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GEORGIA DEFENSE LAWYER

A Magazine for the Civil Defense Trial Bar

Volume XIV, Issue III
Winter 2018

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Volume XIV, Issue III

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President's Message

In the last five years, the Amicus Committee of GDLA has exploded with activity. Now under the leadership of Chair Martin A. Levinson, Hawkins Parnell Thackston & Young, Atlanta and Vice-Chair Garret W. Meader, Drew Eckl & Farnham, Brunswick, GDLA's voice has been heard on a wide variety of issues since June 2017, including the following:

Kern & Curles v. Psychiatric Solutions: The issue was the applicability and interpretation of the five-year statute of repose applicable to medical malpractice claims. The brief was authored by Kristin Hiscutt Pierson, Bendin Sumrall & Ladner, Atlanta, and filed on June 28, 2017.

GEICO v. Morgan: The issue was the enforceability of the rejection of uninsured motorist coverage. The brief was authored by Nnenna T. Opara, McAngus Goudelock & Courie, Atlanta, and filed on September 15, 2017.

Chrysler v. Walden: The issue was the admissibility of the financial condition of a party's Chief Executive Officer for purposes of showing potential bias where no punitive damages claim was made. The brief was authored by Christopher R. Jordan, Hunter Maclean, Brunswick, and filed on September 18, 2017.

Wellstar v. Roman: The issue was discoverability of cost and pricing information charged by a hospital to patients other than plaintiff and the potential applicability of the collateral source rule. The brief was authored by Martin A. Levinson and William J. Martin, Hawkins Parnell Thackston & Young, Atlanta, and filed on September 29, 2017 (see page 17).

Oller & Nobles v. Rockdale Hospital: The issue was whether plaintiff may add vicarious claims against a timely-sued corporate defendant based on acts of professional actor first criticized after statute of limitations expires. The brief was authored by David C. Hanson and Samuel E. Britt, III, Weathington McGrew, Atlanta, and filed on filed October 31, 2017 (see page 16).

Doherty v. Brown: The issue was the distinction between ordinary and professional negligence in professional malpractice cases. The brief was authored by James S. V. Weston, Trotter Jones, Augusta, and filed on November 20, 2017 (see page 18).

Hughes v. First Acceptance: The issue was the requirements of a bad faith failure to settle a claim. The brief was authored by David Atkinson and Jonathan J. Kandel, Swift Currie McGhee & Hiers, Atlanta, and filed on February 2, 2018.

At press time, the following amicus brief requests had been approved, but not yet filed:

Burcham & Petty v. Mayo: The issue is a hospital's potential liability for alleged negligent credentialing. The brief will be authored by Samuel E. Britt, III.

Fender v. Hospital Authority of Valdosta: The issue is how the respondeat superior rule applies in negligent hiring and retentions cases. The brief will be authored by Martin A. Levinson and C. Shane Keith.

Pinnock v. Kings Carlyle: The issue is whether, in the context of a negligent security claim, the plaintiff can maintain a claim for fraud against a rental agent for property who assured the plaintiff that the property was safe. The brief will be authored by Garret W. Meader.

Stephens v. Castano: The issue is whether evidence of a treating physician's contingent financial interest in the outcome of a trial violates the collateral source rule. The brief will be authored by Kristin Hiscutt Pierson.

All of these amicus briefs, and any corresponding rulings, are available in the members only area of our website.

The generosity of the authors with their time and talent is truly incredible. These dedicated members contribute so much to advance the defense perspective on important issues for the benefit of all of us and our clients.

Please join me in thanking these hard-working lawyers. The voice of the defense bar is strengthened by the number of members in our organization; in that regard, we've crossed the 900 member mark. For this reason, please encourage members of your firm, your defense lawyer colleagues and friends to join the ranks of GDLA.

For the defense,

Sarah B. (Sally) Akins
Ellis Painter Ratterree & Adams
Savannah

Member News & Case Wins

MEMBER NEWS

Douglas K. Burrell of **Drew Eckl & Farnham** in Atlanta was re-elected Secretary/Treasurer of DRI—The Voice of the Defense Bar during its Annual Meeting held in Chicago in October. At the same conference, **Laura D. Eschleman** of **Nall & Miller** in Atlanta was presented DRI's Albert H. Parnell Outstanding Program Chair Award for her efforts planning the DRI Medical Liability & Health Care Law Committee's annual seminar. Also during the DRI Annual Meeting, GDLA Past President **Theodore "Ted" Freeman** of **Freeman Mathis & Gary** in Atlanta, was elevated to the DRI Board of Directors by becoming the DRI Southeast Regional Director.

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

Smith Moore Leatherwood announced the addition of **David Lin** to its Atlanta office in the firm's Transportation Industry Group. His practice focuses on representing clients in the transportation industry, including commercial motor vehicle companies and motor carriers, drivers, specialty haulers, bus lines and motor coaches, emergency and non-emergency transportation providers and insurers. Mr. Lin has experience defending these clients in all aspects of litigation involving injuries, fatalities and property damage. He has defended these matters from moments after the collision through resolution of the claims or lawsuits.

Clinton F. Fletcher has joined **Carlock Copeland & Stair** as of counsel in the firm's Atlanta office. He focuses his practice in the areas of products and premises liability, trucking, aviation, construction equipment and material handling equipment claims. He has also expanded his practice to include representing contractors and design professionals in disputes that arise out of the construction and design build process. As Georgia counsel for a major auto manufacturer, he has significant experience defending warranty claims arising under the Magnuson-Moss Warranty Act and Georgia's Lemon Law. Mr. Fletcher was also recently appointed as state membership chair for DRI—The Voice of the Defense Bar.

Maureen "Molly" O'Connor, formerly with **Mabry & McClelland**, has joined the Atlanta office of **Lewis Brisbois Bisgaard & Smith**. She will maintain a general civil defense practice focusing on the areas of general liability matters, personal injury defense, business liability litigation, premises liability, professional liability, insurance law, wrongful death, and real estate litigation.

Waldon Adelman Castilla Hiestand & Prout announced that **Adam P. Smith** has been named a partner in the firm. His areas of focus include insurance defense, premises liability, and insurance coverage.

Drew Eckl & Farnham announced that **Chuck Hoey** has joined the firm as of counsel in the firm's Atlanta office. His practice areas include workers' compensation, general liability, and insurance coverage.

Daedrea D. Fenwick has joined **Galloway Johnson Tompkins Burr & Smith** as an associate in the firm's Atlanta office. Ms. Fenwick was formerly with **Drew Eckl & Farnham**. She focuses her practice on general liability defense, including commercial transportation law, premises liability, and construction litigation.

Matt Stone and **Shawn Kalfus** have left **Smith Moore Leatherwood** to start their own civil litigation firm, **Stone Kalfus**, in Atlanta. The firm focuses on the defense of catastrophic injury and wrongful death claims, including those stemming from commercial motor vehicle accidents, passenger vehicle accidents, non-emergency medical transportation, products liability, premises liability, and crane and lift accidents. The firm also represents auto dealerships, restaurants, and retail and hospitality entities in general and casualty disputes.

GDLA Vice President **William T. "Bill" Casey, Jr.** and GDLA Board member **Erica L. Morton** have joined **Swift Currie McGhee & Hiers** in Atlanta as partners. They were formerly with **Hicks Casey & Morton** in Marietta. Also joining them at the firm are associates **Amy Dowis** and **Monica L. Wingler**. The group's practice focuses on premises liability, product liability, transportation and automobile liability, construction defect and insurance coverage.

Richie C. Foster joined **Swift Currie McGhee & Hiers** as a partner from **Carlock Copeland & Stair**. Also making the move from Carlock Copeland was associate **Elizabeth L. Bentley**. Associate **Marc A. Hood**, most recently with **Cozen & O'Conner**, joined as well. Previously, he worked with Mr. Foster at Carlock Copeland. The group primarily dedicates its practice to motor carrier liability, commercial insurance coverage and general commercial insurance defense.

R. Matthew "Matt" Shoemaker, formerly with **Swift Currie McGhee & Hiers**, has joined **Jones Cork** in Macon. He has a general civil litigation practice, including insurance defense, premises liability defense, products liability defense, insurance coverage, business litigation, and medical malpractice defense. Mr. Shoemaker serves on the Editorial Board of this publication, *Georgia Defense Lawyer*.

CASE WINS

Wiley A. Wasden III and GDLA Board member **Tracie Macke** of **Brennan Wasden & Painter** in Savannah obtained a defense verdict on behalf of their client, a urologist, in Chatham

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

After obtaining summary judgement for a local business facing allegations of Family and Medical Leave Act (FMLA) interference and retaliation, **Tracie Macke** of **Brennan Wasden & Painter's** Savannah office continued to successfully represent the employer after its former employee appealed to the Eleventh Circuit Court of Appeals and petitioned for writ of certiorari to the U.S. Supreme Court. The former employee claimed he was fired after requesting FMLA leave to care for his pregnant wife. In obtaining summary judgment for the employer, Ms. Macke presented evidence showing the employee's termination stemmed from several reasons unrelated to his FMLA request, such as his use of profanity and other offensive behavior directed to a community volunteer during a fund-raising event hosted by the employer. The district court ruled against the employee, using a "but-for" standard of causation. On appeal to the Eleventh Circuit, the employee argued that the court should use a less stringent "mixed-motive" standard utilized by some other federal court circuits, but the Eleventh Circuit rejected this argument and upheld the grant of summary judgment. The U.S. Supreme Court recently declined to hear the employee's petition, allowing the decision to stand so the "but-for" standard is currently the applicable standard for FMLA retaliation claims in the Eleventh Circuit.

