirmed the plaintiff's wife was not

DRI Honors Two of Our Own

The 2016 DRI Annual Meeting, held October 19-23, 2016, in Boston, was a banner event for GDLA. While we send a delegation each year to participate in the State & Local Defense Organizations (SLDO) conclave, this year was particularly noteworthy. Outgoing DRI President Laura Proctor (left) presented the honors noted below.

Former GDLA Trial & Mediation Academy Chair Douglas K. Burrell (center) was chosen to serve on DRI's Board of Directors as Secretary-Treasurer. In addition, he was presented the DRI Richard H. Krochock Award for his work in mentoring young lawyers. He is a partner at Drew Eckl & Farnham in Atlanta.

GDLA Executive Director Jennifer M. Davis (right) was honored with the SLDO Executive Director Award, which recognizes the SLDO executive director who best fosters a relationship between their state and DRI and who has demonstrated exceptional service to the cause of the civil defense bar and their SLDO. This has been only the second time this national award was bestowed. ◆

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home at the time, they entered the house, and while inside learned about the outstanding Adairsville warrants. Upon realizing that the plaintiff had secreted himself in a hidden area of the house, the county officers called in the county-SWAT team to execute the warrants.

Upon arrival, the SWAT team sought to verify the Adairsville warrants after their own county jail could not locate the background felonies supporting the charge. The SWAT liaison called the Adairsville police department who confirmed the warrants after receiving another long form criminal background—again mistaking the plaintiff's brother's convictions for the plaintiff's.

SWAT then inserted tear gas in an effort to extract the plaintiff when executing the warrant. When that was ineffective, four SWAT officers entered the secret location in the house to physically extract the plaintiff. A struggle ensued during which the plaintiff was Tasered. The officers testified that the plaintiff wrestled the Taser from them, and when he started shocking them with it, the plaintiff was shot twice by the SWAT officers.

Plaintiff survived and he and his wife sued the City of Adairsville, its Chief, the involved officers and the civilian employees. In their complaint, the plaintiffs raised Fourth Amendment claims for wrongful arrest and excessive force, Fourteenth Amendment claims for violation of substantive due process, related *Monell* claims, supervisory liability, and various state law claims. Plaintiffs did not sue any of the SWAT team members or other county officers involved in his arrest.

In granting summary judgment to the Adairsville officers and civilian employee, the district court found this to be the rare case where the officers' actions did not proximately cause the use of force against the plaintiff, and the defendants were not liable for the plaintiff's damages on the excessive force claim. The court determined the use of force resulted from the "unforeseeable, independent actions of the SWAT team entering the residence and attempting to effectuate an arrest" and the defendants could not have foreseen that; nor did they have any control over that. Otherwise, regarding the false arrest claim, the court found that even with the mistakes made, those mistakes were reasonable and that arguable probable cause existed. The court also held there was no clearly established law that would deny qualified immunity to the defendants based on the specific facts of this case. The court determined the plaintiffs abandoned their Fourteenth Amendment and *Monell* claims, as well as their claims against the Chief of Police.

Finally, the court declined to exercise supplemental jurisdiction on the remaining state law claims and dismissed those without prejudice. However, because of the "no proximate cause" finding, it will be very tough for the plaintiff to proceed with the state law claims even if those claims are refiled in state court.

Carrie L. Christie, managing partner of **Rutherford & Christie's** Atlanta office, assisted by associate **Emily Y. Wang**, obtained a verdict of $30,700.07 for their client Diversified Maintenance Systems, LLC (DMS) in a case tried in the State Court of Fulton County, Ga. Plaintiff Harvey Gunter, a Home Depot employee, alleged a knee injury caused by a DMS employee who pushed a floor scrubber into a ladder that was pushed into a shopping cart, which was pushed into Plaintiff's right knee. After the incident, Plaintiff was diagnosed with a right meniscus tear and underwent surgery. He asserted the knee injury aggravated a preexisting, chronic, 20-year lumbar back condition and caused him to be completely disabled from work. Plaintiff claimed $56,000.00 for his treatment and two knee surgeries and an additional $300,000 for future lost wages. His initial settlement demand in January of 2016 was for $1.25 million. Defendant admitted liability but contended it was responsible only for the first knee surgery and lost wages up until Plaintiff voluntarily resigned from his position at Home Depot, which occurred approximately three months

following his initial surgery. Plaintiff contended he was unable to ever work again, due to the restrictions he was given following his second surgery and the continued aggravated back pain, and thus was entitled to all of the medical fees, as well as future lost wages and diminished capacity.

For Plaintiff's case in chief, the 12-person jury heard from him, his wife, and his treating physician who performed the second knee surgery. Defense counsel was able to impeach Plaintiff repeatedly based on his unfamiliarity with his own medical, as well as his bank records which showed he had obtained another job subsequent to Home Depot and had recently been making large cash deposits while claiming he was simply doing "odd jobs" with his son. Plaintiff's treating physician, upon cross-examination, learned that Plaintiff did not reveal his 20 year history of back problems. Plaintiff, in fact, reported a history of two surgeries in the late 1990s and never since having back pain, which was quickly refuted with thousands of pages of medical records and pain management visits up through the date of loss. Defendant's case in chief consisted of an expert physician specializing in spinal orthopaedics and the manager who worked with the plaintiff following the subject incident. In closing, Defendant requested the jury award $21,700 for the first surgery and the initial lost wages but no future lost wages.

The jury deliberated approximately 40 minutes before coming back with exactly what Defendant requested plus an additional $9,000 for pain and suffering. All 12 jurors thought it was clear that Plaintiff was misleading the court regarding his capacity to work and exaggerating his continued pain.

The case was *Harvey Gunter v. Diversified Maintenance Systems, LLC*, State Court of Fulton County, Case No. 15EV001587.

After a five-day trial in June, **Susan D. Levy** and **H. Lee Pruett**, partners at **Levy & Pruett** in Decatur, obtained a defense verdict in *Salem v. the Georgia Department of Transportation (DOT)*. Plaintiff sued for a catastrophic brain injury he sustained in an automobile collision which occurred just outside of Jesup, Ga. Plaintiff was four years old at the time of the collision. Specifically, Plaintiff contended that the DOT and its employees breached their duty of care by failing to follow the DOT's own policies and procedures detailing the specific protocol to follow when a smoke and/or fog hazard existed on a state highway. In response, Levy & Pruett successfully argued that the DOT properly responded to the smoke/fog on the roadway and that the crash was caused by the negligence of the drivers.

On July 28, 2016, **Becky Gabelman** of **Waldon Adelman Castilla Hiestand & Prout** obtained a defense verdict from a Fulton County jury. Plaintiff alleged $12,080 in healthcare specials following an admitted fault accident. While there was no complaint of injury at the scene, Plaintiff treated at the emergency room the following day and was subsequently referred to a chiropractor by his attorney for treatment of soft tissue injuries. After deliberating for less than 30 minutes, the jury returned a verdict for the defendant. Before trial, defendant last offered $1,750 to settle the case.

In August, **Waldon Adelman Castilla Hiestand & Prout** partner **Jonathan M. Adelman** successfully argued to a Fulton County jury that a 23-year-old plaintiff's knee surgery was unrelated to a side-swipe motor vehicle accident. Plaintiff alleged that his knee struck the dashboard, necessitating arthroscopic knee surgery to remove some cartilage. Plaintiff also claimed soft-tissue injuries to his neck and back. Plaintiff's surgeon related the condition to the accident. However, the defendant's medical expert provided convincing and common sense testimony as to why the condition pre-dated the accident. Furthermore, the plaintiff and his witnesses were successfully impeached at trial. The total medical expenses were $44,000. The pre-trial offer was $20,000. The pre-trial demand was $50,000 for a limited liability release. The verdict was $10,000.

In September, **Waldon Adelman Castilla Hiestand & Prout** partner **Dan Prout** obtained a defense verdict following a three-day trial in Cobb County. The case involved a rear-end collision with a complaint of injury at the scene and treatment at the ER on the day of the accident. Plaintiff subsequently treated with a pain management specialist who directly related the injuries and need for treatment to the accident. Mr. Prout impeached the plaintiff 26 times on cross-examination regarding her description of the accident, prior injuries/treatment, etc. Plaintiff's total medical specials were $22,000. The highest pre-trial offer was $10,000. At trial, plaintiff's counsel asked for $60,000. The jury deliberated for three hours.

In September, **Waldon Adelman Castilla Hiestand & Prout** partner **Kevin Reardon** successfully defended an uninsured motorist carrier in a two-day trial in Bulloch County. Plaintiff alleged post-concussive syndrome as well as neck and back injuries. Her treating neurologist directly related Plaintiff's symptoms and need for treatment to the accident. Total medical specials were $11,200. In addition, Plaintiff (who was a medical doctor) alleged lost income of nearly $40,000. Prior to trial, the liability carrier had tendered its policy limits of $25,000. Plaintiff's counsel asked for an award of $189,000. After deliberating for less than an hour, the jury awarded Plaintiff a verdict of less than the medical specials, resulting in no exposure on the uninsured motorist claim. ◆

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IN MEMORIAM: Alisa W. Ellenburg

By Ian Matthes
Vernis & Bowling, Atlanta

Alisa W. Ellenburg peacefully passed away at her home on December 9, 2016, surrounded by her husband, daughter, family and friends. Prior to her passing, Alisa was the managing attorney at Vernis & Bowling of Atlanta.

Alisa was born and raised in Atlanta, Ga. In1985, she graduated from the University of Georgia in Athens with a B.A. in journalism and political science. While at the university, Alisa held numerous leadership positions in her sorority and other campus-wide organizations including Ideas and Issues, a student group charged with bringing international speakers to campus. She was also a reporter and member of the editorial staff of the award-winning student newspaper, *The Red and Black*. Alisa earned her J.D. in 1997 from the Vanderbilt University School of Law.

Alisa focused her practice primarily on servicing insurance and self-insured clients. She had extensive experience, including first chair trial and appellate work, in the areas of trucking and cargo, insurance coverage disputes and first party claims, premises liability, automobile liability and uninsured motorist coverage, construction defects, employment, products liability and personal injury/wrongful death claims.

Alisa was also certified with the Georgia Insurance Commissioner's office as an instructor in continuing education classes for insurance professionals. She taught courses on a wide variety of defense-related topics, and always educated and entertained her audiences. Alisa was a registered mediator, approved by the Georgia Office of Dispute Resolution to mediate civil matters. She was admitted to practice before all state courts in Georgia and Tennessee, including the supreme courts of both states. She was also admitted to practice before the U.S. District Court for the Middle District of Tennessee, the U.S. District Court for the Northern, Middle and Southern Districts of Georgia.

She was a member of the Georgia Defense Lawyers Association, the Torts and Insurance Section of the State Bar of Georgia and the Claims & Litigation Management Alliance (CLM). She was also certified as a mentor for new lawyers as part of the State Bar's Transition into Law Practice Program (TILPP).

Alisa served on the Leadership Team of the First Baptist Church of Smyrna, where she also taught preschool and adult Sunday school classes. She was actively involved in their Upward Sports Program as a coach, volunteer and devotional speaker.

She enjoyed hiking, traveling, biking and running. She successfully summited Mount Kilimanjaro in Tanzania, Africa and completed several marathons, half-marathons and sprint distance triathlons. Alisa loved spending time with her husband Howard and daughter Ava. Alisa was smart, witty, driven, and determined. She was a remarkable, accomplished woman who made a difference in many people's lives. ◆

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Welcome, New GDLA Members!

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Christina Balanis
Young Thagard Hoffman Smith Lawrence & Shenton, Valdosta

Kristi Lea Bankston
Worsham Corsi Scott & Dobur, Atlanta

Patrick Lane Barkley
Hunter Maclean Exley & Dunn, Savannah

Sean Eric Boyd
Mozley Finlayson & Loggins, Atlanta

Steven Campbell
Drew Eckl & Farnham, Atlanta

Stephanie Capezzuto
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Travis Cashbaugh
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Eric Connelly
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Gillian Shannon Crowl
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Sandro Stojanovic
Hall Booth Smith, Atlanta

Melanie Taylor
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Zack Stanfield Thompson
Tisinger Vance, Carrollton

Frank Alan Wasser
Ken David & Associates, Atlanta

Donna Overholt Willis
Sharon Ware & Associates, Atlanta

GDLA Files Amicus Brief on Application of Apportionment Statute in Premises Liability Case

On November 15, 2016, GDLA filed an *amicus curiae* brief in the Georgia Court of Appeals regarding the application of the apportionment statute (O.C.G.A. 51-12-33) in a premises liability case.

The primary issue addressed is whether the apportionment statute allows a trial court to enter judgment against a property owner for not only its own percentage of fault, but also for the percentage of fault assessed to its security firm, an independent contractor. The case involves a murder that occurred at a condominium complex. The plaintiff-appellees filed suit against the property owner, the security firm, and the criminal assailants. The jury assessed 25 percent of fault to each of the security firm and the property owner, and 50 percent to the assailants. The trial court then entered judgment against the property owner for 50 percent, reasoning that it was vicariously liable for the security firm's percentage of fault.

GDLA filed its brief to argue that the trial court violated the plain language of O.C.G.A. 51-12-33(b) ...

GDLA filed its brief to argue that the trial court violated the plain language of O.C.G.A. 51-12-33(b), which provides that the "[d]amages apportioned by the trier of fact ... shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution." GDLA's brief argues that the trial court erred in entering judgment against the property owner for more than what was assessed by the jury, and erred in finding the property owner vicariously liable for the security company's percentage of fault. Further, GDLA's brief argues that the jury assessed a percentage of fault to the security firm based on the firm's own negligence, which could not be imputed to the property owner.

The case is *Camelot Club Condominium Association, Inc. v. Afari-Opoku*, Georgia Court of Appeals, Case No. A16A2069.

We thank the brief's co-authors, Amicus Committee Chair Marty Levinson and Camille Smith of Hawkins Parnell Thackston & Young in Atlanta for their service to GDLA. ◆

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GDLA Files Amicus Brief on Application of Apportionment Statute in Professional Negligence Case

On November 30, 2016, the GDLA filed an *amicus curiae* brief in the Supreme Court of Georgia regarding the application of Georgia's apportionment statute (O.C.G.A. § 51-12-33) in a professional negligence case. The case arises out of the sexual assault of a dental patient by a Certified Registered Nurse Anesthetist (CRNA) while the patient was under anesthesia for a surgical procedure.

The anesthetist, an independent contractor referred to the dental practice by a placement company advertising that "all of the CRNAs we work with have gone through our credentialing process [and are the] highest quality CRNAs in the industry," had outstanding references from multiple healthcare providers and no history of any complaints or any criminal record. Even the plaintiff's experts acknowledged the anesthetist "had not done anything that would have put anybody on notice that he might sexually molest a patient." For all of these reasons, the detective who investigated the crime testified that the dental practice was "absolutely" shocked to discover the anesthetist was, in fact, a vile sexual predator.