Lee M. Gillis, Jr., of **James-Bates-Brannan-Groover** in Macon won a defense verdict in a case involving an accident between five motor vehicles in which four of them were totaled. The defendant admitted liability for the accident and defendant's liability limits were tendered to the plaintiff. However, the plaintiff claimed $51,000 in medical specials, as well as future lost wages and a lifetime of pain and suffering from an alleged brain and neck injury. Mr. Gillis' client had a million-dollar underinsured insurance policy at issue, which the plaintiff demanded twice before trial. At the end of the 2.5 day trial, the jury returned a defense verdict because the plaintiff could not prove his issues were caused by the wreck. Mr. Gillis was able to cast doubt on the plaintiff's causation arguments both through his prior behavioral issues and his post-accident conduct and medical treatment.

Attorneys at **Waldon Adelman Castilla Hiestand & Prout** have recorded a number of recent successes at trial. **Adam P. Smith** secured a $3,500 verdict from a Forsyth County jury in an admitted fault case where a 27-year-old plaintiff with no prior history of neck pain underwent neck surgery and incurred medical expenses of more than $102,000. Surgeon Erik Bendiks testified that the plaintiff sustained a herniation at C5/6 that was caused solely by the accident and required a disc replacement surgery. Plaintiff also called a biomechanical engineer to testify about the force of the collision. In closing, plaintiff requested a total award of more than $600,000. **Hilliard Castilla** and **Matthew Hurst** obtained a defense verdict in a case in the Superior Court of Fulton County. Following an investigation of the accident, the defendant was cited for failure to yield, and at trial, the officer was permitted to state that the defendant caused the accident. Plaintiff sued for injuries and healthcare bills in excess of $215,000.00. Additionally, plaintiff had four friends take the stand and testify about plaintiff's reduced quality of life as a result of this accident. Ultimately, the jury agreed that plaintiff failed to meet her burden of proving that defendant was liable for the subject accident. Notably, defendant's insurer had made a pre-suit offer of $250,000. **Ashley Rice and Taylor Barnett** secured a defense verdict following a two-day trial in Fulton County. At trial, both parties and an eyewitness gave accounts of how the accident happened that were substantially different from what they allegedly told the investigating officer at the scene. Because the officer initially attributed fault to the defendant, plaintiff sued for injuries and healthcare bills in excess of $30,000. Ms. Rice and Mr. Barnett successfully challenged the plaintiff's credibility on issues of negligence and causation. Ultimately, the jury agreed that plaintiff failed to meet his burden of proving that the defendant was at fault. The plaintiff rejected defendant's pre-suit offer of settlement in the amount of $8,500.

Nikolai Makarenko, Jr. of **Groth & Makarenko** in Suwanee defended the driver of a company truck in a Henry County case where his client admitted liability. The defendant, who was working at the time, fell asleep while driving and hit a truck, in which the plaintiff was a passenger, causing it to flip several times. The plaintiff claimed injuries to his neck and back, ultimately undergoing surgery to his back and accruing past medical expenses in excess of $324,000. The plaintiff's employer, family members, and treating physician, Dr. Armin Oskouei of Orthopedic Sport and Spine, testified that his injuries were due to this motor vehicle accident. Specifically, Dr. Oskouei testified that the plaintiff's herniated disc in his low back was due the accident, and that he had performed surgery to correct the problem. Dr. Barry Jeffries testified for the defense, finding that the injuries were not caused by the motor vehicle accident. Following six hours of deliberations to consider the plaintiff's request to award past medical expenses, and an ad-

ditional $400,000 in pain and suffering damages, the jury returned a verdict in the amount of $123,783.29. The verdict represented medical expenses prior to the treatment with Dr. Oskouei and some amount for pain and suffering.

Paul Groth of **Groth & Makarenko** in Suwanee defended an automobile accident in which the plaintiff claimed medical injuries to the ulnar nerve in the elbow and median nerve in the wrist resulted from the wreck. The plaintiff presented a Hall County jury with a request for reimbursement of $71,140.00 in medical bills plus a multiple of that amount for pain and suffering. The plaintiff introduced deposition testimony of his surgeon who had performed surgeries on both areas for nerve entrapment. An additional rotator cuff surgery was performed about 1.5 years later. Mr. Groth took the evidentiary deposition of Dr. Daniel Cobb of Gainesville Neurology, EMG, who concluded ulnar entrapment around the left elbow, moderate to severe and mild to moderate ulnar and median neuropathy at the wrist. However, Mr. Groth argued that diabetes (which the plaintiff had) could be an explanation for the neuropathies, as it is the most common, non-trauma cause for the condition. Dr. Cobb *and* the jury agreed. Deliberating for less than two hours, the jury returned a verdict in the amount of $2,066.00—the amount of the emergency room bill.

R. Scott Masterson and **V. Ashley Spires** of **Lewis Brisbois Bisgaard & Smith's** Atlanta office, along with a colleague from their San Francisco office, obtained a defense verdict in favor of their client, Dexter Hysol Aerospace, in Los Angeles (Calif.) County court on October 27, 2017. Judge Michele Flurer of Long Beach, Calif., presided over the three-week trial. Plaintiffs, the four children of Velma Searcy, filed suit against Dexter Hysol and numerous others for wrongful death, negligence, strict products liability and punitive damages. Dexter Hysol was the only defendant remaining at the time of trial. Plaintiffs alleged Velma Searcy, age 51, developed malignant mesothelioma as the result of occupational and childhood asbestos exposure, including to Dexter Hysol Aerospace adhesives during her career as an electrical technician in the aerospace industry from 1982 to 1987. Dexter Hysol presented evidence that Ms. Searcy did not have mesothelioma or any asbestos related disease. Dr. Michael Fishbein (pathologist) and Dr. Barry Horn (pulmonologist) testified on behalf of Plaintiffs. Dr. Victor Roggli (pathologist) and Dr. Allan Feingold (pulmonologist) testified on behalf of the defense. Dexter Hysol also contended that Ms. Searcy was not exposed to asbestos from its products because its aerospace adhesives were not present at Ms. Searcy's workplaces, as alleged. Plaintiffs requested the jury award $21,600,000 for the wrongful death of Ms. Searcy and award punitive damages for the alleged malicious conduct of Dexter Hysol. The jury deliberated for less than three hours and returned a verdict in favor of Dexter Hysol, finding that the decedent did not have an asbestos related disease.

Daniel G. Cheek of **Drew Eckl & Farnham** in Atlanta, and a colleague, obtained summary judgment from DeKalb State Court Judge Johnny Panos in a wrongful death case argued on October 5, 2017. Plaintiffs' decedent was an independent contractor hired to repair lights atop a 30-foot pole around a sports court. Decedent leaned his ladder against the pole, climbed it and lashed himself to it. A weld at the bottom of the pole broke and it collapsed with the decedent, killing him. In summary, the Court held the independent contractor was expected to determine for himself whether his place of employment was safe, citing *Hudson v Santangelo*, 228 Ga.App. 768, 774 (1997), quoting *Amear v. Hall*, 164 Ga.App. 166, 167 (1982). The Court also found no evidence that Defendants had either actual or superior knowledge of the dangerous condition.The settlement demand was $6 million.

Barbara A. Marschalk of **Drew Eckl & Farnham** in Atlanta successfully defended her client, Signature Research Inc., in the Georgia Court of Appeals. Signature Research inspected and certified the safety of a zipline course located in the Dominican Republic. Five months after her client's last inspection of the course, and after her client recommended certain repairs be made to the course by the owner of the course, a portion of the zipline course failed, resulting in injuries to the plaintiff. Ms. Marschalk filed a motion to dismiss the plaintiff's lawsuit on forum non conveniens grounds. The trial court agreed and granted her motion, effectively dismissing the suit against Signature Research in Georgia. The plaintiff appealed to the Georgia Court of Appeals. After receiving extensive briefing and hearing oral argument by the parties, the Court of Appeals affirmed the trial court's decision to dismiss the lawsuit against Ms. Marschalk's client.

M. B. "Burt" Satcher III, a partner in the Atlanta office of **Coleman Talley**, concluded a four-day jury trial on October 12, 2017 in the Superior Court of Cobb County. Judge Robert Leonard presided over the hard-fought case that had been filed three years ago. Mr. Satcher successfully defended a doctor of chiropractic in this civil suit involving allegations of malpractice and causation of significant and long-term injuries to the left neck, shoulder, and arm of the former 26-year-old female patient. The 12-person jury unanimously decided in favor of Mr. Satcher's client and treating doctor, as well as a co-defendant owner of the practice represented by separate counsel, after only one hour and 15 minutes of deliberations. Counsel for the former patient at trial argued to the jury that an award of $1 million would be appropriate and, furthermore, rejected a nominal offer to resolve the case before trial. There was no discussion about a settlement resolution once the trial began on October 9. Discussions with jurors after the trial indicated that the jury found no malpractice by the treating doctor and likewise no causation of the injuries alleged.

Continued on next page

Member News & Case Wins

Continued from previous page

Myada E. Baudry of **Gray Rust St. Amand Moffett & Brieske** in Atlanta (and a colleague turned plantiffs lawyer) tried a case in Fulton County State Court before Judge Fred C. Eady. Plaintiff alleged the defendant trespassed by cutting down six trees on the plaintiff's property. The defendant maintained he was given permission to cut them down by the tenant, who was the daughter of the plaintiff. The plaintiff sought $126,337,15 for the trees, around $50,000 in attorney's fees, and punitive damages. (The defense expert valued the trees at around $20,000.00 total.) The jury decided in favor of the defendant. Because the defense had sent an O.C.G.A. § 9-11-68 offer of settlement over a year prior, Ms. Baudry is seeking attorney's fees and expenses of approximately $70,000.00.

GDLA Vice President **William T. "Bill" Casey, Jr.** and **Monica L. Wingler** of **Swift Currie McGhee & Hiers** in Atlanta defended a premises liability case before Judge Stan Gunter in Union County Superior Court.

The plaintiff, a very likable, retired P.E. coach, was at the defendant's establishment, The Copperhead Lodge, with a group of friends for dinner and was seated in a plastic chair on the outdoor deck. He claimed his chair collapsed causing him to fall to the floor. The chair's left rear leg, and possibly a second leg, broke. The chair was thrown away that same evening or soon after. The defendant had bought the chair at Home Depot about six weeks prior, and the underside of the chair was marked "residential use only."

The court denied the plaintiff's pre-trial motion for spoliation based on disposal of the broken chair, but restricted Defendant from showing the jury an identical chair bought the same day as the one that broke. The case proceeded on theories of negligence and, over the defendant's objection, *res ipsa loquitur*. The defendant denied fault.

The plaintiff claimed immediate low back pain radiating to his right ankle and foot. He treated with Ali Mortazavi, MD, of Resurgens Orthopaedics and Michael Lott, MD, of Center for Spine Interventions. He had lumbar spine surgery about six years prior to the incident and had been treating for low back pain with radiation to his right leg, including treatment with Drs. Mortazavi and Lott, for two years before the date of loss. After filing the lawsuit and about two years after his fall, the plaintiff began treating for neck pain with radiation to his left arm, which he also claimed resulted from his fall. Almost three years after his fall, he had multi-level neck surgery performed by Lucy Love, MD, in Tampa, Fla.

The plaintiff testified at trial. He also presented testimony of his wife and four of the friends who were with him that evening. Generally, his friends testified he was not misusing the chair when it collapsed. The plaintiff was also permitted to present testimony that one of his friends heard an unidentified waitress say there had been a prior chair collapse. Plaintiff played video depositions of Drs. Mortazavi, Lott, and Love. Dr. Mortazavi testified that Plaintiff's low back and right leg pain pre-existed the date of loss, but that his severe cervical stenosis was caused by his fall. Dr. Lott testified the plaintiff's fall exacerbated his low back pain and caused a new onset of sciatica down his right leg, but had no opinion regarding the cause of Plaintiff's neck pain. Dr. Love testified the plaintiff's neck pain resulted from this fall. Plaintiff did not tell his doctors that he had two falls subsequent to the one at The Copperhead Lodge and before his neck surgery. He fell down several steps at his home. He also fell while walking on a boat dock. He denied injury in either fall.

The plaintiff claimed medical specials of $237,418.67. He also sought damages for his pain and suffering and punitive damages; he made a pre-suit, policy-limit demand of $1 million. The case was not mediated, but the parties engaged in settlement discussions. Plaintiff's last demand was $300,000. Defendant's last offer was $125,000.

In closing, Plaintiff's counsel asked for $1.2 million. The court granted the defendant's motion for directed verdict on the plaintiff's claim for punitive damages.

The jury deliberated for less than 20 minutes and returned a verdict in favor of defendant. The case is *Larry Barnes v. The Cycle Resort @Copperhead, LLC.*

Charles M. "Chuck" Dalziel, Jr. of **Gregory Doyle Calhoun & Rogers** in Marietta prevailed in front of Judge Robert Leonard in the Superior Court of Cobb County on a motion for interlocutory injunction relating to a non-competition covenant signed by a licensed professional counselor. The motion regarding a covenant with a one-year duration was held 10 months after the counselor had left the former employer and started her new job. This covenant was subject to consideration under the new Restrictive Covenants Act. The judge found the covenant enforceable, but held there was no need for an injunction now, and the imposition of an injunction would cause economic hardship to the employee, who had received a transplant earlier in her life and feared having her health insurance impacted by an order prohibiting her to work for her current employer.

In another case, while representing the Registered Investment Advisor (RIA) employer of a retirement plan advisor, Mr. Dalziel obtained an interlocutory injunction against the employee from soliciting the clients he serviced while with the RIA. This case is pending in the Superior Court of Gwinnett County before Judge Tom Davis. The employee tried to transition by creating a list of the customers he serviced from public information, but the court recognized the only way the employee could create the list was to seek the public information of the clients he had serviced with the prior employer. This case is proceeding under the old law.

W. Justin Purvis of **Young Thagard Hoffman Smith Lawrence & Shenton** in Valdosta obtained a successful outcome in the State Court of Chatham County. The plaintiff alleged the defendant failed to keep a proper lookout and maintain his lane when he merged into the plaintiff's vehicle, pushing her off the road and causing her to lose control. The defendant denied liability for causing the accident; however, he left the

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scene of the accident before law enforcement responded. The plaintiff alleged significant spinal injuries as a result of the wreck. After 35 minutes of deliberation, the jury returned a defense verdict.

J. Holder "Jay" Smith, Jr. and **W. Justin Purvis** of **Young Thagard Hoffman Smith Lawrence & Shenton** in Valdosta recently obtained a favorable verdict in the Superior Court of Thomas County. The defendant admitted negligence in causing the accident. The plaintiff alleged the defendant was looking down at his radio with his cruise control set on 65 mph and failed to stop or otherwise avoid hitting her vehicle traveling in front of him. The plaintiff claimed she had to undergo surgery to revise a prosthetic previously implanted in her left knee. Defense counsel argued the plaintiff's knee surgery was not related to the accident in question after the surgeon who performed the surgery testified he misdiagnosed the plaintiff and could not opine to a reasonable degree on the medical probability that the surgery was related to the accident. The plaintiff's primary doctor, who treated her both before and after the accident, testified she was much worse after the wreck and that her left knee surgery was necessitated by the plaintiff's condition. The plaintiff alleged special damages of over $100,000.00. The jury returned a verdict of $20,000.00 after one hour of deliberation.

Attorneys at **Weathington McGrew** in Atlanta have notched several successes in recent months. The Court of Appeals of Georgia affirmed a trial court's grant of summary judgment that was obtained by **Andrew Bagley** and **Sam Britt** for their OB/GYN client and his medical practice in April 2017. The plaintiffs alleged that the OB/GYN physician applied excessive lateral traction in the face of shoulder dystocia and caused the plaintiffs' son to sustain a brachial plexus injury. Andrew and Sam were able to show that the plaintiffs' lone expert's opinion impermissibly relied upon the doctrine of res ipsa loquitor, which is inapplicable to medical malpractice cases in Georgia. As a result, the trial court excluded the plaintiffs' expert and awarded summary judgment to the defendants. The Court of Appeals affirmed the trial court's decision, finding that there was no evidence from which a jury could determine that the OB/GYN had applied any lateral traction during the delivery.

Dan McGrew and **Sam Britt** obtained a dismissal on behalf of their dentist client and her dental practice. Defense counsel was able to show that the plaintiff's claim was governed by the one-year statute of limitations applicable in foreign object cases. They further persuaded the trial court that their clients were entitled to dismissal because the plaintiff failed to file her complaint within one year of the alleged discovery of the foreign object.

Paul Weathington and a colleague won a defense verdict for a Columbus pulmonologist in a two-week jury trial in Muscogee County. The case involved respiratory distress complications following neck surgery, resulting in brain damage and blindness. The jury rendered a defense verdict for the pulmonologist defendant yet found in favor of the plaintiff for $26 million dollars for the conduct of the hospital co-defendant and its employee.

Gabriella Klaes recently won summary judgment in a Section 1983 action brought against two correctional nurses. The plaintiff alleged that he was denied the appropriate treatment for his injuries and mental health. Ms. Klaes argued that the medical records showed the nurses responded to his medical and mental health requests with customary medication and within the applicable time period. Further, the plaintiff failed to provide evidence that the nurses acted with a complete denial of readily available treatment for a serious medical condition. United States District Judge Clay D. Land agreed and granted summary judgment.

Robert A. Luskin and a colleague in **Goodman McGuffey's** Atlanta office. achieved a full defense verdict after a four-day trial in Clayton County. The case, *Alissa R. Turner v. Air Freight Atlanta, Inc. and Thomas Blakely*, CAFN No. 2015CV00756D, involved a wheel detaching from a box truck and sideswiping the plaintiff's vehicle. The plaintiff claimed an injury in the incident and brought suit against the company that owned the vehicle, as well as the employee-driver personally. The plaintiff alleged the company and driver were negligent for causing the incident and for failing to properly maintain and repair the wheel. The plaintiff also sought punitive damages against both defendants. After three days of argument, both parties rested and turned the case over to the jury. In the early afternoon of the fourth day the jury returned a full verdict for the defense, vindicating both the company and the company's driver of all claims against them.

GDLA Past President **Matthew G. Moffett** and **Jacquelyn Smith** of **Gray Rust St. Amand Moffett & Brieske** in Atlanta obtained a defense verdict in a wrongful death case against Triest Ag Group, Inc. and Riley Jake Hulsey after a week-long jury trial in the State Court of Gwinnett County.

The defense team argued that when the decedent, Brandon Lanier stepped into the cross walk on Main Street in downtown Tifton on April 22, 2014, the white "walk" sign had gone away, and the orange "don't walk" hand was flashing. The plaintiff's team, Katherine McArthur, Caleb Walker, Jordan Josey and Laura Penn of the McArthur Law Firm in Macon, asserted that Mr. Lanier started crossing on the "walk" signal, although he had not yet entered into the crosswalk until the orange hand began flashing. The accident was captured on video as a police officer in his patrol vehicle happened to be stopped on the opposite side of this intersection.