... the dental practice was "absolutely" shocked to discover that the anesthetist was, in fact, a vile sexual predator.

The plaintiff, asserting claims for professional negligence and negligence per se (for violating a statute regulating dental anesthesia), filed suit against the dental practice, but did not pursue claims against the anesthetist after he was sentenced to life in prison. Following trial in the State Court of Fulton County, the jury awarded damages in the amount of $3.7 million, and apportioned zero percent fault to the non-party sexual offender and 100 percent o the dental practice. The dental practice objected to the verdict on the basis that it was contrary to the evidence presented. Notwithstanding the dental practice's objection, the trial court entered judgment on the verdict, which gave rise to the subject appeal.

A divided panel of the Court of Appeals affirmed the trial court's ruling on the grounds that: (1) the verdict form was ambiguous and capable of a construction which would uphold it; (2) the Georgia Dental Act is intended to guard against a category of harm so general as to cover all "unreasonable risks;" which include sexual assault, and (3) proximate cause is a jury issue.

The primary issue, in GDLA's *amicus* brief, is that it is illogical, as between one undisputed tortfeasor who sexually assaulted the plaintiff and another purported tortfeasor who was not alleged to have committed any intentional tort, to assign zero percent liability to the sexual predator and 100 percent liability to the other alleged wrongdoer. Being void, clear error, and against the weight of the evidence, it should be reversed. This result is supported by appellate rulings in other jurisdictions that have apportionment statutes similar to Georgia's and that have reviewed this exact issue. *See, e.g., State Dept. of Health and Social Services v. Mullins*, 328 P.3d 1038 (Alaska 2014) (holding that, as between one tortfeasor who committed sexual assault and another tortfeasor who did not commit any intentional tort, a verdict assigning zero percent liability to the sexual predator was irrational and against the weight of the evidence, and ordering a new trial).

While it appears the dental practice violated a statutory requirement to have a permit prior to administering general anesthesia through a nurse anesthetist, in order to recover damages, a plaintiff must also demonstrate (1) the plaintiff falls within the class of persons the statute was intended to protect; (2) the harm complained of was the same harm the statute was intended to guard against; and (3) the violation of the statute proximately caused the plaintiff's injury. *Kull v. Six Flags Over Georgia II, L.P.,* 264 Ga. App. 715 (2003). Given that the educational requirements for obtaining a permit are logically related to preventing anesthesia errors which can be avoided through education, rather than sexual assault, it does not appear the statute was designed to protect against the criminal act in question.

While the parties appear to agree that proximate causation includes "all the natural and probable consequences of the tortfeasor's negligence, unless there is a sufficient and intervening cause" (*Cowart v. Widener*, 287 Ga. 622, 627-628 (2010)), they disagree as to what was reasonably foreseeable. Plaintiff contends that sexual assaults are known to occur to sedated patients, and are considered "never events" by the medical community, meaning that they should never occur and are preventable. Plaintiff also argues that the patient was sedated too deeply, for too long (the malpractice), and that this should have put the dental practice on notice of the likelihood of misconduct. On the issue of proximate cause, GDLA asserts that it is not *reasonably* foreseeable to anticipate that a health care provider will commit a criminal assault upon a patient by virtue of being alone with a sedated patient where there is no particularized evidence of criminal propensity. After all, the likelihood of a sexual assault is not determined by the time spent alone with a patient, the age, sex or sexual orientation of the parties, or the degree or duration of sedation. Rather, the determinative factor is the character of the person attending to the patient which places the patient at risk. Without a particularized basis for suspecting the person has a propensity to harm a patient, imposing liability in this situation effectively transforms the healthcare provider into an insurer.

GDLA's brief was authored by Past President Kirby Mason and Allan Galis of Hunter Maclean in Savannah. The case is *Goldstein, Garber & Salama, LLC v. J.B.*, Supreme Court of Georgia, Case No. S16G0744. The Supreme Court of Georgia heard oral arguments in the case on December 5, 2016. ◆

GDLA Files Amicus Brief on the Meaning of "Compensation" in O.C.G.A. § 34-9-221(h) in Workers' Compensation Cases

On November 29, 2016, GDLA filed an *amicus curiae* brief in the Court of Appeals of Georgia on an issue regarding whether compensation, as it is found in O.C.G.A. § 34-9-221(h), includes medical benefits such that an employer/insurer would be prohibited from controverting a case as an "all issues" case beyond the time frame contained therein (where there is no new evidence or a change in condition) where only medical benefits on a claim have been paid.

This case involved a motorcycle accident sustained by the employee on the way to a hotel on a Sunday evening, the night before the work was scheduled to begin out of town. After the accident, the workers' compensation insurer inadvertently sent the employee a prescription card, which the employee used to obtain prescription medications related to the motorcycle accident. Nearly a year later, the employee filed a request for hearing, seeking income and other medical benefits. The employer/insurer filed an "all issues" controvert on the entire claim.

The employee argued that the employer/insurer's controvert was untimely because it was well past the 81-day requirement in O.C.G.A. § 34-9-221(h), as the insurer had provided remedial treatment in the form of prescription medications, and there was no evidence of a change in condition or newly discovered evidence. The State Board of Workers' Compensation Trial Division, however, 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.

On appeal, the employer/insurer contended that the decisions below should be affirmed because the employer/insurer were not required to show a change of condition or newly discovered evidence to controvert the "all issues" claim

because the employee was never paid compensation, and because the board properly found that the employee's injury did not arise out of and in the course of his employment, since the employee was on his personal time while traveling to the out-of-town job site and had not begun any duties for the employer.

The GDLA filed its brief to argue that the decisions below should be affirmed because the plain meaning of "compensation" makes O.C.G.A. § 34-9-221 inapplicable to this case; the Workers' Compensation Act never intended to define the term "compensation" within O.C.G.A. § 34-9-221 so broadly as to include medical benefits; and, the overly-broad definition of "compensation" proposed by the employee would be an impermissible burden shifting and would have far reaching and deleterious effects on the workers' compensation system.

GDLA argued that, in its very basic definition, compensation refers to a payment to a person, not the provision of medical benefits. Furthermore, in looking to the intent of the General Assembly, it is clear that the drafters of the Georgia Workers' Compensation Act never intended "compensation" as used in O.C.G.A. §34-9-221(h) to include payment of medical benefits. O.C.G.A. §34-9-221(h) provides the time limitations for controverting a claim, absent the discovery of new evidence or a change of condition, where compensation is being paid without an award. Board Rule 221(h) elaborates on the practical applications of O.C.G.A. §34-9-221(h) and specifically sets out that O.C.G.A §34-9-221(h) "applies only when *income* benefits are being paid under forms WC-2, WC-2A, or subsection B of Form WC-1."

Several cases cited by GDLA are instructive on this issue, including *Meredith v. Atlanta Intermodal Rail Services*, 274 Ga. 809 (2002), where the Supreme Court of Georgia addressed the statute of limitations for controverting a claim pursuant to O.C.G.A. §34-9-221(h) where no indemnity or medical benefits had been paid on the claim, affirmed the award below denying indemnity benefits, and held that an employer is not precluded from defending a claim for benefits where a notice to controvert was untimely. The *Meredith* case sets forth the opinion of the Georgia Supreme Court that "the state board has interpreted subsection (h) as applying 'only when income benefits are being paid.'" Additionally, two other cases, *Raines and Milam v. Milam*, 161 Ga. App. 860 (1982) (a case involving subsection (d), the insurance carrier was not prohibited from denying a claim more than 21 days after the death of father and son employees and even after the payment of an ambulance service bill), and *ITT-Cont'l Baking Co. v. Powell*, 182 Ga. App. 533 (1987) (an employer may controvert medical treatment after more than 81 days) make it clear that medical benefits are not compensation such that O.C.G.A. §34-9-221(h) applies.

Further, other references to "compensation" contained in the Workers' Compensation Act confirm that med-

Continued on page 58

GDLA Files Amicus Brief in Case Involving Tolling of Statute of Limitations

On December 2, 2016, GDLA filed an *amicus curiae* brief in the Supreme Court of Georgia seeking a writ of certiorari on an issue of importance in many cases for many areas of personal injury practice, particularly automobile liability and premises liability. The case involved a shooting incident by an unknown criminal assailant at a restaurant owned by the defendant, Twisted Shamrock, Inc. The owners of the restaurant did not face any criminal charges as a result of the non-fatal shooting, nor was there any suggestion, by anyone, that criminal liability on the part of the restaurant or its staff/owner was appropriate.

Plaintiff filed his lawsuit beyond the two-year statute of limitations and a Motion for Summary Judgment was granted at the trial court level. Given that the identity of the criminal assailant was, and still is, unknown, no prosecution of any person or entity was ever initiated with regard to this incident. On appeal, the Court of Appeals reversed the grant of summary judgment based upon O.C.G.A. § 9-3-99, which tolls statutes of limitation for certain claims belonging to victims of crimes. The Court of Appeals based its decision on an interpretation that the plain language of the statute applies to *any* tort claim a crime victim may have arising out of the crime at issue, regardless of whether the claim is against the alleged perpetrator of the crime or some other person or entity. The holding overturned years of precedent interpreting the statute to apply only to a crime victim's claims against the alleged perpetrator of the crime that forms the basis of the lawsuit. The *Twisted Shamrock* defendant has petitioned the Supreme Court for a writ of certiorari on the issue of the interpretation of the statute in cases where the criminal charges are not against the defendant in the lawsuit (and, indeed, where there were no criminal charges at all).

GDLA filed an *amicus curiae* brief in the case urging the Supreme Court to take up this issue due to the noteworthy departure of the Court of Appeals from years of precedent, in a decision that could have far-reaching and unintended consequences.

GDLA has argued that the decision to toll the statute of limitations in every premises liability case involving a crime, regardless of whether that perpetrator is a party to the case, is a grave extension of the statute, and is certainly a matter of great concern and importance to the public. Indeed, such could extend to numerous other practice areas, most notably automobile liability wherein most suits are, to some degree, caused by a violation of the rules of the road. Should the statute be tolled in a case of a passenger against a driver of the same vehicle, if it is a driver of another vehicle that received a criminal citation (or no one received a citation at all?).

GDLA argued that the Court of Appeals erred in both refusing to follow accepted precedent and misapplied the statute, ignoring the established intent of the General Assembly in enacting the statute, which was to "provide for a statute of repose in certain actions brought by victims of crimes *against the person accused of such crimes*." Allowing this extension does nothing but misinterpret the statute, GDLA has argued, and create a vast amount of uncertainty for defendants in civil litigation. This would leave potential defendants, particularly those who have no idea a crime *may* have been committed by some other party or non-party, with great uncertainty. This could lead to other consequences, such as the destruction of evidence after the two-year statute of limitations, only to be accused of spoliation if the plaintiff merely claims *some* crime was committed by *someone* in relation to the litigation.

GDLA's brief was co-authored by Vice President Pamela Lee, R. Matthew Shoemaker, and Donovan Potter of Swift Currie McGhee & Hiers in Atlanta. The Defendants are represented by GDLA member R. Scott Masterson of Lewis Brisbois Bisgaard & Smith. The case is *Dargan McAfee and Twisted Shamrock, Inc. v. John Harrison*, Supreme Court of Georgia, Case No. S17C0093. ◆

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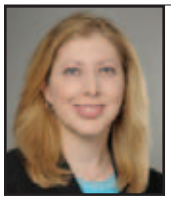

Admissibility of Evidence of Medical Funding Companies: A Non-Traditional Collateral Source

By Jennifer L. Nichols
Swift Currie McGhee & Hiers, Atlanta

In Georgia, the collateral source rule "bars the defendant from presenting any evidence as to payments of expenses of a tortious injury paid for by a third party and taking any credit toward the defendant's liability and damages for such payments." *Kelly v. Purcell*, 301 Ga. App. 88, 91, 686 S.E.2d 879, 882 (2009); *Hoeick v. Bradley*, 282 Ga. App. 123, 124, 637 S.E.2d 832, 833 (2006). In a matter of first impression, the U.S. Court of Appeals for the Eleventh Circuit is currently considering the question of whether funding by a medical funding company is a collateral source and whether evidence of a medical funding company's involvement in a plaintiff's treatment is inadmissible in light of Georgia's collateral source rule. A medical funding company, sometimes referred to as a litigation investment company, finances a plaintiff's medical treatment by advancing payment to the plaintiff's medical providers at a set percentage of the total medical expenses incurred. In exchange, the medical funding company obtains an assignment of the plaintiff's bills. Under most agreements, the plaintiff is then expressly obligated to pay the medical funding company the full amount of his or her healthcare bills upon recovery, despite the fact the medical funding company paid only a portion of the expenses.

On August 17, 2016, oral argument was held in *Robin Houston, Plaintiff-Appellant, and ML Healthcare Services, LLC, Nonparty-Appellant v. Publix Super Markets, Inc., Defendant-Appellee* (Docket Nos. 15-13851-G /15-13852-G). The three judge panel of the U.S. Court of Appeals for the Eleventh Circuit included Judge Julie E. Carnes, Judge Gerald Bard Tjoflat and Senior Judge Anne C. Conway, U.S. District Court for the Middle District of Florida, sitting by designation.

Evidence of medical funding company, ML Healthcare Services, LLC ("MLH"), was introduced at trial by Publix Super Markets, Inc. following the entry of a July 29, 2015 Order by Chief Judge Thomas W. Thrash, Jr., U.S. District Court for the Northern District of Georgia-Atlanta Division, which denied Plaintiff's Motion in Limine on the medical financing issue. Plaintiff-Appellant and Nonparty-Appellant asserted evidence regarding MLH was irrelevant, prejudicial, and should have been inadmissible at trial. Defendant-Appellee, which obtained a defense verdict, asserted evidence of MLH was properly admitted, regardless of whether it is considered a collateral source. Defendant-Appellee contended there were other issues in the case to which evidence of collateral benefits was material, and the evidence was admissible for the purposes of (1) attacking the credibility of causation testimony given by Plaintiff-Appellant's expert witnesses, and (2) showing the reasonable value of Plaintiff-Appellant's medical services.

A trial court has discretion to weigh the effect of collateral source evidence before ruling on its admissibility. *Kelley v. Purcell*, 301 Ga. App. 88, 91 (2009). Chief Judge Thrash, in his discretion, determined evidence of MLH could be admitted at trial. He provided a very detailed rationale for his decision. Notably, Chief Judge Thrash did not find MLH is not a collateral source. Rather, he observed, "ML Healthcare is not in the nature of a traditional collateral source." *Houston v. Publix Super Markets, Inc.*, No. 1:13-CV-206-TWT, 2015 WL 4581541, at *2 (N.D. Ga. July 29, 2015). He noted, "Unlike an insurance company, to which the plaintiff would pay premiums, ML Healthcare serves as an investor in the lawsuit and receives no payment from the plaintiff until after the lawsuit. Furthermore, the Defendant does not seek to offer evidence of

the relationships between ML Healthcare and the plaintiff and ML Healthcare and the plaintiff's doctors in order to reduce its liability, but rather to attack the credibility of the plaintiff's experts and the reasonable value of medical services. Weighing the effect of this testimony, the Court finds that it is highly relevant and probative." *Id.* It appears Chief Judge Thrash did not believe such evidence would be at odds with, or undermine, Georgia's substantive collateral source rule.