The 12-person jury heard from witnesses over the course of several days, including the plaintiff's eyewitnesses, who testified that Mr. Lanier had pressed the pedestrian crossing button, waited for the signal and let an approaching truck come to a stop before crossing. One eyewitness, an off-duty police officer, testified that Mr. Hulsey never looked right before proceeding to make his right turn on red.

Notwithstanding some conflicting evidence, the jury deliberated for less than two hours before finding for the defense. The defense team convinced the jury that both the pedestrian and driver contributed to the accident and that it was not reasonable to place all of the responsibility on either of them. The verdict assigned 50 percent of the fault to each party.

The plaintiff asked for a verdict of up to $20 million and not less than $10 million. The estate had already received $1 million in a settlement from the primary insurance carrier in 2016 in exchange for a limited liability release. There was an excess insurance policy of several millions and prior to and during the trial, the parties worked on a further settlement and then a high-low agreement but were unable to come to an agreement on numbers.

Plaintiff has indicated an intention to appeal the verdict. The case is *Nancy Quynn, as administrator of the estate of Brandon Lanier v. Riley Jake Hulsey and TriEst Ag Group*, No. 15C04812-4.

Mary Katz and GDLA Treasurer **David N. Nelson**, partners at **Chambless Higdon Richardson Katz & Griggs** in Macon, assisted by associate **Chris Miranda,** recently obtained an Order in the State Court of Rockdale County striking the plaintiff's complaint for failure to preserve critical evidence. The plaintiff sued the defendant, a municipality, claiming it had failed to properly maintain a roadway which resulted in standing water. The plaintiff claimed his pregnant wife, who was driving a 1994 Chevrolet pickup truck, struck the standing water, which then allegedly caused her to depart her lane of travel and collide with an oncoming vehicle. The ensuing collision resulted in the death of the plaintiff's wife and unborn child.

Within days of the accident, the plaintiff retained counsel and advised the wrecker service that his vehicle was an important piece of evidence. However, he thereafter ignored multiple certified letters from the wrecker service, as well as calls from his mother alerting him that he had received mail indicating his truck was going to be disposed of if he did not pay the storage fees. Ultimately, the truck was disposed of before the municipality received an ante litem notice and before it had an opportunity to inspect the vehicle.

Judge Nancy Bills of the State Court of Rockdale County issued an order striking the plaintiff's complaint for failure to preserve the pickup truck. The court concluded the municipality had been prejudiced by the destruction of the truck because there was no way for it to determine after the fact whether a mechanical failure or improper equipment had potentially caused the accident. The court also concluded that because the plaintiff had identified this evidence for preservation prior to its destruction that his subsequent decision to ignore mail from the wrecker service supported a finding of bad faith on his part. Accordingly, the court struck the plaintiff's complaint and dismissed the action. ◆

Welcome, New GDLA Members!

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

Douglas Geoffrey Ammerman
Hall Booth Smith, Atlanta

Alycia Foggs-Anderson
Lynn Leonard & Associates, Atlanta

Quinton R. Beasley
Rutherford & Christie, Atlanta

Fletcher Beaumont "Beau" Howard
Freed Howard, Atlanta

Eugene Bartlett Benton
Drew Eckl & Farnham, Atlanta

Spencer H. Brown
Weathington McGrew, Atlanta

Abigail Castleberry
Hall Booth Smith, Atlanta

Joseph Charles "Joe" Chancey
Drew Eckl & Farnham, Atlanta

Emily Kayla Chiang
Drew Eckl & Farnham, Atlanta

Sandra Mekita Cianflone
Hall Booth Smith, Atlanta

Joseph Cianflone
Hall Booth Smith, Atlanta

Caitlyn Clark
James Bates Brannan Groover, Macon

Alisa Connell
Worsham Corsi
Scott & Dobur, Atlanta

Caleb Davis
Jones Cork, Macon

Jason Howard Deere
Carlock Copeland & Stair, Atlanta

Samantha Dorsey
Goodman McGuffey, Atlanta

James "Jay" Doyle
Lewis Brisbois
Bisgaard & Smith, Atlanta

William Dale Ellis
Lynn Leonard & Associates, Atlanta

Jena Emory
Gray Rust St. Amand
Moffett & Brieske, Atlanta

Christopher George
Drew Eckl & Farnham, Atlanta

Amanda Hall
Dennis Corry Smith & Dixon, Atlanta

Jessica F. Hubbartt
Mabry & McClelland, Atlanta

Norbert "Bert" Daniel Hummel IV
Lewis Brisbois
Bisgaard & Smith, Atlanta

Joshua Joel
Goodman McGuffey, Atlanta

Earl Roger King
Drew Eckl & Farnham, Atlanta

Gabriella B. Klaes
Weathington McGrew, Atlanta

LeRyan Paige Lambert
Hawkins Parnell
Thackston & Young, Atlanta

Carolyn Lee
Waldon Adelman Castilla
Hiestand & Prout, Atlanta

Patrick William Leed
Hamilton Westby Antonowich & Anderson, Atlanta

Caitlin Dorne Mattler
Hall Booth Smith, Atlanta

Alex D Mayfield
Waldon Adelman Castilla
Hiestand & Prout, Atlanta

Stephanie McDonald
Hall Booth Smith, Brunswick

D. Reid Morelli
Hall Booth Smith, Atlanta

Neeta Muddaraj
Waldon Adelman Castilla
Hiestand & Prout, Atlanta

Eric Retter
Drew Eckl & Farnham - Financial Services Office, Atlanta

Marlina Rogers
James Bates Brannan Groover, Macon

Parks Kalervo Stone
Wilson Elser Moskowitz Edelman & Dicker, Atlanta

Cheryl Lynn Tomlinson
Wallace Law Group, Valdosta

Jason T. Vuchinich
Hall Booth Smith, Atlanta

Lawrence Lee Washburn IV
Wilson Elser Moskowitz Edelman & Dicker, Atlanta

Samuel O. Weaver
Weathington McGrew, Atlanta

Bradley Steven Wolff
Swift Currie McGhee & Hiers, Atlanta

Bradley Wood
Carlock Copeland & Stair, Atlanta

Walter B. Yarbrough
Nall & Miller, Atlanta

IN MEMORIAM:
Richard A. "Rick" Brown, Jr.

In 1977, Rick became a founding partner in Dickey Whelchel Brown & Readdick. This respected firm—now known as Brown, Readdick, Bumgartner, Carter, Strickland & Watkins—still carries his name.

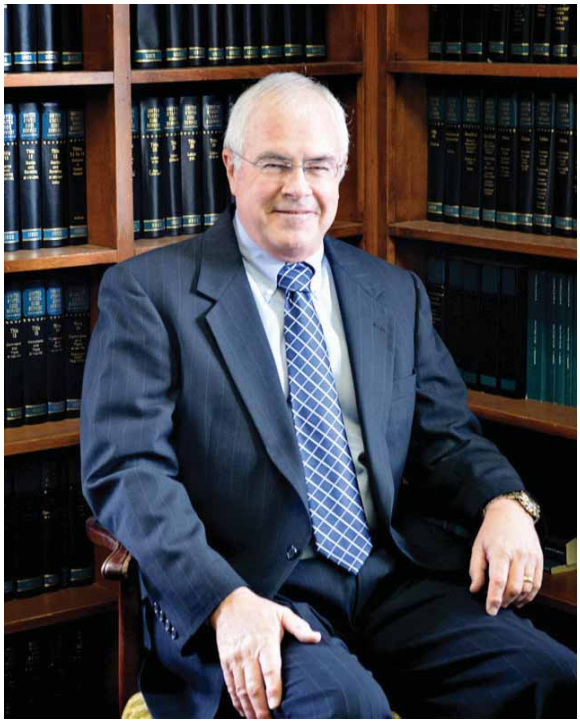
Longtime GDLA member Richard A. "Rick" Brown, Jr., a respected defense lawyer and avid motorcyclist, died on October 16, 2017, after a motorcycle accident in Camden County, Ga. He passed away in Shands Hospital in Jacksonville, Fla., later that day.

Rick Brown was born on July 4, 1947, in Washington D.C. to Richard Albert Brown, Sr., and Marianne Burns Brown. He spent much of his childhood in St. Petersburg, Florida, where he worked a paper route on his bicycle and later scooter—perhaps discovering his love of two wheels—and enjoyed life on the water. He was the eldest son of six siblings, and graduated from St. Pius High School in Atlanta.

He attended college at Loyola University in New Orleans where he met his future wife, Janet Amelia Smart, a dental hygiene student from Galesburg, Ill. He graduated with a bachelor's degree in Economics in 1969.

He received his Juris Doctor from the University of Georgia in 1972, where he was a member of the *Georgia Law Review* and graduated twelfth in his class. Rick had been in ROTC at Loyola University. After law school, he served on active duty in the United States Army Infantry at Fort Benning, where he graduated from Officer Candidate School (OCS).

Rick and Janet married in 1971 in Atlanta. They moved to St. Simons Island where they would reside for the next 46 years. They had two children, which Rick would call, along with his wife, the "joys of his life." Their daughter, Heather (Rick) Natsch, graduated magna cum laude from Davidson College and received her MBA from the Haas Business School at the University of California-Berkeley. She lives in San Francisco, where she is a successful entrepreneur and the mother of two children. Their son, Taylor Brown, graduated summa cum laude from the University of Georgia and resides in Wilmington, N.C. He is the author of four books, two of which have been named "Books All Georgians Should Read" by the Georgia Center for the Book.



In 1977, Rick became a founding partner in Dickey Whelchel Brown & Readdick. This respected firm—now known as Brown, Readdick, Bumgartner, Carter, Strickland & Watkins—still carries his name. Rick served as trial counsel to some of the world's leading and most-recognized companies, as well as individuals and small businesses, litigating complex and high-stakes cases across Georgia and Florida. Rick tried well over 100 civil cases to jury verdict as well several hundred workers' compensation and other administrative trials. Rick served as president of the Brunswick-Glynn County Bar Association and member of the Southern District Advisory Board. He was ranked AV-Preeminent by Martindale-Hubbell. His induction as a member of the American Board of Trial Advocates also signified his highest level of professional excellence.

Rick kept up his love of motorcycling. In the fall of 2014, at the age of 67, he rode his motorcycle more than 9,000 miles around the United States, visiting family and friends and many of the historic landmarks and national parks of our nation.

Rick retired from the active practice of litigation in December of 2014, but remained of counsel to the firm. He was a certified mediator and served as a senior correspondent for BikeBound.com, becoming a well-respected member of the motorcycle community.

Rick was widely known in the community as a man of character and principle, who was a pillar of strength to those who knew him. He died doing what he loved. ◆

GDLA Files Amicus Brief on Application of the Expert Affidavit Requirement in Medical Malpractice Cases

On October 31, 2017, GDLA filed an *amicus curiae* brief in the Georgia Supreme Court regarding the application of the expert affidavit requirement in a medical malpractice case.

The primary issue addressed is whether the conduct of a professional that was not put at issue in the original complaint nor described or alluded to in any expert affidavits filed within the periods described by O.C.G.A. § 9-11-9.1 can be added into a lawsuit after the statute of limitations expires because a claim of general vicarious liability, which had been previously asserted, used the term "treating physicians." In the present case, Plaintiffs attempt to recover on a wrongful death and estate damages claim. Plaintiffs' last amended complaint prior to the running of the statute of limitation explicitly listed certain doctors in the physicians' group ("Appellants) and used the term "treating physicians." After the statute of limitations had run, Plaintiffs filed an amended expert affidavit to include specific acts of negligence against other doctors in the physicians' group and then sued Appellants on a vicarious liability claim.

GDLA filed its brief to argue that the Appellate Court erred when it permitted Plaintiffs to amend their affidavit to include physicians who had not previously been listed in any manner in either an expert affidavit or complaint prior to the running of the statute of limitation. GDLA argues that if the physicians at issue cannot be sued themselves for their actions because the statute of limitation had run, then any claim of vicarious liability for their actions should also be precluded, since vicarious liability is entirely derivative. GDLA further argues that O.C.G.A. § 9-11-9.1 enumerates three specific periods where an expert affidavit may be filed. Since the expert affidavit at issue did not fall within one of these periods, it cannot be construed to defeat a statute of limitations defense.

The case is *Rockdale Hospital, LLC d/b/a Rockdale Medical Center et al. v. Oller et al.* Supreme Court of Georgia, Docket No. S18C0149.

We thank the brief's co-authors, David Hanson and Samuel Britt of Weathington McGrew in Atlanta for their service to GDLA. The Amicus Committee is led by Chair Marty Levinson of Hawkins Parnell Thackston & Young in Atlanta and Vice-Chair Garret Meader of Drew Eckl & Farnham in Brunswick. ◆

Court of Appeals Sides with GDLA Amicus Brief on Inapplicability of Collateral Source Rule to Defendant's Discovery Request to Nonparty Hospital

On January 30, 2018, the Georgia Court of Appeals issued an opinion in *WellStar Kennestone Hospital v. Roman*, Docket No. A17A1497, a case involving the question of whether a nonparty medical provider may be required to provide information relating to rates charged by the provider to patients other than the plaintiff. In *Roman*, plaintiff Autumn McKinney sued Mario Roman for injuries sustained in a motor vehicle collision.

During that litigation, Roman served a notice of deposition on nonparty Kennestone Hospital, where McKinney had been treated following the accident. The notice of deposition sought to require the hospital to designate an officer or employee to testify as to rates the hospital would charge for the same services the hospital had provided to McKinney if provided to uninsured patients, insured patients, patients under workers' compensation plans. patients under Medicare/Medicaid plans, and litigant/non-litigant patients.

WellStar moved to modify the subpoena, arguing that the information requested was a collateral source, and thus not calculated to lead to discovery of admissible evidence. Roman contended that the information would support or pertain to his contention that the amounts charged by the hospital for McKinney's care were not reasonable for the services rendered.

The trial court denied the motion to modify the subpoena, holding that there is "no authority in Georgia law to support nonparty WellStar's contention that the collateral source rule bars the discovery of the medical rates and charges of third parties that are not involved in the case." WellStar appealed the trial court's denial of its motion to modify the subpoena.

GDLA's Amicus Curiae Committee received a request from GDLA members Jonathan Adelman, Ashley Rice, and Taylor Bennett of Waldon Adelman Castilla Hiestand & Prout in Atlanta, and GDLA's Executive Committee approved the request. Marty Levinson, who chairs the Amicus Brief, and Will Martin of Hawkins Parnell Thackston & Young in Atlanta authored GDLA's brief, which argued primarily that the collateral source rule does not apply to discovery requests. Rather, GDLA contended that the discovery Roman sought from WellStar was clearly relevant and within the scope of discovery without regard to whether it might ultimately be admissible.

GTLA filed its own amicus brief, contending that the subpoena to WellStar was barred by the collateral source rule and that the information requested would not lead to discovery of admissible evidence. Essentially, GTLA contended that evidence of rates charged by the hospital to other patients could never be relevant in a personal injury case because the defendant would not be permitted to mention why the rates differed (i.e., the existence of insurance or other benefits that would apply to a particular patient's care).

In affirming the trial court's denial of WellStar's motion to modify the subpoena, the Court of Appeals reached the same conclusion urged in the GDLA brief— that there is no authority in Georgia supporting the argument that the collateral source rule bars discovery of medical rates and charges of third parties. The Court of Appeals' decision does leave open the possibility that such a subpoena could be quashed if a trial court determined the request to be overly burdensome or the information requested to be somehow privileged. ◆

Supreme Court Sides with GDLA Amicus Brief Addressing Ordinary Negligence in Professional Malpractice Cases

The Supreme Court, on March 5, 2018, issued an opinion in a medical malpractice case in which GDLA submitted an amicus brief—*Doherty v. Brown,* Docket No. S17G0733.

At trial, the plaintiffs requested and the judge gave, over the defendants' objection, a jury instruction on ordinary negligence (in addition to instructions on professional negligence).

The plaintiffs argued that an instruction on ordinary negligence was warranted based on the defendants' "obvious" obligation "to save the patient if they're not breathing" and alleged misrepresentations made by a defendant doctor to other healthcare providers. In anticipation that the judge would give the ordinary negligence charge, plaintiffs' counsel made extensive argument to the jury in closing based on the ordinary negligence standard as opposed to the professional negligence standard under Georgia law.

After a three-phase trial, the jury ultimately rendered a verdict of nearly $22 million, apportioning all fault among the named doctor and two defendant companies that employed medical professionals involved in the patient's care. Another defendant, the nursing director, was absolved of liability by the jury.

The defendants appealed the verdict, but it was affirmed on appeal by the Georgia Court of Appeals. After the defendants' petition for certiorari was granted by the Supreme Court of Georgia, they requested that GDLA file an amicus brief in the appeal. GDLA Board member Jamie Weston of Trotter Jones in Augusta stepped up to write GDLA's brief, which argued primarily that the trial court had erred in charging the jury on ordinary negligence when all of the issues for the jury's consideration were in fact ones concerning professional negligence. Essentially, GDLA contended, if the plaintiffs were allowed to argue ordinary negligence in professional malpractice cases, the higher standard of proof now required in those cases would be converted to one of ordinary negligence. GDLA's brief also focused on decisions from other jurisdictions under similar circumstances which provided for a clear-cut distinction between the two types of cases and would not have permitted a charge on ordinary negligence in this case. GTLA filed its own amicus brief in support of the plaintiffs-appellees and argued that the underlying verdict and the Court of Appeals' judgment be affirmed.

In a 22-page opinion , the Supreme Court of Georgia sided with the appellants-defendants and held that "[t]he Court of Appeals erred in concluding that an ordinary negligence instruction was authorized by evidence that a doctor defendant responded inadequately to medical data provided by certain medical equipment during a medical procedure."

In particular, the Supreme Court rejected the argument and the Court of Appeals' holding that "whether and how to respond to medical data from medical devices during a medical procedure does not require medical judgment." The Supreme Court went on to explain that "the ability of the public to purchase a medical device [here, a pulse oximeter] is not evidence of general lay knowledge regarding how to interpret and act upon readings provided by that device, much less in the middle of medical procedure." Furthermore, even if a layperson could be presumed to from the pulse oximeter that the patient was experiencing respiratory distress, "it does not follow that lay persons would know the proper response to that information in the midst of a complex medical procedure."

The Supreme Court also specifically criticized plaintiffs' counsel for "exacerbating the impact of this error in closing argument, [by] suggesting to jurors that the defendants merely had to exercise care of the sort 'ordinarily careful persons' and by "invit[ing] jurors to conflate the standards for ordinary and professional negligence."

Lastly, the Court held that "[b]ecause the verdict was a general one such that we cannot determine that the jury did not rely on this erroneous theory of liability," a full retrial of the case is required as to the appellants, but not as to the nursing director who received a defense verdict. The new jury will be required to decide punitive damages again (no punitive damages were awarded in the first trial) because issues relating to punitive damages are too interrelated with the liability issues in the case for a verdict on punitive damages alone to stand.