The case of *Polito v. Holland*, 258 Ga. 54, 56, 365 S.E.2d 273, 274 (1998) provides support for Chief Judge Thrash's decision. In *Polito*, the Georgia Supreme Court noted, "If collateral benefits may not be set off against damages, evidence of collateral benefits is immaterial in a damage case. Certainly that is true if the *only* proposition of which it is offered is in reduction of damages, because then it is offered to help prove the proposition which is not a matter in issue." *Polito v. Holland*, 258 Ga. 54, 56, 365 S.E.2d 273, 274 (1998)(emphasis added).

The Supreme Court further noted, "Of course there may be *another issue in a case to which evidence of collateral benefits is material*. When such evidence is admitted on another issue it is proper to charge the jury that collateral benefits shall not reduce damages the tortfeasor is otherwise liable to pay." *Polito v. Holland*, 258 Ga. 54, 56, 365 S.E.2d 273, 274-275 (1998)(emphasis added). The Georgia Supreme Court has seemingly recognized that "evidence of collateral benefits" may be admissible if "material" to an issue that does not implicate the substantive collateral source rule. For example, it has been found when a witness gives false evidence relating to a material issue in a case, collateral source evidence may be admissible for impeachment purposes. *Kelley v. Purcell*, 301 Ga. App. 88, 91 (2009)(citing to *Warren v. Ballard*, 266 Ga. 408, 410 (1996). It can logically be argued that, since the reasonableness of invoices submitted by a plaintiff's medical providers forms a basis upon which a plaintiff seeks damages, the reasonableness of these expenses is another issue in a case to which evidence of collateral benefits is material.

During the Eleventh Circuit oral argument, counsel for Plaintiff-Appellant contended Judge Thrash disregarded prior precedent and essentially punted the issue of whether MLH is a collateral source.

At trial, Defendant-Appellee introduced evidence of MLH, not for the purpose of mitigating its damages, but rather for the purpose of attacking the credibility of causation testimony given by Plaintiff-Appellant's expert witnesses. Causation is a material issue in any tort case and Defendant-Appellee presented this evidence to impeach physicians, demonstrate their potential bias, and undermine the proximate cause of Plaintiff-Appellant's alleged damages. *Pennington v. WJL, Inc.*, 263 Ga. App. 758, 760 (2003)(causation is always an essential element in slip or trip and fall cases).

According to Defendant-Appellee, evidence of MLH was crucial to a jury's understanding of the financial scheme engaged in by Plaintiff-Appellant's attorneys, MLH, and physicians in its network, whose opinions are arguably influenced by a desire to receive continued referrals. As required under Georgia law, Chief Judge Thrash charged the jury that collateral benefits shall not reduce damages the tortfeasor is otherwise liable to pay. *Houston v. Publix Super Markets, Inc.*, No. 1:13-CV-206-TWT, 2015 WL 4581541, at *2 (N.D. Ga. July 29, 2015); *Polito v. Holland*, 258 Ga. 54, 56, 365 S.E.2d 273, 274-275 (1998). He instructed the jury as follows:

> If you determine that the plaintiff is entitled to recover damages, you should not speculate about whether they have been compensated in whole or in part by any other source for any of the damages you find. *It would not be proper for you to reduce any damages you find based upon speculation about other sources of payment that may or may not exist.* The law does not allow a wrongdoer to take advantage of payments made by any other source. *You should give no consideration whatsoever to any such things.* You must decide the case based on the evidence presented to you during this trial. (emphasis added).

Although Chief Judge Thrash also found evidence of the relationship between MLH and Plaintiff-Appellant's physicians relevant for the jury to consider in determining the reasonable value of medical services provided, Defendant-Appellee ultimately did not urge the jury to consider payments by MLH in determining the reasonableness of the medical expenses presented.

During the Eleventh Circuit oral argument, counsel for Plaintiff-Appellant contended Chief Judge Thrash disregarded prior precedent and essentially punted the issue of whether MLH is a collateral source. Notably, the Court reminded Plaintiff-Appellant that Georgia's collateral source rule is not a talisman to insulate a plaintiff from evidence introduced for a legitimate purpose. Although counsel for Plaintiff-Appellant requested the Eleventh Circuit certify the question to the Georgia Court of Appeals, it is not anticipated the Eleventh Circuit will "punt" this case to another jurisdiction. Should the appeal be denied

and the lower Court decision upheld, it is the hope that the Eleventh Circuit will publish its opinion so as to create binding precedent on this issue, rather than mere persuasive authority.

As Georgia's attorneys from both the plaintiffs' bar and the defense bar await the Eleventh Circuit's decision, which may significantly alter the landscape of the admissibility of collateral source evidence in Georgia litigation, it is expected MLH and other medical financing companies will continue to file Motions to Quash or seek protective orders when served with requests for production of documents. Defense attorneys have found MLH is often willing to produce the distribution agreement between MLH and a given plaintiff, its communications with that plaintiff's lawyers, subject to applicable privileges, and the medical bills it received for that plaintiff's treatment. However, MLH continues to push back on document requests seeking copies of its agreements with its network medical providers and agreements which disclose the set percentage amount that MLH will remit to the providers for services rendered. MLH also routinely objects to producing correspondence exchanged between MLH and a plaintiff's attorney regarding that plaintiff's medical treatment, and documents evidencing MLH's actual payments to the medical providers. MLH takes the position such documentation contains trade secrets and highly confidential business information.

As recently as July 20, 2016, MLH has been ordered to produce, pursuant to a protective order, its business documents evidencing payments made to a plaintiff's medical providers, as well as the contracts between MLH and those medical providers. Just as Chief Judge Thrash had, Judge Mark Cohen, U.S. District for the Northern District of Georgia-Atlanta Division, found the documentation discoverable because it was reasonably calculated to lead to the discovery of admissible evidence as to causation and reasonableness of medical charges. *Nicholas Robert Hillhouse v. Ronnie Penny et* al,. 1:16-CV-201-MHC (citing to *Houston v. Publix Super Markets, Inc.*, No. 1:13-CV-206-TWT, 2015 WL 4581541, at *1 (N.D. Ga. July 29, 2015) and *Hart v. Wal-Mart Stores, Inc.*, No. 1:11-CV-3519-RLV (N.D. Ga. June 15, 2012)).

This ruling demonstrates defense attorneys should remain vigilant in their efforts to obtain documentation from medical funding companies. They are not in the nature of a traditional collateral source and, unless the Eleventh Circuit finds otherwise, court intervention could provide the ability to impeach a plaintiff's physicians, demonstrate their potential bias, or undermine the amount of damages sought by demonstrating the medical expenses incurred were not reasonable. ◆

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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.

What Online Jury Research Can–and Cannot–Do

By James L. McGarity, M.S.
R&D Strategic Solutions

These days, more and more jury consulting firms offer online jury research as an option to clients as a way to get juror feedback on their cases. Online (or computer-based) jury research can provide a great solution for certain research objectives; however, it is also possible to ask too much of the data collected from this research platform. In other words, online research is a great option for some distinct purposes, but it should not be used as a replacement for traditional mock trials and focus groups. Therefore, it is a good idea to get an understanding of the appropriate uses of this research platform. Users of this research platform must likewise keep in mind that the research goals could be asking too much of the data collected, and must be wary of basing conclusions beyond the scope of the research design.

When I discuss "online jury research," I am referring to jury research exercises that are developed and executed through the Internet rather than traditional "in-person" exercises (like mock trials and focus groups). In these exercises, jurors watch or read attorney presentations or case summaries and answer questionnaire items from their computers at home. Typically this platform does not involve deliberations, as it is virtually impossible to recreate this dynamic over the Internet (at least in a meaningful manner).

Because the deliberation dynamic cannot be recreated online, this platform cannot provide the same level of insight as traditional mock trials and focus groups into why jurors reach their verdict conclusions, what group dynamics are involved, and what arguments ultimately prevail in discussions. But there certainly are benefits of this platform and the quantitative data collected (i.e., totals of jurors' individual responses), as well as appropriate uses of this type of research.

Benefits of Online Jury Research

Online jury research can be a huge timesaver. For those who are involved in the process of developing, building, and trying high risk cases, it seems there is never enough time to prepare for *everything*—much less the work needed for a mock trial or focus group, however valuable to the case the study may be. High stakes cases are often fraught with unforeseen developments that create problems and take time and attention away from preparing for the mock trial/focus group exercise, or require rescheduling the study altogether. Therefore, these online exercises can be an attractive alternative to traditional "in person" jury research for at least a few reasons:

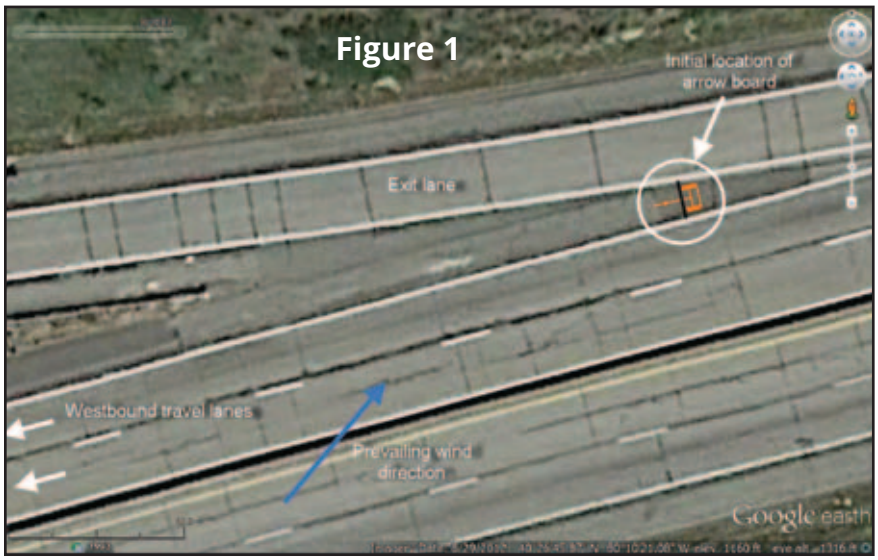
1) There's more schedule flexibility. Attorneys and other members of the trial team don't have to wrestle with schedules to find a single date(s) that work for everyone to be available and attend. The materials for the exercise can be prepared and presented remotely, at team members' convenience, and the study can be launched as soon as the materials are finalized. This way, attorneys and trial team members can attend to important duties and "late breaking developments" that require immediate attention while making preparations for the research at their convenience.

2) Online research is typically less expensive. Online research avoids the need for expenses often required of in-person studies like meeting rooms, audio/video equipment, travel, lodging and other expenses that can impose upon a tight budget. Online jury research also does not require trial

Continued on page 56

The Case of the Wayward Arrow Board

By C. Michael Dickinson, MSME, PE
Exponent



Arrow boards—we see them every day when we travel through road construction. These truck or trailer-mounted flashing arrow sign boards are used by contractors to direct traffic flow. But, what happens when a trailer-mounted arrow board rolls into moving traffic? Vehicles brake, swerve, and crash into each other and barriers, causing property damage and personal injuries, and insurance claims, litigation, and the hiring of lawyers follow. In other words, mayhem ensues. On top of all this, product claims add significant complexity to the matter, and a technical expert becomes a necessity for the defense. This case study describes the role of the expert on the arrow board manufacturer's defense team.

The Incident

Construction was ongoing to widen a roadway bridge spanning a four-lane, limited-access state highway divided by a concrete median barrier. The general contractor (GC) rented an arrow board from a local supplier of barriers, arrow boards, and other equipment for construction site safety. The arrow board was delivered to the job site equipment staging area by the rental company. The arrow board was then towed by the GC from the staging area and placed in the gore between the westbound, right-hand, through travel lane and the exit lane (Figure 1).

Construction operations were suspended on weekends; however, the arrow board was left in place in the gore, with the signal turned off. The area of the accident was experiencing high winds one Saturday afternoon as a result of the remnants of a tropical storm. As a group of several vehicles approached the inactive construction area, the arrow board rolled out of the gore, passed through the right-hand lane, and entered the left-hand lane. The driver of an SUV (Vehicle 1) moved from the right-hand lane into the left-hand lane to avoid the moving arrow board. The left rear of Vehicle 1 struck the right front of another vehicle (Vehicle 2), which was already traveling in the left-hand lane. The front of Vehicle 1 then struck the right rear of the arrow board before coming to rest against the median barrier. The arrow board spun approximately 180 degrees counterclockwise and also came to rest against the median barrier. Figure 2 shows Vehicle 1 and the arrow board at rest. Vehicle 2 came to rest on the right-hand shoulder of the roadway.

The Litigation

The passenger in Vehicle 2 claimed injuries as a result of the accident and filed suit against the driver of Vehicle 1, the GC, the rental company, and the manufacturer of the arrow board. The product liability action against the manufacturer included the following claims: the arrow board was defective in design and manufacture; the arrow board was unfit for its intended use; the manufacturer did not meet the standard of care in the industry; and the defects in the design and manufacture led directly to this accident.

The Expert

A technical expert was retained by defense counsel for the manufacturer to investigate and answer the following questions:

1. Was the arrow board used properly by the GC, in compliance with the manufacturer's instructions?;
2. Could the high winds at the time of the accident have caused a properly deployed arrow board to move from the gore into the traffic lanes? Corollary–how did the arrow board roll out into traffic?; and
3. Was the arrow board designed and manufactured in compliance with applicable codes, regulations, and standards and consistent with the common practice in the arrow board industry?

The Product

To evaluate product claims, the technical expert must identify the product and its specifications. The subject arrow board was a four-foot-by-eight-foot, battery-powered electronic sign board mounted atop a single axle trailer. The total weight of the assembly was approximately 900 pounds. The arrow board was equipped with four leveling/stabilizing devices, two diagonally-oriented outriggers on the front (hitch tongue side) of the arrow board, and two hand-cranked jacks at the rear of the trailer. The diagonal outriggers are to be pinned in position. The jacks are to be stowed in a horizontal position for transport and rotated into a vertical position for deployment.

The arrow board manufacturer's instructions state: "Step 2: Leveling the Unit. a. Ensure the ground slope does not exceed 15 degrees; b. Pull out outriggers; c. Use jacks to level arrow board and raise wheelbase off the ground."

The instruction manual also contains the warning shown in Figure 3. After the arrow board outriggers and jack stabilizers are deployed, the sign panel is to be raised into the "display" position using a hand-cranked wire rope winch.

The Reconstruction

Analysis of photographs taken at the accident scene by the driver of Vehicle 1 and the responding fire department revealed that:

- Both front diagonal outriggers were in the "stowed" position (Figure 2);
- The left rear jack stabilizer was in the "stowed" position (Figure 4); and
- The right rear jack stabilizer had been knocked off the arrow board frame (Figure 4), most likely due to contact by Vehicle 1, and was located under the right front wheel of Vehicle 1 (Figure 2). The detached right rear jack stabilizer was placed on the battery compartment of the arrow board, which was moved to the right-hand shoulder by the fire department.

The chief of the responding fire department also provided a statement, in which he confirmed that while moving the arrow board from the median barrier to the right-hand shoulder, no fire department personnel modified or adjusted any component of the arrow board.

An important piece of physical evidence (the right rear jack stabilizer) was not retained or secured by the controlling parties (the GC and the rental company). Had this evidence been retained, the mating fracture surfaces on the arrow board frame and the detached stabilizer could have been examined and the orientation of this stabilizer (stowed or deployed) at the time of impact could have been determined with a high degree of confidence. Can you say "spoliation?"

It was concluded that both the two diagonal outriggers and the two jack stabilizers were in the stowed position at the time of the accident. It was further concluded that the arrow board was not properly deployed by the GC prior to the accident–*i.e.*, the GC had left the arrow board resting on its wheels and tongue jack. Since the arrow board was not properly deployed in accordance with the manufacturer's instruction, this constituted a "misuse of product."

The Tests and Analyses

A series of quantitative tests and analyses were performed to investigate the hypothesis that the wind blew a properly deployed arrow board out of position. First, full scale tests were performed using an exemplar arrow board deployed in accordance with the manufacturer's instructions to determine the force necessary to cause it to move. A horizontal pull force was applied using an electric winch (as shown in Figure 5). Results indicated that approximately 600 pounds was required to cause the properly deployed arrow board to move.

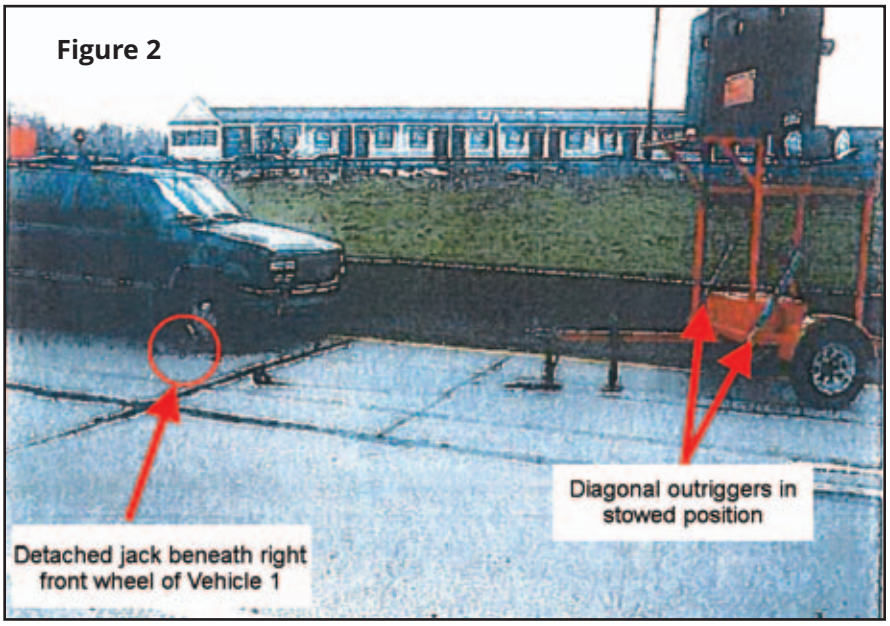
The next step was to determine whether the wind speeds were sufficient to cause a properly deployed arrow board to move. Certified wind speed data was obtained for the specific accident location and time frame. During the 2:00 P.M. hour (time of the accident), an average wind speed of 22 mph from the south-southwest (SSW) was recorded. Wind gusts between 32 mph and 40 mph were recorded. Had the reported winds impinged perpendicular to the four-foot-by-eight-foot face of the arrow board, the maximum aerodynamic force that could have been applied by the wind to the arrow board at 40 mph was approximately 140 pounds. Therefore, the maximum wind force at the time of the accident could not have caused a properly deployed arrow board to move.

So what did happen? In order to determine whether the aerodynamic force of the wind at the time of the accident could have caused the improperly deployed arrow board to move, a static force and moment balance analysis was performed. The component of the aerodynamic force perpendicular to the face of the sign panel is resisted by the frictional force between the tongue jack foot and the road surface. This component of the aerodynamic force also applies an overturning (tipping) moment to the arrow board which results in weight transfer from the trailer tongue jack to the trailer wheels, effectively reducing the frictional force resisting motion. The analysis results indicated that a SSW 33 mph wind was sufficient to cause the improperly deployed arrow board to start rolling. This is well within the reported wind speeds at the time of the accident.

The Alleged Defects

The design defects alleged by the plaintiff included: inadequate instructions and warnings contained in the product manual and on product labels and the lack of a safety device that would prevent the raising of the sign

Figure 2



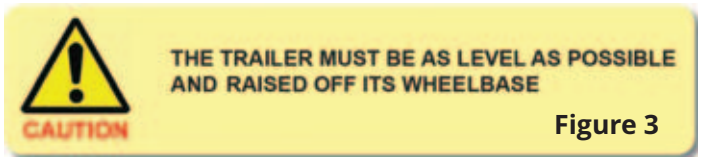


Figure 3

Figure 4

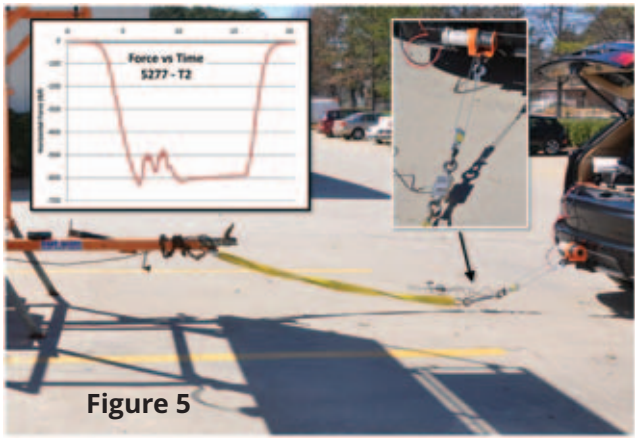


Figure 5

panel and activation of the sign unless the outriggers/stabilizers were in the proper deployed position.

The jurisdiction in which this lawsuit was filed recognizes a "sophisticated user" doctrine. In this case, the discovery responses and deposition testimony of the GC revealed that the GC was a road construction contractor with decades of experience in the use of temporary traffic control on highway projects. Testimony further confirmed that the GC was knowledgeable regarding the transport, placement, and setup of arrow boards, and that they "didn't need a manual to tell them how to properly set up the arrow board." Therefore, the GC was a sophisticated user of this equipment, which mitigated the effectiveness of the plaintiff's inadequate instructions and warnings argument.

A "state of the art" defense was not available to the manufacturer to answer the failure to meet the standard of care claim, since this defense is not recognized in the jurisdiction. To address the standard of care issue in this case, an expert analysis of the applicable codes, regulations, and standards for this product and of the common practice in the arrow board industry (both of which are always part of a state of the art defense) was performed.

The federal requirements for arrow boards and "changeable message boards" are defined in the Manual for Uniform Traffic Control Devices (MUTCD), which is promulgated by the Federal Highway Administration (FHA). The arrow board involved in this case was found to comply with all MUTCD requirements. Most states adopt the MUTCD in its entirety with regard to traffic control devices. However, some states also have supplemental requirements for arrow boards. The supplemental requirements of every such state were obtained and reviewed. The arrow board involved in this case was found to comply with all supplemental state requirements.

There is no federal or supplemental state requirement for a safety device that prohibits the raising of the sign panel or activation of the arrow board sign without the outriggers/stabilizers in the correct deployed position, nor is there any recommendation for such a device found in federal or state regulations.

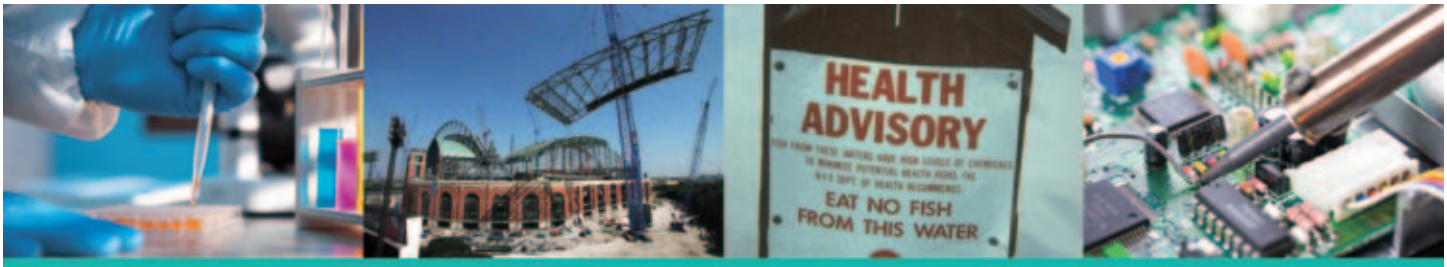
A web-based search, as well as a review of pertinent trade journals, was also performed to identify all manufacturers of "arrow boards," "arrow panels," and "changeable message boards/panels" in the North American market. Specifications and product literature was downloaded (if available online) or obtained directly from the manufacturer for each arrow board product. Review of this information revealed that the design and operational features of arrow boards are remarkably uniform across the industry. This is not surprising given the uniformity of the governing federal and state regulations for these devices.

The Value of the Expert

The technical expert in this matter played an essential role in defending the product claims. Physical evidence, facts, and testimony were reviewed to determine "what" happened. Then, technical questions were formulated and addressed to determine the "how" and "why." The expert identified the specifications and instructions for use of the subject arrow board. Then, the expert performed directly relevant testing and analyses that met standards of admissibility–*i.e.*, using well-defined and repeatable test methods and using basic principles of physics for the analyses. The results clearly supported that the arrow board was not properly deployed at the time of the accident, and that it was vulnerable to moving under the reported wind conditions as a result. Further, the expert debunked the specific defect claims based on the law in the jurisdiction and diligent identification and review of federal, state, and industry documents.

In a multi-party lawsuit, product claims can seem intangible and difficult to defend. However, a qualified technical expert can translate the claims into specific steps to evaluate the what, how, and why of an incident, to quantitatively test competing hypotheses, and to evaluate whether the product complies with regulatory and industry standards. ◆

C. Michael Dickinson, MSME, PE is a professional mechanical engineer with GDLA Platinum Sponsor Exponent and is registered in three states. He has investigated and analyzed over 1,500 accidents and incidents in 33 states, Canada, and France and has testified in deposition and trial in over 130 matters. His practice includes the analysis and prevention of accidents and failures involving industrial machinery and equipment, the analysis of the design and safety of consumer and industrial products, and the analysis of motor vehicle accidents.



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Elevate Your Perspective: Advanced Technology in Forensic Engineering

By Chris Stewart. P.E.
Forensic Engineering Technologies

Forensic technology is moving forward at a rapid pace. Americans are bombarded by high-tech forensics in every TV show they watch. From CSI to MacGyver, investigators solve their cases and problems with innovative technology. Jurors are not immune; they expect to see advanced technology utilized in the analysis of a case. As forensic engineers, problem solving is our job and using advanced technology is expected, often by attorneys and adjusters and almost always by jurors. This article will discuss three technologies–3D scanners, high-definition drones, and video analysis software–and how these technologies can be used in a case from inception to resolution.

3D Scanning

After using a 3D scanner for more than five years, it's been interesting to see the technology grow and become more common. Documenting a scene, vehicle, or machine with a 3D scanner misses very little. The speed and accuracy of the technology has improved, decreasing the time required on site while capturing more detailed measurements.

3D scanner technology allows for rapid 360-degree documentation of scenes, vehicles, or machines. The accuracy of the device provides the user with comprehensive data that is not isolated to a particular point, but is available for any area scanned. This assures that on the day of, the day after, or a year after the accident, the dimensions and visible conditions of the subject are preserved.

Figure 1 shows the representation of a scanned vehicle. Each pixel is a three-dimensional point of data. With more than 50 million points of data, documenting damage to a vehicle is straight-forward. The amount of data also provides additional options for compelling demonstrative aids.

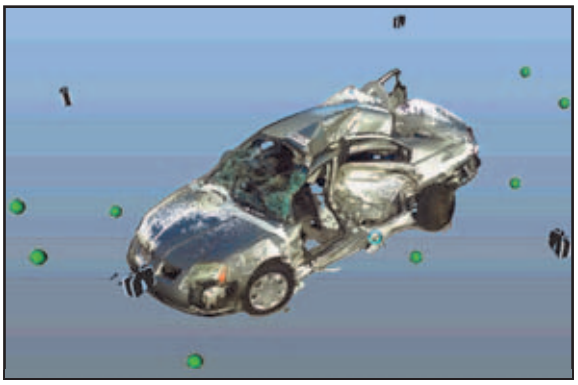

Figure 1: 3D Scan of Crushed Vehicle

Figure 2: 4K Drone Photograph

High-Definition Drones

Drones are starting to play a large role in forensic engineering. Drone platforms equipped with 4K cameras allow for unprecedented video and photographic documentation of active or older crash sites, as well as complete documentation of vehicles (Figure 2). Like the 3D scanner, documentation using a drone platform is quick and thorough and it provides a wide range of views from bird's-eye to even a human's perspective.

Video and photographs from a drone platform are captured in high-resolution digital formats. These high resolution images combined with ground targets, reference measurements, or scanner data, can be used to obtain accurate measurements. The exceptional quality of the photographs allows for the use of Photomodeler or other analysis software.

Another use of drone video is animations. Video shot using the drone can be combined with forensic animations to serve as demonstrative aids for mediation or trial.

Dash Cams and Surveillance Video Analysis

Dash cameras and video surveillance is becoming more common as the technology becomes less expensive and more accessible. Dash cams are being used in large commercial fleets, RVs, and private vehicles. Many times the presentation of the dash cam video may be all that is necessary to bring a case or claim to a close. But in most instances, the video captured by the camera is used to acquire more accurate dimensional and speed data for the reconstruction of a vehicle accident.

Surveillance video also offers the opportunity to obtain additional information about an accident or event. Newer security cameras are capturing events in HD format. The high resolution of HD offers increased accuracy during the analysis.

Analysis of dash camera and surveillance video is advancing. Certain types of software, originally used in the movie industry, are now being used to analyze video for speed and distance data. This software, combined with documentation of the scene and vehicles, can lead to very accurate analysis and reconstruction of accidents. One example of this technology is

SynthEyes. SynthEyes provides engineers with extensive tools to obtain relevant data from dash cams or surveillance video footage. Figure 3 is a sample of the SynthEyes technology being applied to a dash cam of an incident.