The Supreme Court specifically declined to decide or comment at all on whether the defendant doctor's alleged misstatements to other medical providers after the incident could support a charge on ordinary negligence. Interestingly, though, the Court's opinion does seem to indicate that even if an ordinary negligence charge might under some circumstances be appropriate in a medical malpractice case, the trial court may not "giv[e] only [a] vague instruction that some of the claims involved ordinary negligence and others involved medical malpractice" but should instead "tell the jury which claims should be considered under a professional negligence standard and which claims should be considered under an ordinary negligence standard," or at least "give the jury a standard by which it might make that determination."

This brief and the Court's opinion, as well as other GDLA amicus briefs, are available in the members only area under "Amicus Policy & Briefs." ◆

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What Every Defense Attorney Must Know About Sexual Harassment: A Primer

By Robert A. Luskin and Joshua Y. Joel
Goodman McGuffey, Atlanta

Harvey Weinstein. Bill O'Reilly. Roger Ailes. Kevin Spacey. Matt Lauer. Charlie Rose. Representative John Conyers, Jr. Senator Al Franken. Judge Alex Kozinski. And, the list goes on.

In the current climate, it seems that sexual harassment claims are taking down big names almost every week, and there is increased awareness of issues of sexual harassment in the work place. As defense attorneys, we must be prepared for a likely deluge of sexual harassment claims that will come our way. In fact, the Equal Employment Opportunity Commission has reported a spike in visits to its sexual harassment website, as well as a surge in interest in its sexual harassment workplace training program. The purpose of this article is to provide some basic guidance for Georgia defense attorneys, many of whom are not employment law practitioners, on defending against sexual harassment claims and recognizing the potential issues before they become a major problem and your client ends up in the headlines.

Defining Sexual Harassment

Sexual harassment is a form of workplace sex discrimination when an individual is subjected to unwelcome sexual conduct in the workplace. "Unwelcome" is not the same as non-voluntary. In fact, the Eleventh Circuit has held that a victim can engage in otherwise voluntary sexual activity in the classic legal sense, but it could still be considered sexual harassment if the employee did not solicit or incite the activity.[1] The lynchpin is whether the employee regarded the conduct as undesirable or offensive, even if, in the moment, he or she voluntarily participated. The Supreme Court has echoed this holding, holding that the inquiry is whether the victim, by his or her conduct, indicated that the alleged advances were unwelcome.[2] Thus, the alleged victim's activity—including his or her provocative speech or manner of dress—is relevant to considering whether the sexual advances were unwelcome. While this standard has been criticized by commentators, it reflects the current state of the law in the United States.

The EEOC guidelines define sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. Such activity can include:

- Offensive sexual comments, including innuendo, obscene jokes, or lewd language;
- Sexually offensive communications, such as e-mails or text messages;
- Sexual or romantic propositions of coworkers;
- Insults, whistling, or other sexually suggestive sounds;
- Displaying pornographic pictures or sexual material in the workplace;
- Unwelcome touching; or
- Pressuring or coercing a coworker for sexual favors.

It is important to note that the gender of the harasser and victim is only relevant to the extent it shows that unwanted sexual activity occurred. In other words, sexual harassment can be male to female, female to male, male to male, or female to female, as long as it was unwanted and motivated by the victim's sex.

Sexual Harassment Claims Under Title VII

Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace on the basis of sex.[3] The idea that sexual harassment could be considered sex discrimination did not crystalize until 1980, when the EEOC added sexual harassment claims to its sex discrimination guidelines. In 1986, the Supreme Court followed by recognizing standalone sexual harassment claims under Title VII in *Meritor Savings Bank v. Vinson*.[4] After *Vinson*, federal courts recognize three types of claims of sexual harassment prohibited under Title VII: *quid pro quo* claims, hostile work environment claims, and retaliation claims.

Quid Pro Quo Claims

In *quid pro quo* sexual harassment, sometimes referred to as committing a "tangible employment action," an employer explicitly or implicitly makes a condition of employment dependent on the victim's willingness to subject

himself or herself to unwanted sexual activities. For example, the Eleventh Circuit's seminal case, *Henson v. City of Dundee*,[5] involved a police supervisor who refused to allow a female officer to attend police academy unless she had sex with him. Other examples include a manager threatening to terminate an employee if she does not provide sexual favors or continue providing sexual favors or a CEO offering an employee an opportunity to go on a business trip with him, provided that the employee repays him with sexual favors on the trip. In these cases, because the supervisor relies on his or her apparent or actual authority to harass the victim, the employer is strictly liable because the harasser, by definition, acts as the company itself. Furthermore, this type of sexual harassment can make an employer liable even in a single incident and does not require a showing of a pattern of behavior.

Hostile Work Environment Claims

Another, and more common, form of Title VII sexual harassment involves claims in which sexual misconduct in the workplace is sufficiently severe and pervasive as to alter the terms of an individual's employment. To establish such a claim, an employee must have been subject to activity that created an intimidating, hostile, or offensive work environment. Isolated incidents of petty slights are not sufficient.

To demonstrate the "severe and pervasive" requirement, consider the following examples. The Eleventh Circuit found no hostile work environment where a male supervisor was caught staring at a subordinate, called her at her home a number of times, offered to do her favors, commented on her beauty, unzipped his pants in the subordinate's presence supposedly to tuck in his undershirt (which was the only shirt he was wearing), touched the employee on her knee and thigh, and touched her bracelet and the hem of her dress.[6] The supervisor also made comments such as "Indian people are really decent, and the Caribbean and Western people are really promiscuous. I can look at you and I can tell you are innocent and you don't have much experience" and "Oh, you were all by yourself on a dark and stormy night? Why didn't you call me? I would have come and spend [sic] the night with you." While the court recognized that the defendant's actions made the plaintiff uncomfortable, it reasoned that the employee never claimed that the activity was intimidating, the actions were not accompanied by sexually explicit comments, and the touching incidents were momentary and did not involve further sexual advances.

On the other hand, a hostile work environment was found where a city mayor repeatedly told stories of his sexual escapades to a city employee even though she asked him to stop, persistently tried to give the employee gifts despite her rejections, made sexual comments to her about her body, her clothing, and his desire for her, and demeaned her work telling her she was "cute" when she was upset.[7] Or, for example, the Eleventh Circuit held that conduct was sufficiently severe or pervasive where a female's supervisor fre-

Continued on page 44

Beware of the Weinstein Tax:

How the New Tax Bill Affects Sexual Harassment Settlements

In a nod to the #metoo movement and increased awareness of workplace sexual harassment and issues of sexual abuse, the Tax Cuts and Jobs Act, signed into law by President Donald Trump on December, 22, 2017, includes what has become known as the "Weinstein Tax."

The Weinstein Tax, originally proposed by Democratic Senator Bob Menandez, is not a tax at all. Rather, Section 13307 of the Act, prohibits settlement funds or attorneys' fees paid out pursuant to confidential settlement agreements from being deducted from taxes. In an effort to curb the use of settlement agreements that muzzle those who raise claims of sexual harassment or abuse, the provision was intended to protect the victims and incentivize employers not to demand confidentiality. Specifically, Section 13307 states:

> PAYMENTS RELATED TO SEXUAL HARASSMENT AND SEXUAL ABUSE.—
> No deduction shall be allowed under this chapter for—
> (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or
> (2) attorney's fees related to such a settlement or payment.

When faced with a sexual harassment claim—whether meritorious or not—employers must now consider the tax implications of contemplating settlement. For many, if not most sexual harassment claims, the potential risks of not including a non-disclosure provision will outweigh any tax benefits. This is especially true in cases that do not involve significant settlement payment amounts, as it is usually far more beneficial to keep any claims confidential then to receive the deduction. Therefore, the provisions effect on these agreements is questionable.

But, interestingly, the new law, while apparently intended to target only employers, is written broadly enough that it may prohibit plaintiffs from deducting their settlement payments as well. In fact, under the Act as written, victims of sexual harassment or abuse may need to pay taxes on the full amount of settlement payments, and even for their attorneys' fees. This may result in a lower settlement for plaintiffs, and create the opposite effect than what was intended.

It remains to be seen how the IRS will interpret the law, or whether Congress will issue technical corrections. Meanwhile, employers should be aware of this new development. If you find yourself in the unfortunate situation of defending a sexual harassment claim consider involving your companies tax professional or at the very least consider the tax implications.

—Joshua Y. Joel

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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.

Litigation in the Era of Fake News and Rampant Suspicion

By Maithilee K. Pathak, PhD, JD
R&D Strategic Solutions

Much has been written about conspiracy theories in the American psyche, some of which are classic (e.g., assassination of JFK, Roswell), others comical (e.g., the Earth is flat), and others pernicious (e.g., Sandy Hook never happened). More people believe in conspiracy theories than you might think. Did you know that roughly one-third of jurors (34 percent) agree with the statement that "the 1969 moon landing was faked"?[1]

The age of President Donald Trump has given conspiracy theories room to flourish, in part because of ubiquitous access to the Internet, daily harangues about "fake news," and the viral nature of social media platforms (e.g., Twitter). As an increasing amount of substantive material is characterized as "fake," a decreasing amount of truly fringe material is dismissed as wholly outlandish and incredible. Thus, conspiracy theories take on a patina of legitimacy—or at minimum, *plausibility*. People are left wondering what information is reliable and trustworthy, and what is actually "fake." As a litigator, why should you care?