Application

In today's society, it's all about having the latest and greatest technology. As engineers, we feel that to the highest degree. We love cool stuff. But we also understand that the end result of our work is to educate and explain. What makes these technologies so important is not only the level of thoroughness they offer, but the diversity they offer as well. With 3D scanner or HD Drone data comes the ability to choose the level of sophistication you elect to present during a case. This allows you to tailor your approach to your audience and your case. For example, you could choose 2D line drawings of the scene and vehicles presented on easels for the Jury.

Additionally, you could build a 3D environment and provide different perspectives of the same scene, while being able to change the point of view on demand. One could take the 3D data of the scene and vehicles to render an animation and still photographs that explain an accident reconstruction, or how a particular machine operates. Another choice is to use the data to 3D-print a scaled model of the scene, vehicle, or machine (Figure 4). This method allows for hands-on demonstrations and explanation of analysis. Showing often trumps explaining.

Advanced technology is everywhere, and the courtroom is no exception. Using advanced technology from the start of an investigation is expected by most jury members. 3D scanning, 4K drone flights and advanced video analysis software are on the leading edge of advanced technology in evidence preservation and accident analysis. Using advanced technology offers more information and options for the analysis and presentation of case issues. More information and options benefit the decision-making process on how to handle a claim or case. ◆

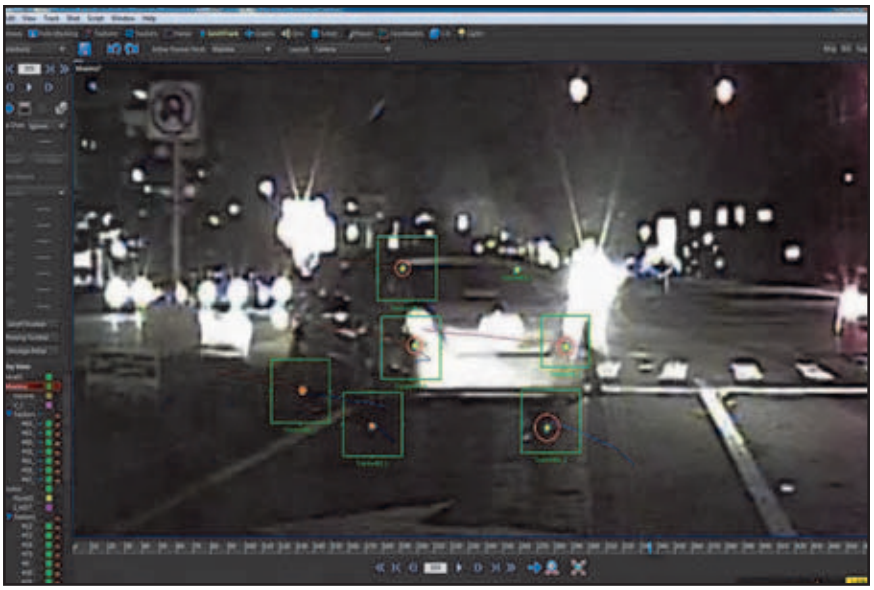

Figure 3: SynthEyes User Interface

Figure 4: Upper Left = Subject Vehicle
Upper Right = Vehicle Scan / Lower Right = 3D Printer Model

Chris Stewart is a mechanical engineer with Forensic Engineering Technologies, a GDLA Platinum Sponsor, and is registered in Florida and Georgia. He specializes in product failure analysis and the reconstruction of traffic accidents involving trucks, buses, automobiles, motorcycles, bicycles and pedestrians. Mr. Stewart has over 20 years of experience in engineering consulting and traffic accident reconstruction. He is a Board Certified Diplomate in Forensic Engineering by the National Academy of Forensic Engineers and an ACTAR Certified Traffic Accident Reconstructionist. He has testified in cases in both state and federal court.

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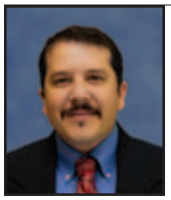


Stucco Veneer Primer: *Basic Information and Common Problems*

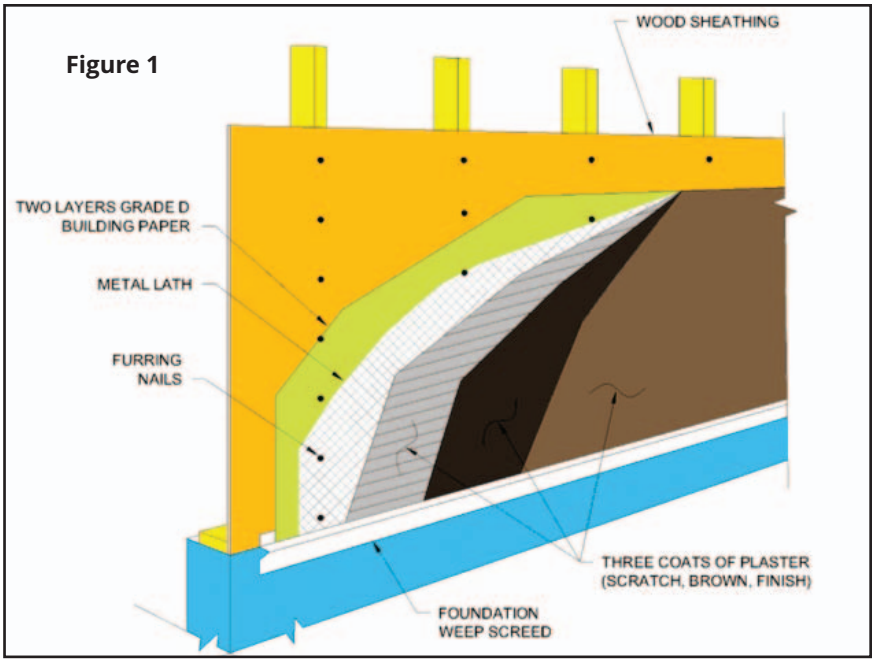
By Bart Barrett, P.E.
Nelson Forensics

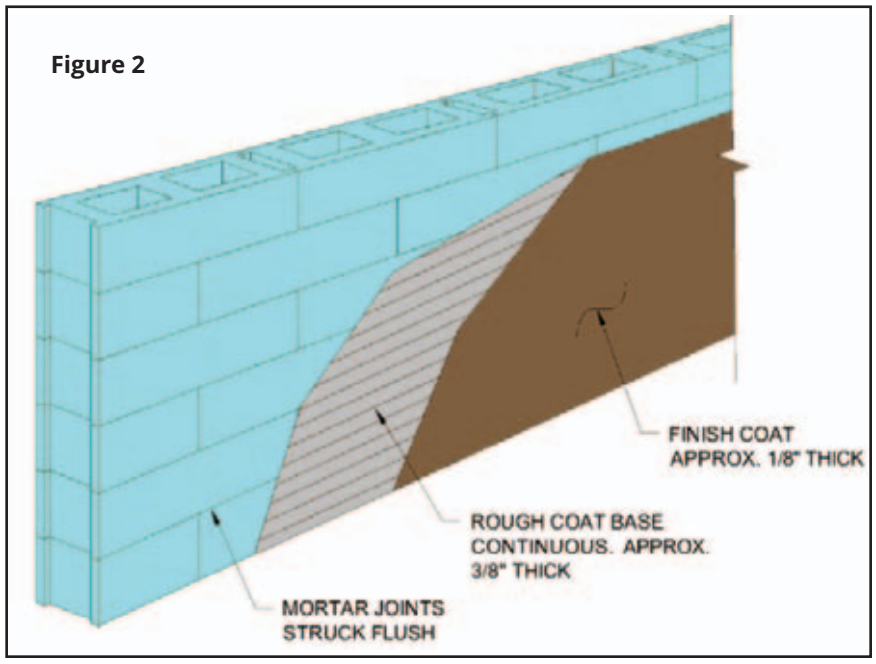
Basics

If designed well and applied sufficiently, stucco veneers provide a durable exterior finish for most building types. Stucco veneer is an exterior application of Portland cement-based plaster. The design and application of stucco should conform to the governing building code. Indicated below are the two standards typically required by building codes that provide specifications for the installation and application of stucco (ASTM 2016):

- C 926 addresses appropriate mixing ratios, nominal thicknesses and design considerations, etc.;
- C 1063 provides specifications for the support of metal-based stucco (specifically lath and furring) and addresses stucco accessories.

Stucco veneers applied over solid bases, such as concrete or masonry, often do not require a metal base (lath) to support the veneer. However, the use of lath is required when stucco is applied over sheathing supported by wood or steel framing or solid substrates that cannot provide adequate bond for the stucco veneer. Stucco veneer is developed by applying multiple layers, or coats, of the cementitious plaster. A scratch coat is first applied to either a solid substrate or metal lath and is scarified horizontally prior to curing. After the scratch coat has cured and is able to accept another coat without sagging or deforming, the brown coat is applied. A finish coat is then applied over the brown coat in a three coat veneer. Figure 1 and Figure 2 illustrate the two-coat and three-coat application of stucco.





In standard C 926, ASTM indicates nominal plaster thicknesses for two-coat and three-coat stucco veneers. The required thicknesses vary based on the number of coats, the type of substrate, and the application. The standard provides thickness requirements for the scratch, brown and finish coats, but the ASTM standard does not provide a deviation tolerance and does not indicate whether the thickness values are to be considered a minimum or a maximum value. Figure 3 (on page 38) depicts a brown coat par-

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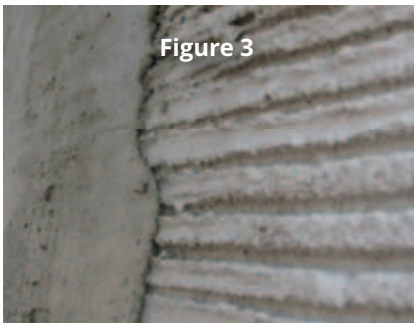
tially applied to over the scratch coat.

"Stucco Accessories" is a term used to include the various beads and trim pieces that are integral in the installation of stucco veneers supported by metal lath. Examples of stucco accessories include control joints, expansion joints, corner beads, weep screeds and casing beads. Corner beads and casing beads provide terminations for the stucco veneer around openings and along its perimeter. Weep screeds allow water to migrate out of the base of the veneer. Each accessory has a designated "ground," (thickness), and it is the ground of the accessory that defines the overall thickness of the stucco veneer.

Control and expansion joints reduce internal stresses in the stucco caused by expansion and shrinkage of materials. Expansion joints are two-piece assemblies installed over expansion joints in the substrate or when differential movement is expected between two sections of the stucco veneer. Control joints are single-piece accessories used to reduce cracking related to tensile stresses in stucco veneer panels. The placement of control joints should be designed in accordance with the configuration requirements stipulated by ASTM C 1063.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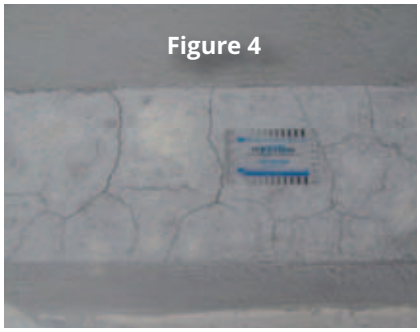
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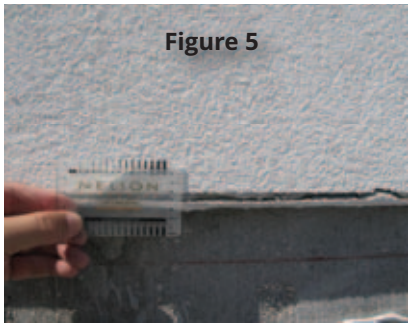
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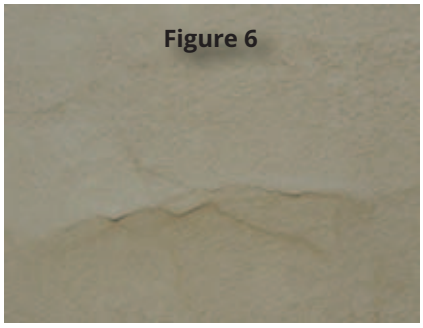
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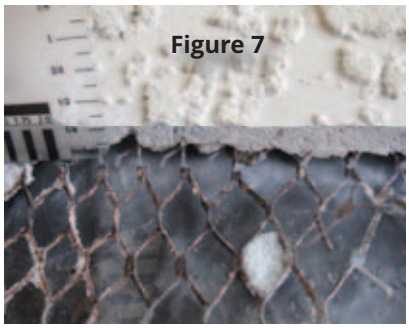
Figure 7


Figure 8

Common Problems

Although stucco veneers provide a durable finish, stucco is susceptible to distress when not mixed, applied or designed appropriately. Many conditions can lead to stucco distress, but problems are often related to water intrusion, material application or curing methods.

Stucco is a cementitious material that is applied wet and then cures to a rigid state. The material shrinks as it cures. When curing of stucco is not controlled, the veneer may experience excessive cracking or curling. Poor curing of the stucco can create tension in the stucco as the veneer begins to shrink while being restrained from moving at control joints and other stucco accessories. The tensile stresses developed in the stucco results in multiple cracks in the veneer which manifests as crazing (Figure 4).

Curling occurs during the curing process when there are shrinkage differentials through the cross-section of the stucco. As the exterior surface of the stucco veneer is exposed to environmental conditions that accelerate the curing process, such as wind or elevated temperature, stucco at the exterior surface shrinks more than the stucco at the substrate, resulting in the curled appearance and separations along the stucco accessories (Figure 5).

Stresses may develop in the stucco due to abrupt changes in the cross-section of the veneer. Dimensional changes in the stucco that affect the performance of the veneer may be the result of poor substrate construction tolerances, inadequate application of the stucco material, or improper lathing techniques. When cast-in-place concrete or masonry are constructed in a manner that does not provided a uniform vertical plane, the plasterer is often tasked with correcting the variances by adjusting the thickness of the stucco veneer and to provide a plumb exterior wall line, resulting in thickness variations in the stucco veneer.

Lath applications can also affect the thickness of the stucco veneer. Lath that is deformed or not adequately secured can affect the thickness of the stucco veneer. In places where the lath installation is separated away from sheathing, the stucco is applied in a thinner section, creating a void behind the lath. Figure 6 and Figure 7 depict cracking

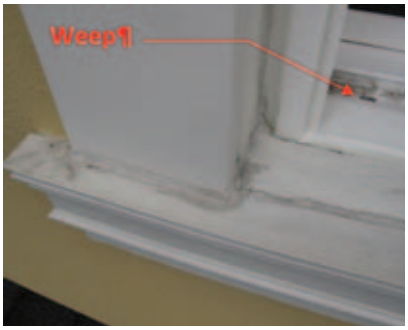

Figure 9

Figure 10

Figure 11

Figure 12

Figure 13

Figure 14

associated with buckling of thin veneer developed from poor lathing.

Metal lath is produced in sheets that must be overlapped to develop consistent support for the veneer. However, overlaps of too many lath sheets reduces the size of the openings available for the stucco to be extruded through. The result is poor embedment of the lath into the stucco, which can result in cracking or buckling. Paper-backed lath is produced with a layer of building paper attached to the back of the lath sheet. Lapping of this material requires that the paper of the overlying lath be placed underneath the metal lath of the underlying lath. This procedure properly results in the lapping of the two metal sections and lapping of the two paper sections. However, improper lapping of the sections allows the paper of the upper layer to obstruct the extrusion of the stucco through the underlying metal lath. Linear patterns of cracking can develop when paper backed lath is not properly lapped.

Metal lath can be manufactured with dimples that offset the metal lath from the substrate. This offset creates a space that allows the stucco material to be extruded through the lath and promotes full embedment of the metal lath. When the metal lath is not fully embedded in the stucco, the support of the stucco material is compromised and cracking may occur.

As indicated in the accessory discussion, control joints reduce cracking in stucco veneers. ASTM standard C 1063 recommends limiting the size and length-to-width ratio of panels developed by control joints and recommends installation of control joints at openings and substrate/framing changes. When control joints are not installed in accordance to ASTM recommendations, cracking may result. Cracking at openings usually occurs in a diagonal pattern (Figure 8).

Cracking may develop in areas where water is allowed to accumulate. Stucco veneers supported by metal lath are applied over a double layer of building paper. The building paper provides a weather resistive barrier (WRB), which diverts water away from the interior of the structure. This type of system is considered a drainage system, which performs differently than a barrier system. A barrier system repels the majority of water at the exterior face of the wall and relies on the thickness of the wall components to mitigate water intrusion. Stucco applied directly to a masonry wall is a common example of a barrier system. Drainage systems require a mechanism for water accumulated inside the veneer to exit to the exterior of the structure. For this reason, ASTM requires a weep screed installed at the base of framed walls. When drainage mechanisms are not incorporated into the stucco veneer, the accumulation of water in the wall assembly promotes deterioration of the veneer support and cracking can occur.

Many window assemblies include drainage mechanisms that allow water that travels inside the assembly to migrate out at the base. The weep locations for the window must be accommodated by the installation of the stucco. Stucco veneer or accent

band assemblies that obstruct these weeps direct water toward the interior of the structure. The water intrusion can compromise the support for the veneer, deteriorate structural members and cause fungal growth (Figure 9 and Figure 10 on previous page).

Another common area of water intrusion occurs at eave and wall interfaces. The National Roofing Contractors Association (NRCA) requires diverter flashing at this location (NRCA 2013). The metal flashing directs water traveling along the interface away from structure at the termination of the eave. Omitting this flashing commonly results in deterioration of the wood sheathing and damage to the stucco veneer.

Improper installations at gutter and fascia boards at the eave and wall interface can also result in water intrusion. In these cases, the fascia board and/or gutter are installed prior to the stucco veneer and extend to the wood sheathing of the adjoining wall. Stucco is then applied directly against these items, embedding the gutter or fascia board in the stucco. During rain events, water travels around them and behind the stucco veneer, resulting in conditions similar to areas of omitted diverter flashing. Figure 11 and Figure 12 (see previous page) depict deterioration of the stucco veneer and interior framing at improper installations of the gutter and diverter flashing.

When stucco damage occurs, it is imperative to understand the factors causing the distress. Non-destructive testing can be performed to determine the causative factors resulting in the stucco distress. Common non-destructive techniques include distress mapping (Figure 13 on previous page), soundings, moisture surveys, plumbness surveys and infrared surveys (Figure 14 on previous page). Destructive testing may be required to determine the exact mechanism of the distress, but results from non-destructive testing can reduce invasiveness of destructive procedures by limiting the amount of veneer removal.

For best performance, stucco veneers must be reviewed periodically to determine the presence of deterioration. The Florida Lath & Plaster Bureau recommends an annual review of buildings with a stucco veneer to address cracks in the plaster material and sealant separations (FLPB 2012). Some design and/or construction issues, such as moisture intrusion sources, must be addressed prior to veneer repairs as these factors will continue to cause stucco damage.

Areas of damage due to improper curing of the stucco can be repaired. The American Concrete Institute (ACI) and the Portland Cement Association (PCA) both address stucco distress and remediation (ACI 2016, PCA 2001). The guidelines presented by ACI and PCA should be followed when remediating stucco damage. ◆

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Bart Barrett, P.E., has over 15 years of engineering experience in the design and construction industry, and works with Nelson Forensics, a GDLA Platinum Sponsor. While his background is based in structural design and forensics, veneer analysis has been an integral part of his forensic work. Relevant projects include hospital, museum, mid- and high-rise condominium structures and multi- and single family residences. Mr. Barrett is active in the stucco industry, including serving as a board member for the Florida Lath and Plaster Bureau and participating in the ASTM C-11 workgroup, which develops amendments to plastering standards, ASTM C926 and ASTM C1063.

Appellate Case Law Update

By Mark W. Wortham, Appellate Section Chair
Hall Booth Smith, Atlanta

***Pandora Franchising, LLC v. Kingdom Retail Grp., LLLP*, S16G0490, 2016 WL 5757959 (Ga. Oct. 3, 2016)**
VENUE

The Supreme Court of Georgia (Benham, J.) held that the trial court erred when it transferred the plaintiff's tort action against a foreign corporation to another county in Georgia pursuant to O.C.G.A. § 14-2-510(b)(4). In so doing, the Supreme Court affirmed the Court of Appeals' decision and held that the Court of Appeals' construction of the statute was correct. The Court of Appeals had construed O.C.G.A. § 14-2-510(b)(4) to mean that only a corporation with its worldwide principal place of business, or "nerve center," in Georgia has the right to remove the action to the county in Georgia where that principal place of business is located. The crux of the Supreme Court's opinion is based on statutory construction. As the statute does not define the term "principal place of business," the Supreme Court construed the statutory language to mean that "principal place of business" is only one place. If that place is in Georgia, a corporate defendant has a right to remove to a court in that county. Otherwise, the right to remove pursuant to O.C.G.A. § 14-2-510(b)(4) is not applicable.

Summers v. Wasdin
337 Ga. App. 671 (2016)
DEFAULT JUDGMENT

The Court of Appeals (McFadden, J.) vacated the trial court's order granting the defendants' motion to open default and affirmed the denial of the plaintiff's motion for entry of default judgment, ruling that the defendants timely filed their answer.

The plaintiff's complaint was filed on June 2, 2014. On June 17, 2014, the defendants' attorney signed an acknowledgment of service, which was filed on June 26, 2014. The defendants filed their answer on July 23, 2014. Subsequently, the plaintiff moved the trial court to strike the defendants' answer and enter a default judgment. In response, the defendants argued that their answer was timely and filed a separate "Motion for Leave to Open Potential Default," noting the timeliness of their answer and, in the alternative, asking for permission to open default if the trial court found them to be in default. The trial court denied the plaintiff's motion and granted the defendants' motion.

The Court of Appeals affirmed the trial court's denial of the plaintiff's motion on the basis that the defendants timely filed their answer. The Court of Appeals reasoned that pursuant to O.C.G.A. § 9-11-4(h), the plaintiff filed the written acknowledgement more than five business days after the service date, such that the time for the defendants to answer did not begin to run until the plaintiff filed the written acknowledgment of service with the court. The defendants' written acknowledgment of service was dated June 17, 2014, but it was not filed with the trial court until June 26, 2014. Accordingly, the time for the defendants to answer began to run on June 26, 2014, making their July 23, 2014 answer timely.

The Court of Appeals also vacated the trial court's grant of the defendants' motion on the basis that it was moot.

Judge Carla Wong McMillian concurred fully in Divisions 1, 2 (a), and 3 and in the judgment only as to Division 2 (b). Judge McMillian also wrote separately to note that the opinion in Division 2 (b) was physical precedent only.

Partain v. Pitts et al.
338 Ga. App. 298 (2016)
ENFORCEMENT OF SETTLEMENT

The Court of Appeals (McMillian, J.) reversed the denial of the defendant's motion to enforce a settlement agreement in Elizabeth and James Pitts' personal injury action. The Pitts' attorney sent a time-limited settlement demand to the defendant's insurer, State Farm Mutual Automobile Insurance Company ("State Farm"), for its policy limits. State Farm accepted the offer.

When the adjuster sent the check to the Pitts' attorney, he mistakenly sent a letter with instructions that was meant for defense counsel. There were also problems with the check, as it was made out to "Elizabeth Pitts & Jimmy Pitts, Individually & as Husband and

Wife & Stephen C. Carter, P.C., their Attorney" rather than to Elizabeth and the attorney only. Realizing his mistake, the adjuster reissued a check made out to "Elizabeth P. Pitts and Stephen C. Carter, P.C., her attorney" and delivered that check to the Pitts' attorney.

The Pitts' attorney asserted that he viewed the first check as a counter-offer and rejection. He also notified State Farm that the Pitts rejected State Farm's "post-rejection effort to accept the settlement opportunity" by sending a second check. The defendant moved to enforce the settlement. The trial court denied the motion.

In its opinion, the Court of Appeals held that the parties reached an enforceable settlement. The initial check and letter were meant for defense counsel. Although the letter was delivered to the Pitts' attorney, it could not be considered a communication imposing additional conditions on the offer. The Court of Appeals also found that the Pitts' attorney was the unintended recipient of an inadvertently disclosed communication from a client to its attorney.

Because of the privileged nature of the attorney-client communication, the privilege cannot be lost if an attorney inadvertently discloses it. As such, the Pitts' attorney could not use the inadvertent disclosure as evidence of a counter-offer to his clients' settlement demand.

Therefore, the Court of Appeals determined that State Farm's delivery of the conforming check, within the time frame specified by the Pitts, constituted acceptance, and that a binding contract had been formed as a result. ◆

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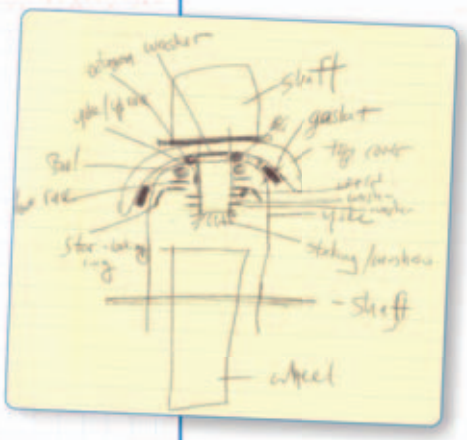

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Mass Torts Case Law Update

By Todd E. Schwartz, Masss Torts Section Chair
Lewis Brisbois Bisgaard & Smith, Atlanta

***Thurmon, et al v. Georgia-Pacific, et. al.*, United States Court of Appeals, Eleventh Circuit, No. 14-15703 (May 27, 2016)**

The Eleventh Circuit affirmed the U.S. District Court for the Northern District of Georgia's grant of Defendant Crane Co.'s Motion for Summary Judgment. The trial court found that the Plaintiffs failed to prove that Crane Co. ("Crane") proximately caused the asbestos-related injuries of the Decedent William H. Thurmon ("Decedent" or "Mr. Thurmon"). Mr. Thurmon worked at the Rayonier Pulp and Paper Mill in Jesup, Georgia. The Plaintiffs alleged that Mr. Thurmon worked in the vicinity of others performing routine maintenance on valves. Co-workers of Mr. Thurmon testified that some of the valves at Rayonier were manufactured by Crane. However, no one testified that Mr. Thurmon was exposed to gaskets or packing supplied or manufactured by Crane. Mr. Thurmon died of mesothelioma in November 2009.

The Plaintiffs filed suit against Crane and numerous other defendants in April 2011. The case was removed to federal court later that month and transferred to the United States Judicial Panel on Multidistrict Litigation for asbestos cases sitting in the Eastern District of Pennsylvania ("MDL"). Crane filed a motion for summary judgment which the MDL granted in part and denied in part. The MDL found that Mr. Thurmon had presented no evidence of exposure to gaskets and packing products manufactured or distributed by Crane, and could only be liable to the Plaintiffs if Georgia did not recognize the bare metal defense. Not finding any decisions on point, the MDL remanded the case to Northern District of Georgia where Crane renewed its motion for summary judgment there. The Northern District of Georgia granted Crane's motion finding Georgia law supports application of the bare metal defense.

The Eleventh Circuit determined that it did not have to decide if the Georgia Supreme Court would adopt the "bare metal defense" as a bright line rule, because its analysis of products liability law leads to a clear resolution for the court. The Court found that Georgia law requires plaintiffs to prove exposure to a particular defendant's product to establish proximate cause. Georgia has refused to impose market share or industry-wide liability. The Eleventh Circuit next determined that Plaintiffs had failed to offer any evidence of a defective design of Crane's valves. Further, the court found that the fact that gaskets on the Crane valves were replaced with asbestos-containing gaskets did not mean that Crane designed or specified asbestos gaskets for those valves or that the valves required asbestos replacement products. Plaintiffs failed to present any evidence that Mr. Thurmon was exposed to a negligently designed Crane valve. Therefore, Plaintiffs failed to demonstrate the Crane proximately caused Mr. Thurmon's injuries and summary judgment was properly granted.

***Scapa Dryer Fabrics, Inc. v. Knight*, Supreme Court of Georgia, S15G1278 (July 5, 2016)**

The Supreme Court of Georgia reversed the trial court decision to allow the testimony of Dr. Jerrold Abraham, an expert witness testifying on behalf of the Plaintiffs at the trial of this case. In so doing, the Supreme Court also reversed the judgment entered by the trial court against Scapa Dryer Fabrics, Inc. ("Scapa"), which the Georgia Court of Appeals affirmed. The Plaintiffs sued Scapa, and other defendants, alleging that Mr. Knight contracted mesothelioma as a result of exposure to asbestos fibers from products manufactured by the defendants or from products used on the defendant's premises while he worked at that facility. Specifically, Plaintiffs alleged that Mr. Knight was exposed to asbestos fibers from insulation on boilers and pipes and from yarn used in the manufacturing process while working for an independent contractor at the Scapa facility in Waycross. The case was tried before a jury in Ware County. During the trial, Dr. Jerrold Abraham testified on behalf of the Plaintiffs opining that Mr. Knight's exposure at the Scapa facility, however minimal, contributed to the overall cumulative dose of asbestos for Mr. Knight and thus was a contributing factor to his mesothelioma. The jury returned a verdict in favor of Mr. Knight. Scapa appealed the verdict contending the trial court erred in admitting the testimony of Dr. Abraham because the testimony was not reliable and the every exposure theory on which the expert relied did not comport with the legal requirements of causation in Georgia. The Court of Appeals affirmed the judgment of the trial court. The Supreme Court granted Scapa's petition for a writ of certiorari.