One consequence of the "what's-fake-what's-real?" conundrum is an erosion of public confidence in both corporations and institutions; many people today doubt the integrity of large companies, regulatory and law enforcement agencies (e.g., EPA, FDA, FBI, local police) and the legal system (e.g., attorneys, legislators, and judges alike).

The degradation of confidence in corporations has profound implications for corporate litigants for multiple reasons. For example, jurors are increasingly inclined to discount expert testimony (e.g., jurors conclude that "both sides just have their hired guns," and/or that "statistics can lie"). Jurors are also more likely to hold companies to idealistic standards of conduct, reasoning that they should do more than meet government standards (e.g., jurors cynically argue that "regulations are determined by company lobbyists").

In today's jury climate, jurors simultaneously feel power*ful* and power*less*.

In what way do jurors feel power*ful*? The Internet provides infinite access to information, and information is empowering. "Google" is a verb in the American lexicon. Access to information leads people to confidently conclude, "*I can do this!*" regardless of what "this" is. People today believe they can renovate their homes, cook gourmet meals, evaluate the safety and efficacy of medications—and solve complex lawsuits. Jurors are confident that they can put information together and "figure it out."

In what way do jurors feel power*less*? Recent media coverage on the mood and psychology of "average Americans" says many feel embattled, abandoned and vulnerable. Pollsters report increased anxiety, disillusionment, unhappiness and distrust in the general population. Jurors' number one concern is government corruption and pollution and climate change rank among the top 10.[2] Jurors feel they are subject to the whims of powerful corporations perceived to be in control.

Why should corporate litigants be concerned about today's jury climate?

Increased anxiety and fear provide fertile ground for Ball and Keenan's reptile strategy to take root.[3] The reptile framework generally involves arguing that: (1) the defendant violated a fundamental "safety rule" of operating in society, one which is virtually impossible to controvert; (2) the defendant's conduct endangered the plaintiff and, left unchecked, endangers the community at large; (3) the plaintiffs need and deserve compensation; and (4) it is incumbent on jurors to render a large award and send a message to the defendant to safeguard the community. The reptile strategy activates jurors' fears. Plaintiffs advancing the reptile strategy essentially argue that the defendant company acted negligently (e.g., by rejecting industry norms, etc.) and endangered everyone in its ambit. The plaintiffs argue that the only way to get the company "back in line" is to hit it with a huge verdict, thereby negating the company's cost/benefit analysis. Jurors are implored to correct the errant behavior of the defendant rule-breaker through eight, nine or 10-digit (or more) verdicts.

What must corporate defendants do to prevail in court?

We will examine three ways in which corporate defendants can enhance their odds of prevailing in court.

Continued on page 47

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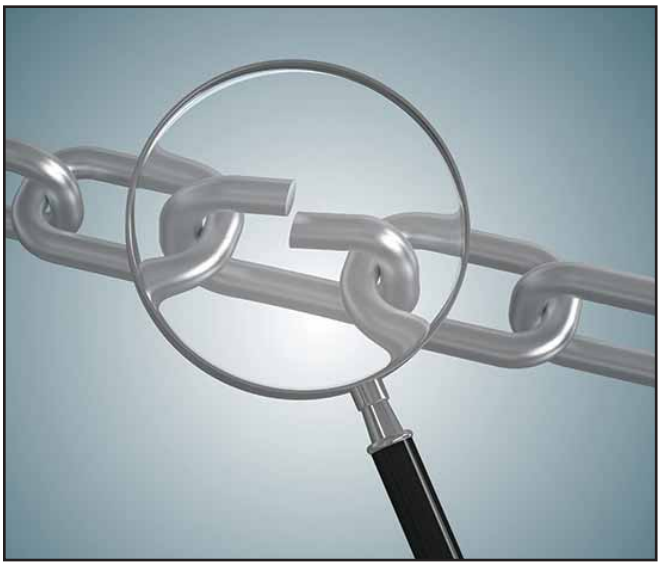
Preserving Evidence in a Product Liability Case: Focus on Medical Devices

By Marta L. Villarraga, Ph.D., and William Kane, Ph.D.
Exponent



The central piece of evidence in a product liability trial is usually the product at issue. Both sides of the dispute will want their technical experts to have the opportunity to examine the subject product and potentially conduct further analyses to support their opinions. Thus, preserving this evidence throughout the litigation is crucial, particularly because valuable and often unique information may only be obtained by an expert examining the product.

In light of the need to preserve this critical evidence, someone charged with examining the product must consider a variety of issues, including how the evidence should be handled so that no one party is prejudiced by another party's examination. When the product at issue is a medical device, particularly one that has been explanted from a patient, additional issues need to be considered, including how to handle a potentially biohazardous device and whether there are any timing considerations for the analyses. Also, there may be a desire to do destructive testing for further in-depth analysis, which an expert may consider depending on the technical issues being examined.

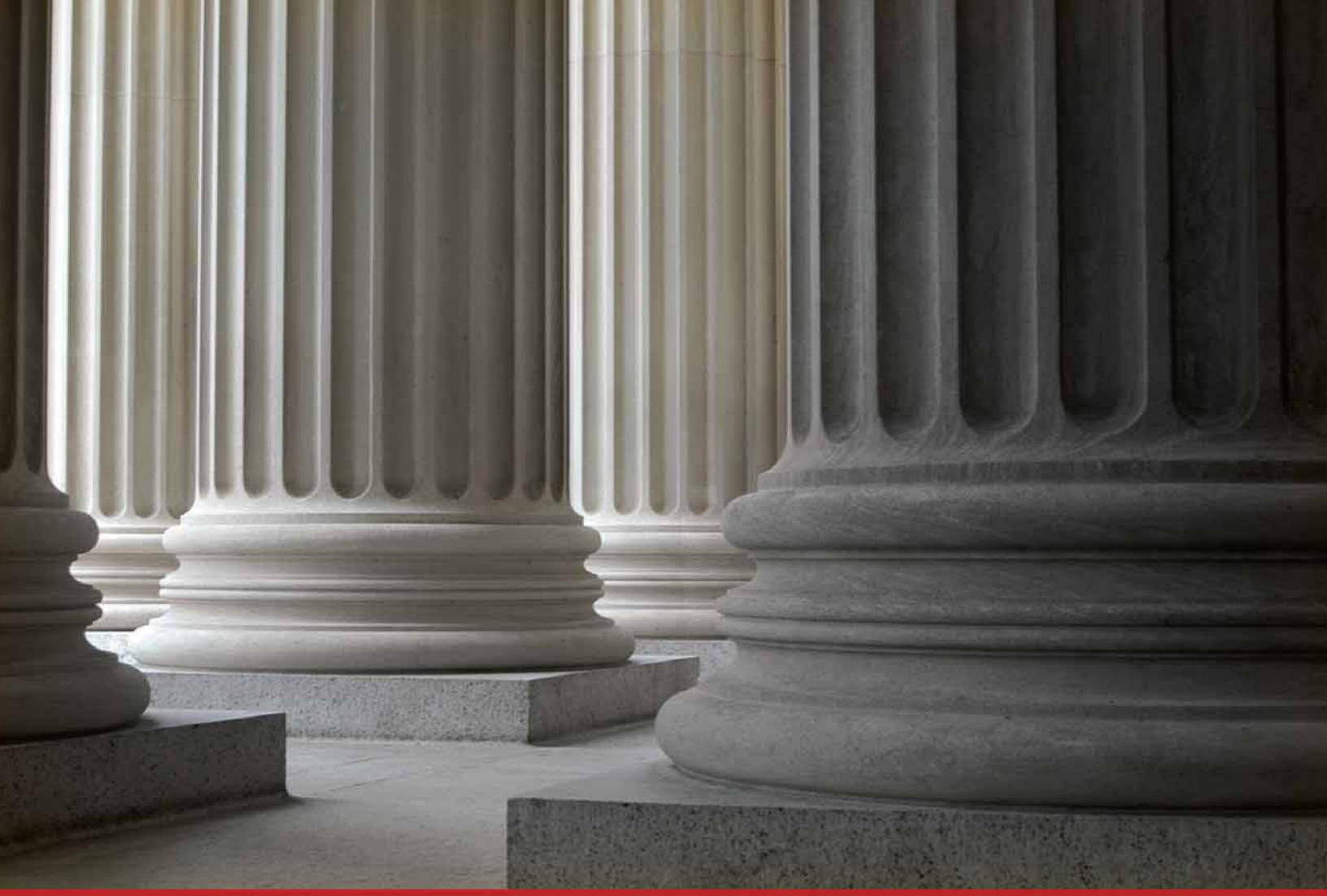
If the product must be shipped for each expert to examine, handling the evidence properly requires that anyone coming into contact with the evidence track its exchange, location, and that appropriate release and acceptance forms are completed. There also should be an agreement among the parties as to how much time each party has available to examine the product at issue and the order in which the examinations will occur. In addition, consideration should be given to having an agreement that all initial examinations be limited to nondestructive testing. Often the parties may agree to share any factual data (e.g., photographs or measurements) produced by each expert after individual examinations take place.

Thought should be given to preserving evidence at every step. Preserving medical device evidence means storing it in a safe place while it is being examined and also storing and shipping it under appropriate conditions so that the evidence will not be adversely affected. For example, some devices need to be stored in a particular fluid for preservation (e.g., saline, formalin). Additional considerations should be given to separately storing and packaging various subcomponents so that each part is accounted for and the individual parts do not adversely affect each other if all parts are packaged together.