The Supreme Court analyzed the every exposure testimony offered by Dr. Abraham under the standards for admissibility set forth in former O.C.G.A. §24-9-67.1(b). The Court looked closely at the requirements for proving causation under Georgia law noting that a "de minimis" contribution of asbestos is not sufficient. The Court found a serious dispute existed at trial if Mr. Knight was exposed to asbestos at the Scapa facility at all which the jury should have resolved itself. By allowing Dr. Abraham to testify that every exposure contributed to Mr. Knight's disease, the Court removed the decision that an exposure might be de minimis and did not contribute to Plaintiff's disease from the province of the jury. Because Dr. Abraham's testimony failed to adequately quantify any level of actual exposure of asbestos for Mr. Knight at the Scapa facility, it did not comply with the requirements for causation under Georgia law and should have been excluded. Finally, the Court held that since Dr. Abraham's testimony was the heart of Plaintiff's case on causation, the judgment against Scapa had to be reversed . ◆

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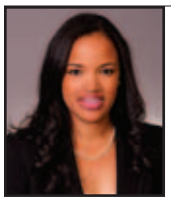


Premises Liability Case Law Update

By Sherrie M. Brady (left), Premises Liability Section Chair
Hawkins Parnell Thackston & Young, Atlanta
and Tynetra Evans, Premises Liability Section Vice-chair
Gray Rust St. Amand Moffett & Brieske, Atlanta

***Stephens v. Kmart*, 336 Ga. App. 332 (March 2016)**

Retail store was not entitled to summary judgment because issues of fact remained as to whether the configuration of the merchandise display was the proximate cause of Plaintiff's injury and whether Plaintiff exercised reasonable care for her own safety.

Plaintiff Nadine Stephens allegedly sustained injuries when she fell off the curb of the sidewalk in front of a Kmart store. On the date of incident, Stephens was looking through clothing racks located outside the store. As she navigated around a column to get to another rack of clothes, her foot stepped off the curb causing her to fall. Stephens brought suit against Kmart alleging the store failed to properly maintain the premises when they placed clothing racks on the sidewalk which obstructed her view. Kmart moved for summary judgment.

The trial court granted summary judgment for Kmart. However, the Court of Appeals in *Stephens v. Kmart Corp.*, 336 Ga. App. 332 (2016) , reversed the summary judgment ruling and found that there were issues of fact regarding whether Kmart had complied with its own policies and whether Plaintiff exercised reasonable care for her own safety. *Id*. Stephens described the clothing racks as lined up bumper to bumper, "right up against the curb," with no space between the racks and the curb. She also stated that she was unable to see where the sidewalk ended. A Kmart corporate representative testified that Kmart's policies and procedures were to "make sure there's a 36-inch clearance between rack to rack" and "make sure customers are able to maneuver from each side of the pallet or whatever we may have displayed outside."

The store manager took a photograph of the scene and submitted an incident report to the insurance carrier. The store manager testified at deposition that it was his routine practice to initial and date the photographs before sending them with the report to the insurance carrier; however, the photograph sent with his report was not signed or dated. Interestingly, the paper that the photograph was printed on was dated, but there was no indication in the record as to what that date represented.

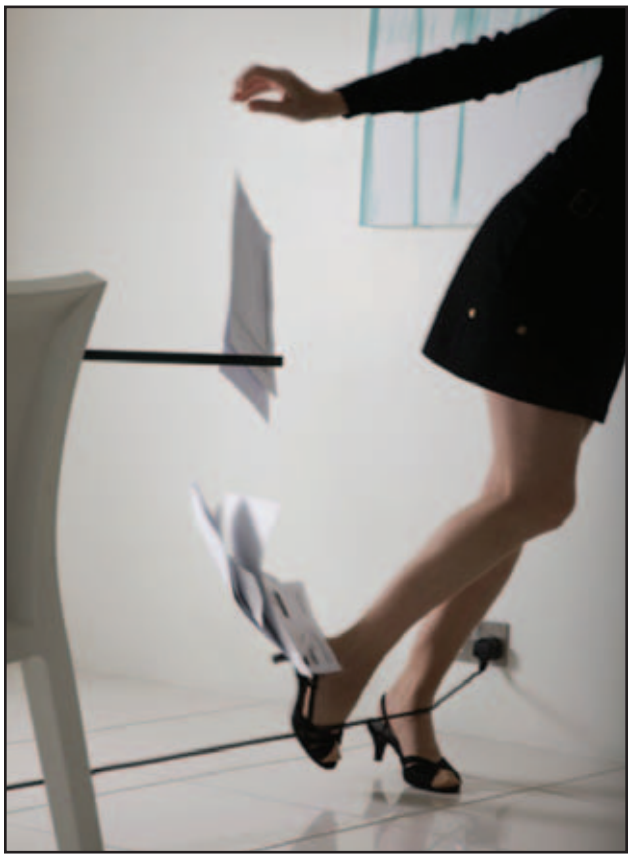
Stephens maintained that "it was impossible to determine where the drop off was because of the position of the racks and because the clothes were hanging down to the sidewalk." *Id*. at 335. For these reasons, the appellate court determined there was no evidence that the clothing racks' placement on the day of the incident complied with the store's policy. Relying on *Robinson v. Kroger*, 268 Ga. App. 735 (1997), the *Stephens* court explained "an invitee is entitled to assume that the owner/occupier has exercised reasonable care to make the premises safe" and need not look continuously at the ground for defects. Thus, there was a question of fact as to whether the configuration of the merchandise display by Kmart was such that the injury sustained was proximately caused by Kmart's negligence.

***Teston v. SouthCore Construction, Inc.*, 336 Ga. App. 733 (March 2016)**

Issues of fact remain in Plaintiff's slip and fall action as to whether, taking into account all circumstances, Plaintiff exercised ordinary prudence

This case arises from an incident where an employee, Teston, was injured when she tripped and fell over electric cords that were exposed during an office renovation. Teston was an employee of TitleMax of Georgia, Inc. The TitleMax storefront housed two related businesses, TitleMax and Eq-

uity Auto Loan, a/k/a Instaloan. The storefront "was divided pretty evenly straight down the center," with Title Max employees' desks on one side of the room and Instaloan employees' desks on the other. After desks were removed and furniture rearranged on the Instaloan side of the room, electric cords that had been previously concealed by the Instaloan desks were exposed. A mat was placed over a portion of the newly exposed cords, but there was a portion of the cords uncovered near a desk and near the wall. As Teston walked across to the Instaloan side of the store, she noticed the mat, but she did not notice the exposed cords. As she returned to the TitleMax side of the store, she tripped on the exposed cords and fractured her wrist.



Teston brought suit against the contractor for failure to exercise the prudence the ordinarily careful person would use in a like situation. Although Teston knew that SouthCore had removed the furniture, and employees had generally been warned to "be careful" during the renovation, neither SouthCore nor TitleMax warned her or anyone of the hazardous condition created by the exposed cords.

The trial court granted summary judgment for SouthCore finding that Teston's knowledge of the recent furniture arrangement imposed a heightened obligation to look for open and obvious hazards where she was walking. The Court of Appeals in *Teston v. SouthCore Construction, Inc*., 336 Ga. App. 733 (2016) reversed the summary judgment stating that a jury issue existed as to whether SouthCore's act of covering the exposed electrical cords with floor mats, but leaving portions of the cords exposed, would constitute the use of ordinary care. *Id*.

The Court of Appeals noted that "this case may not be strongest case for imposing liability upon SouthCore, as a jury might conclude that Teston should have seen the cords that caused her fall, but it "did not find that the circumstances in this case automatically require such a finding and warrant an award of summary judgment in SouthCore's favor. *Id*. at 736-737. The *Teston* court reiterated that "an invitee is not required to maintain a constant lookout, relying on *Robinson v. Kroger*, 268 Ga. App. 735 (1997). Rather, "the issue is whether, taking into account all the circumstances existing at the time and place of the fall, the invitee exercised the prudence the ordinarily careful person would use in a like situation." *Id*. (*quoting Robinson*, *supra* at 748 *and citing J.H. Harvey Co. v. Reddick*, 240 Ga. App. 466 (1999) where plaintiff who slipped and fell in a grocery store did not fail to exercise ordinary care for her own safety, such that summary judgment was warranted to defendant grocery store, despite testimony that the plaintiff did not look down at the floor before she fell).

SouthCore moved for reconsideration arguing that the appellate court should have affirmed the trial court's ruling under the "right for any reason" doctrine. However, the Court of Appeals remained "unpersuaded." *Id*. at 737. SouthCore also argued that the appellate court should have affirmed the grant of summary judgment because Teston had previously traversed over the alleged defective condition.

The Court of Appeals did not agree and found that there was no evidence in the record as to whether Teston successfully negotiated the area not covered by the floor mats where the electrical cords were exposed prior to her fall. Contrary to SouthCore's argument, Teston's deposition revealed that, prior to her fall, she crossed the cables where they were covered by the clear mat, which did not present a dangerous condition, although it would have indicated that the cables were present at that location if she had looked down.

It is the plaintiff's knowledge of the specific hazard precipitating a slip and fall which is determinative, not merely her knowledge of the generally prevailing hazardous conditions or of hazardous conditions which the plaintiff observes and avoids. *Id*. However, the *Teston* court acknowledged "that at trial SouthCore will have an appealing argument that Teston should have seen the exposed electrical cords prior to her fall." *Id*. at 738.

***Charter Communications v. Berwick*, 790 S.E.2d 120 (July 2016)**

Plaintiff failed to show defendant television cable company was the proximate cause of her injury when she tripped over a cable lying across her driveway.

Charter Communications ran a television cable across Plaintiff Berwick's driveway in order to provide cable service to her neighbors. On the night

of the incident, Berwick was carrying a piece of glass to the recycle bin at the end of her driveway. Berwick successfully stepped over the cable with her right foot, but her left foot caught on the cable. The motion stressed the glass pane and it broke in two, severing a tendon in Berwick's right ankle. Berwick and her husband brought suit against Charter alleging negligence for failure to warn. Berwick's complaint also alleged negligence per se based on a county ordinance requiring the cable provider to install lines in such a manner so as to cause the minimum interference with the rights and convenience of property owners, and not to cause unreasonable interference with the proper use of streets and public ways.

At the time of the incident, the cable had been left in place for over 19 months. Berwick acknowledged that she was long aware of the presence of the television cable. In fact, she drove across the cable four times each day on average, and walked across it at least once per week. In affirming the trial court's grant of summary judgment, the Court of Appeals relied on *Fitzgerald v. Storer Cable Communications*, 213 Ga. App. 872 (1994), finding that the proximate cause of the injury in this case was Berwick's own lack of due care because of her "long-term actual knowledge of the presence of the cable and her frequent, successful negotiation of that condition."

With respect to the negligence per se claim, the Court of Appeals held, "even if [Charter] violated that county ordinance, negligence per se does not equal liability per se," and Berwick's equal knowledge of the hazard would still entitle Charter to summary judgment. *Charter Communications v. Berwick*, 790 S.E.2d 120 (2016).

***Sidhi Investment Corporation v. Thrift*, 336 Ga. App. 617 (March 2016)**

Denial of summary judgment to landlord of leased convenience store was improper because the landlord was an out-of-possession landlord and delegated maintenance of the premises to the tenant.

It is the plaintiff's knowledge of the specific hazard precipitating a slip and fall which is determinative, not merely her knowledge of the generally prevailing hazardous conditions or of hazardous conditions which the plaintiff observes and avoids.

Plaintiff Vicki Lee Thrift was a customer of a convenience store owned by Sidhi Investment Corporation ("Sidhi"). Thrift brought suit against Sidhi to recover for injuries she sustained when she slipped and fell on an unknown substance while shopping. Sidhi leased the convenience store to Shivam Trading. The lease agreement required Shivam to be solely responsible for all repairs and maintenance, including the floors. Sidhi reserved the right to enter the store for the purposes of inspection, repair or showing to prospective purchaser or future tenant. Sidhi moved for summary judgment, arguing that, because it was an out-of-possession landlord, it was not responsible to third parties for damages resulting from the negligence of the tenant.

The trial court denied summary judgment as a result of Plaintiff's argument that a question of fact remained as to whether Sidhi was an out-of-possession landlord because Sidhi maintained a beer and liquor license and a business license for the store.

The Court of Appeals reversed the decision and concluded the trial court erred in denying the motion for summary judgment. Relying on *Gainey v. Smacky's Investments*, 287 Ga. App. 529 (2007), the court reasoned that the term "repair," as used in the statute stating that an out-of-possession landlord is responsible for damages arising from the failure to keep the premises in repair, contemplates an existing structure which has become imperfect, and means to supply in the original structure that which is lost or destroyed, and thereby restore it to the condition in which it originally existed, as near as may be. Here, Thrift simply alleged that she slipped on dirt, sand or a greasy substance, rather than alleging that an imperfect structure caused her fall. Therefore, Sidhi's liability for failure to repair was not triggered.

The apparent failure to transfer or update the business licenses did not alter the fact that Sidhi "fully parted with possession and the right of possession" and delegated maintenance of the floor to Shivam as a result of the lease agreement. Further, the facts in the record established that Patel, the sole officer and stockholder of Sidhi, had no involvement in the operation of the store during the lease term. In fact, throughout the term of the lease, Patel visited the store only once as he traveled through the area. As a result, there was no genuine issue of material fact that Sidhi was an out-of-possession landlord and that its motion for summary judgment should have been granted. ◆

GDLA Board Holds Fall Meeting in Greenville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With Hurricane Matthew bearing down on the coast, the GDLA Board of Directors headed to Greenville, S.C., for its Fall Meeting, October 7-9, 2016. It turned out to be great timing, as Board members from Savannah used the Westin Poinsett as an evacuation site.

The weekend commenced with a reception in the hospitality suite, after which everyone walked to dinner at Rick Erwin's Nantucket Seafood. The Board met on Saturday morning, and then the group adjourned to enjoy Greenville's beautiful downtown area. That evening was another cocktail reception, followed by an impromptu pizza party in the hospitality suite to watch college football.

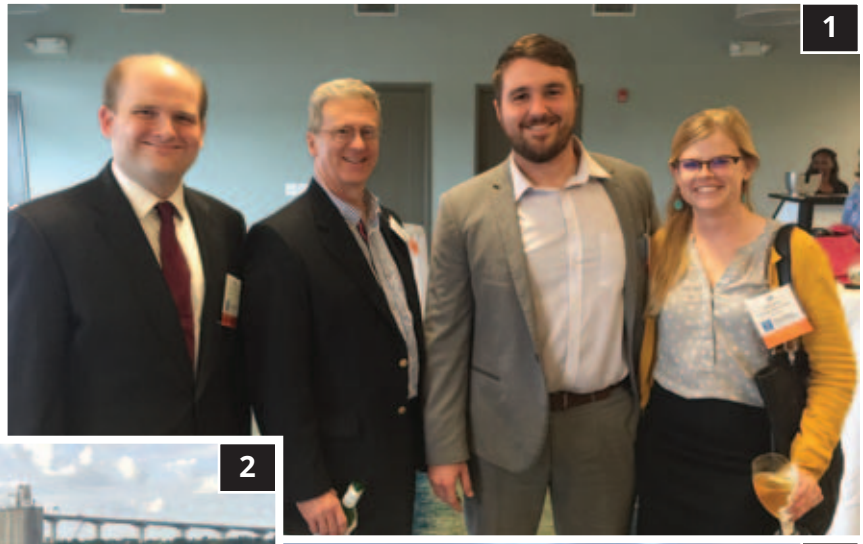
Those present were **Executive Committee:** President Peter D. Muller, Goodman McGuffey, Savannah; President-elect Sarah B. (Sally) Akins, Ellis Painter Ratterree & Adams, Savannah; Treasurer Hall F. McKinley, III, Drew Eckl & Farnham, Atlanta; Secretary Craig C. Avery, Cowsert & Avery, Athens; Immediate Past President Matthew G. Moffett, Gray Rust St. Amand Moffett & Brieske, Atlanta; and Past President Kirby G. Mason, Hunter MacLean, Savannah. **Vice Presidents**: Pamela N. Lee, Swift Currie McGhee & Hiers, Atlanta; David N. Nelson, Chambless Higdon Richardson Katz & Griggs, Macon; **Directors:** Candis Jones, Gray Rust St. Amand Moffett & Brieske, Atlanta; Martin A. (Marty) Levinson, Hawkins Parnell Thackston & Young, Atlanta; Jason D. Lewis, Chambless Higdon Richardson Katz & Griggs, Macon; Erica L. Morton, Hicks Casey & Morton, Marietta; James W. Purcell, Fulcher Hagler, Augusta; James S.V. Weston, Trotter Jones, Augusta; and C. Jason Willcox, Moore Clark DuVall & Rodgers, Albany; **Past Presidents:** N. Staten Bitting, Jr., Fulcher Hagler, Augusta; Theodore (Ted) Freeman, Freeman Mathis & Gary, Atlanta; Edward M. (Bubba) Hughes, Ellis Painter Ratterree & Adams, Savannah; Walter B. McClelland, Mabry & McClelland, Atlanta; and Lynn M. Roberson, Miles Mediation, Atlanta. **GDLA:** Jennifer M. Davis, Executive Director.

It should be noted that then-Secretary Craig Avery has since gone to practice on the dark side, and his shoes will be filled by Dave Nelson. George Hall was appointed to assume Dave's position as Vice President, and Tracie Macke has joined the Board in George's Southern District seat. Even though this was Craig's last Board meeting, we have proudly included photos of him and his wife, Resa, both of whom have meant so much to our association and will be missed at future gatherings. And not one to shirk his duties, Craig completed this meeting's minutes before switching sides. The minutes were approved at the Board's Winter Meeting and are posted in the members' only area of our website. ◆

Pictured at the Board of Directors Fall Meeting in Greenville *are (left to right unless otherwise noted): President Peter Muller and then-Secretary Craig Avery; 2. Past Presidents Bubba Hughes, Matt Moffett, Lynn Roberson, Walter McClelland, Ted Freeman and Staten Bitting; 3. Past President Staten Bitting with his wife, Cindy, and President-elect Sally Akins; 4. Board member Jamie Weston and Judge Henry Newkirk; 5. Annie and Jason Lewis with Resa and Craig Avery; 6. First Lady Lisa Muller, President Peter Muller, Ann Hopkins and Treasurer Hall McKinley; 7. Vice President Pamela Lee and Board member Erica Morton; 8. Treasurer Hall McKinley; 9. Board member Candis Jones and Past President Lynn Roberson; 10. Immediate Past President Matt Moffett; 11. Board member Marty Levinson with Frank Mason and Past President Kirby Mason; 12. Past President and DRI State Rep Ted Freeman (standing) with Board members Jason Lewis (left) and Jim Purcell seated.*

GDLA Platinum Sponsors Host Happy Hours in Savannah & Macon

Collision Specialists, Inc., Courtroom Sciences, Inc. and LexisNexis, three of GDLA's valued Platinum Sponsors, have hosted happy hours across the state for members to network outside of the office. In the summer, they held one in Atlanta at RiRa Irish Pub; those photos were in the last edition. The Savannah version was September 20, 2016, at the Cotton Sail Hotel's rooftop terrace (photos on this page). The Macon edition was November 15, 2016, in the Beer Garden of Bearfoot Tavern (see photos on opposite page).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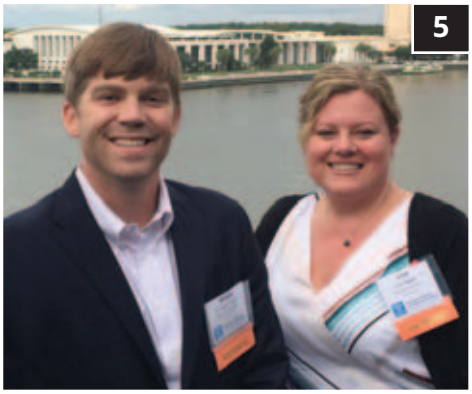
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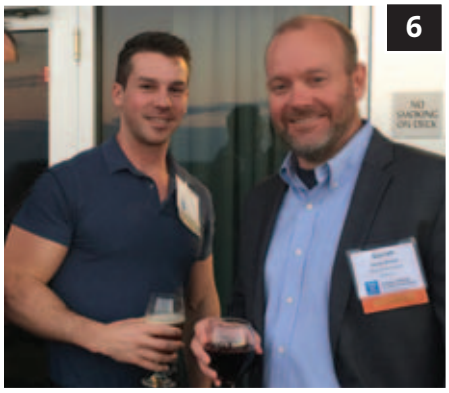
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Pictured on the rooftop terrace at the Cotton Sail Hotel in Savannah *are (left to right): 1. Philip Thompson, Cam Bowman, Josh Dorminy and Jill Jenkins; 2. President Peter Muller, President-elect Sally Akins, Vice President and* Georgia Defense Lawyer *Editor-in-Chief Jeff Ward, and Platinum Sponsor LexisNexis' Justin Kolumber; 3. Past Presidents Bubba Hughes and Kirby Mason; 4. Catherine Bowman and Tracy O'Connell; 5. Waite Thomas and Lisa Higgins; and 6. Will Ward, of Platinum Sponsor Courtroom Sciences Inc., and Garret Meader.*

Pictured enjoying the Beer Garden at Bearfoot Tavern in Macon *are (left to right on the opposite page): 7. Bruce Barrickman, Callie Bryan, Andrew Davidson, Platinum Sponsor Courtroom Sciences Inc.'s Will Ward, Wes Childs and Joe Stephenson; 8. Executive Director Jennifer Davis and her "cousin," Will Davis; 9. Taylor Hamrick and Jason Lewis; 10. Frank Butler and Reneé Rainey; 11. Platinum Sponsor Collision Specialists Inc.'s Jeff Kidd, Dee Sams, Gene Hatcher and Joe Howe.*


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GDLA Verdicts Database: Enter Yours!

Please take time to enter your own verdicts back to 2010, regardless of outcome, so this becomes a robust resource for the civil defense community. There are directions for inputting verdicts (after you log into the members only area, select the verdicts database in the right navigation). You will see it is searchable in a variety of ways, including by venue, judge, expert, plaintiff's and defense lawyers, etc.

Log into the Members Only area at www.gdla.org

GDLA Platinum Sponsor Hosts Holiday Happy Hour

Sprits were bright at the holiday happy hour hosted by GDLA Platinum Sponsor DTI Global on December 7, 2016, at the Establishment in Midtown Atlanta*. Pictured enjoying the evening are (left to right): 1. Mike Reeves and Al Adams; 2. Stephen Campbell and Amy Dowis; 3. Anandhi Rajan and DTI Global's Rob Draper; 4. Gillian Crowl, Anne Gower and Jason Darneille; 5. Andy Treese and Scott Farrow; 6. DTI Global's Reggie Jones, Mike Reeves, Gary Freed and Tina Cheng; and 7. Monica Dean and Robert Johnson.*

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Online Jury Research

Continued from page 27

teams or consultants to travel, as the materials can be prepared and distributed from team members' respective offices. This too prevents attorneys and trial team members from being away from the office and missing important meetings, conferences, or court appearances critical to case development.

3) Results are typically available quickly. Sometimes there's just not enough time to plan, prepare for, and complete a traditional mock trial—but feedback/results are needed right away. Because online studies produce primarily quantitative data, these results can be produced fairly quickly (typically a few days).

4) It's easier to get a larger sample. Because online jury research studies typically require no more than an hour or two from participants to complete the survey, it is easy to get a few hundred (or more) participants to complete it. With more completed surveys (or "N size"), you can have greater confidence in the analyses of important questions like, "What attitudes, beliefs, and/or life experiences are correlated with verdict preference?" "What amount do jurors who award damages give the plaintiff(s)?" or "How favorable or unfavorable is my client's reputation in the trial venue—and does this impact jurors' verdict orientation?"

Appropriate Research Goals for Online Jury Research

Generally speaking, the best questions to answer through online jury research are broader questions. In order to avoid asking too much of the data collected from an online jury study—or reaching conclusions that really aren't supported by the data—it's important to have the appropriate research goals in mind for an online jury research project. Here are some examples (but certainly not the only appropriate goals to consider):

1) What is a reliable estimate of the damages we can expect jurors (who are inclined to award damages) to award? This type of estimate can be very helpful when considering negotiations with the other side. Because of the large number of participants available in this research platform, this data is hard to argue with when negotiating a settlement.

2) What are the characteristics (i.e., attitudes, beliefs, life experiences, etc.) generally associated with jurors who are favorable to the plaintiffs and defendants? Data collected from an online study to develop juror profiles is best used as an adjunct to previous jury research. When juror profiles from a mock trial or focus group have started to appear, an online study is a great way to bolster those profiles, and reveal other important characteristics that can further differentiate favorable and unfavorable jurors.

3) Which venue is most/least favorable for our case? Getting a handle on what perceptions, experiences, and attitudes that exist about your client (or another party), about litigation in general (or a specific type of case), or about other relevant issues is very helpful when faced with a choice of between venues to try a particular case.

Limitations of Online Jury Research

In many other circumstances the answers sought through jury research are much more complex (e.g., do jurors believe this was a design defect that caused the plaintiff's injuries, or were his/her injuries caused by something else? Did the plaintiff's medical history make him/her more vulnerable to this unfortunate outcome, or did the doctor miss an important symptom during evaluation? Is the plaintiff overstating their injuries? Do jurors think that the case merits punitive damages, and if so, why?). These are the more in-depth research questions that quantitative data alone (i.e., data provided from online jury research) cannot really reliably answer.

A critical part of understanding jurors' ultimate verdict decisions relies upon the qualitative data provided by mock trials and focus groups.

A critical part of understanding jurors' ultimate verdict decisions relies upon the *qualitative data* provided by mock trials and focus groups—learning from jurors' deliberation discussions. This type of data provides more insight into the underlying reasons behind jurors' individual verdict decisions, as well as revealing some of the group dynamics (e.g., polarity shift, groupthink, confirmation bias, etc.) that come into play in deliberations which cannot possibly be recreated in an online study.

These observations in deliberations are also vital to developing key strategies that help effectively tell the case story and avoid some of the shortcomings or pitfalls that may not be apparent until one has witnessed the unique group dynamic that only occurs in deliberations. ◆

James L. McGarity is a partner at R&D Strategic Solutions, a GDLA Platinum Sponsor. He has been a jury consultant since completing his Masters degree in industrial/organizational psychology in 2000. Mr. McGarity works with trial teams around the country on a wide range of high stakes cases by conducting mock trials and focus groups, assisting counsel with jury selection, and preparing witnesses for deposition and trial testimony.

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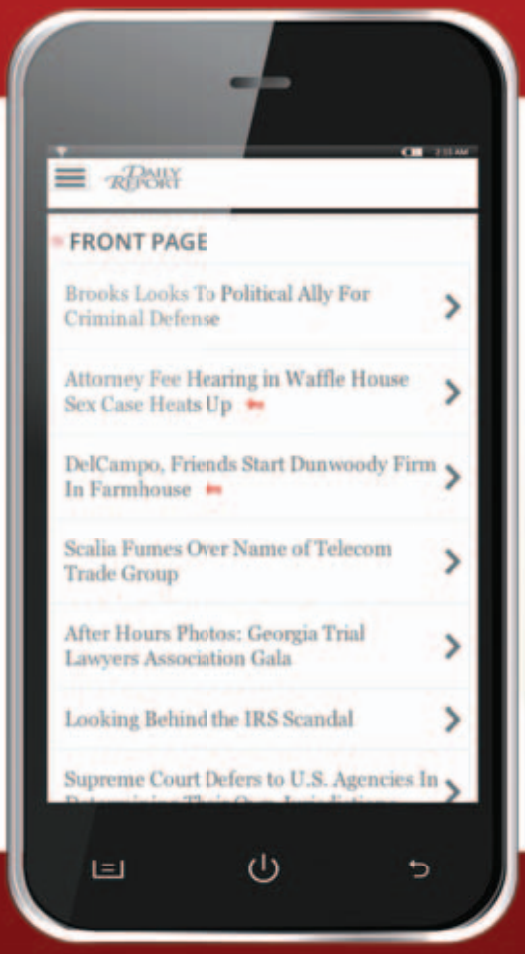

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The Meaning of "Compensation"

Continued from page 19

ical benefits and indemnity benefits are not interchangeable. *See* O.C.G.A. §34-9-82(a) (the initial statute of limitations treats medical benefits differently than income benefits); O.C.G.A. § 34-9-221(b) (assuming a claim is accepted as compensable, there is a deadline for income benefit payments which does not exist for medical benefits–the "first payment of *income* benefits shall become due on the twenty-first day after the employer has knowledge of the injury or death"); O.C.G.A. § 34-9-104 (statute of limitations for change of condition does not apply to medical only claims); O.C.G.A. § 34-9-207(c) and O.C.G.A. § 34-9-240(a) (the Act repeatedly allows for suspension of income benefits—e.g., where a claimant refuses to sign a WC-207 or accept suitable employment—but suspension of medical benefits is only available where the claimant undergoes a change of condition for the better).

GDLA brief's co-authors were M. Ann McElroy and Crystal Stevens McElrath of Swift Currie McGhee & Hiers in Atlanta with review by Amicus Committee Chair Marty Levinson of Hawkins Parnell Thackston & Young in Atlanta and Vice-chair Garret Meader of Drew Eckl & Farnham in Brunswick. The employer/insurer appellees are being represented by GDLA members Rufus D. Sams, III and Callie D. Bryan of Jones Cork in Macon. The case is *Kendrick v. SRA Track, Inc., et al.*, Georgia Court of Appeals, Case No. A17A0094. ◆

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