It is important for experts to understand where and in what conditions the subject product has been stored and preserved before they received the product for their initial examination. For example, when dealing with a medical device that has been explanted from a patient, the interested parties need to be aware of how the device was initially handled after it was removed from the patient and if it was cleaned at the health care facility. If the product is an explanted device, experts need to treat the device as a biohazard and follow safety precautions, even if it has been "cleaned" at the health care facility. This requires that the experts have the appropriate training and biosafety processes and resources in place to handle the device during its examination.

If the parties are interested in doing analyses that require destructive testing, there needs to be an agreement as to whether the product will be divided first among the interested parties (if feasible) or whether the analyses will be done by a third party in the presence of the various experts involved. If the product is to be divided among all interested parties, there needs to be a protocol as to how that will be done, and all parties involved need to have reviewed and agreed to that protocol. Involving your technical expert early in this process is very important because there might be technical challenges to conducting further analyses if the device is not divided appropriately (e.g., direction, shape, amount). If the product will be analyzed destructively by a third party in the presence of all the experts, there should be an agreement as to what analyses will be performed, the protocols that will be followed, who will conduct the analyses (including vetting the third party's credentials and certifications), and where the analyses will be conducted. The recommended approach

Continued on page 49



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How Many Employees Does it Take to Change a Light Bulb?

By Aaron S. Butcher, P.E., C.F.E.I.
S-E-A, Ltd.

How many employees does it take to change a light bulb? That is the question many employers should ask themselves before having an employee or contractor change a light bulb in their facility. More specifically, employers should ask:

1. How can we provide a safe working environment for our employee to change the light bulb?
2. What relevant training does the employee need in order to change the light bulb?
3. What codes and standards apply to the light fixture?
4. Does the structure's electrical wiring comply with current regulations?

For such a simple task, it would take an entire team of employees to account for the issues arising from this list of questions. Changing a light bulb never seemed so difficult. On the other hand, an accident involving an electrical shock or a fall would be an unacceptable event. With the potential wage loss, staffing issues, and downtime, as well as possible insurance involvement, legal representation, and/or workers' compensation concerns, the cost of a light bulb accident can be substantial.

The Bureau of Labor and Statistics indicates there was a total of 419 fatalities due to exposure to harmful substances or environments in 2011, of which 174 were caused by exposure to electricity. The 2010 data from the Electrical Safety Foundation International indicates that in private industry, there were 163 fatalities due to contact with electrical current and a total of 1,890 non-fatal electric shock injuries resulting in numerous days away from work.

The Occupational Safety and Health Administration (OSHA) requires an employer to provide a workplace free from known dangers, and the employee must follow established regulations (General Duty Clause). Yet, electrical accidents, both fatal and non-

fatal, still occur. Changing a light bulb can result in a workplace accident and an OSHA investigation.

Effects of electrical contact can result in pain, burns, neurological damage, and/or death. Typically, one expects increased voltage to be the determining factor in the degree of damage sustained by an individual. In actuality, it is the current which causes injury . For example, a 0.03 Amp (30mA) current can cause a person to stop breathing resulting in respiratory failure. A 30mA current powers less than a 4-watt light bulb; wattage equivalent to that of a hallway night light. A 75mA current can cause the heart to go into fibrillation, which is the same current for a 9-watt light bulb. For comparison, a single 4-ft. T8 fluorescent light bulb is rated at 32-watt. Human tissue begins burning at 5 amps;enough current to operate a mini-refrigerator. The possibility of internal organ damage begins at 20 amps, the same current rating observed in a typical home kitchen circuit.

In order to limit hazards in the workplace, there is a five step hierarchy of controls.. The steps range from most effective to least effective: elimination, substitution, engineering controls, administrative controls, and personal protective equipment (PPE). The most effective, elimination of the hazard, is essentially the removal of the hazard from the workplace. Substitution of the hazard, for example, is using fiberglass insulation instead of asbestos. Applying engineering controls involves designing mechanisms to avoid or prevent hazards which cannot be removed from the workplace, i.e., adding two buttons to be pushed simultaneously when operating a machine, therefore reducing the possibility of a pinch hazard for an operator. Administrative controls are the codes, requirements, and recommendations produced by the associated community (i.e., OSHA, National Fire Protection Association) to limit potential hazards. PPE, the final and least effective step involves insulating the worker from a hazard, such as wearing a dust mask or electrical insulated gloves.

De-energizing an electrical system is the premier method used in preventing electrical workplace injuries. This methodology is generally referred to as "Lockout-Tagout" or "LOTO." LOTO is a six-step process as defined by the National Fire Protection Association. A summation of the steps is as follows:

1. Determine all sources of electricity.
2. Open the disconnecting devices.
3. Visually verify (if possible) that disconnect blades are open.
4. Apply lockout devices and tags.
5. Test with rated voltage detector.
6. Ground the de-energized phase conductors in case of possible induced voltages.

Unfortunately, there are exceptions to using LOTO in the field; however, these exceptions do not apply to changing a light bulb. The exceptions are used when a life safety issue arises from de-energizing the electricity, typically observed in an industrial environment. There are strict requirements for PPE when working on energized equipment.

Continued on page 54

Drip, Drip, Disaster: The Problem with Balconies

By Bart B. Barrett, P.E., M. ASCE
Nelson Forensics

Water damage to balcony structural systems is a recurring failure in residential construction. Deterioration can develop unseen in balconies covered with a continuous walking service and wrapped with exterior finishes. With a continuous top surface and finishes along the edge and soffit, water can become trapped against wood framing members that are sensitive to long-term moisture exposure. As deterioration in wood framing progresses, it compromises the strength of the balcony structure, which can lead to structural failure. To fully understand the conditions that have led to balcony failures, one must rely upon an expert adept in both structural systems and building envelope analysis.

Let's start with the building envelope. The building envelope protects the interior of the structure from exterior conditions (moisture, temperature, etc.). Typical components of a building envelope include the exterior walls, roof, doors, windows, balcony decks, etc. It is important that these components divert water away from the structure and form a barrier against water entry. Lapping of upper components over lower components is termed "shingle lapping" and is key to diverting water away from the interior of the structure. Another key concept is material compatibility which is the ability of intersecting materials to interact in a manner that diverts water away from the intersecting materials. An improperly designed or installed building envelope allows water to migrate to moisture-sensitive materials, which can have a significant impact on not only the aesthetics of the building but also the integrity of its structural system.

Balconies pose a specific challenge in developing the building envelope, as the balconies create a building space that is exterior to the outer walls of the structure. If entrapped water is not allowed to migrate to the exterior, and is confined within the building's interior cavities for long periods of time, then serious life safety damage can occur to the structure.

Figure 1: Exposed balcony assembly

Similar to the roof of a building, the top horizontal surface of a balcony deck should be protected by a waterproofing membrane system that is sloped to divert water to the exterior face of the balcony or to a drainage system. This membrane should be specifically manufactured for this type of installation and attached to the building's vertical walls and columns with flashing, sealant, and trim, to create a fully integrated, continuous building envelope that protects the interstitial space, which encloses the balcony structure below.

If solid veneers, like stucco, are applied to the face of the balcony, a weeping system should be incorporated into the underside of the interstitial space (soffit) to allow water to escape from the balcony assembly. When water breaches the interior of the balcony assembly and is not allowed to escape, deterioration of moisture-sensitive materials, such as the wood framing, will occur.

Case Studies

Field observations indicate that, in many cases, the design and installation of balcony waterproofing was not developed sufficiently by the building designer to protect the structural system that supports the balcony. The following case studies illustrate the impact of poorly executed balcony weather protection systems.

Case Study #1

A single-family residential structure in a North Carolina coastal city experienced damage to aesthetic features along the perimeter of the balcony. The tiled walking surface, exterior veneer, and ceiling finishes enclosed the structural system of the balcony. Destructive testing exposed discolored and deteriorated wood framing (see Figure 1).

Architectural and structural details for the balcony were included in the construction drawings for the building. The structural plans indicated beam and joist locations with beams consisting of sawn lumber and laminated veneer lumber (LVL). The general notes prepared by the structural engineer specified all LVL beams to be wrapped *"so as to prevent exposure to weather"* (emphasis added). The notes did not indicate the material in which the LVL lumber was to be wrapped. The architectural drawings included a balcony plan and elevation with profile sections that illustrated the cornice along the perimeter of the balcony. No details or notes on the architectural plans provided direction for weatherproofing of the balcony.

A review of the exposed wood framing indicated that the LVL beams were not wrapped with a water-resistive barrier.

Continued on next page

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Further examination indicated that the waterproofing membrane between the tile floor finishes and the balcony floor sheathing terminated inside the finishes at the perimeter of the balcony and did not overlap any other weather-resisting component. When constructed, this configuration directed water inside the finishes, which was trapped against the LVL beams and caused them to deteriorate behind the finishes. A sketch of the balcony assembly is provided in Figure 2. The waterproofing members are indicated in red, and the path of moisture is indicated in blue.

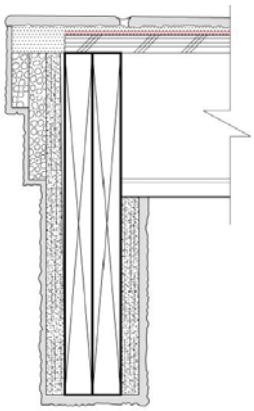

Figure 2: As-built balcony detail

In this assembly, there were no weather-resisting components that directed the water to the exterior of the veneer. In addition, there were no features that allowed entrapped water to escape the assembly.

Case Study #2

The balcony of a single-family residential structure experienced excessive deflections and fractures in the stucco veneer. Partial removal of the stucco veneer revealed a wood beam assembly supporting the balcony that included approximately 1/2"-thick exterior oriented strand board members combined with multiple plies of conventional lumber. A vapor barrier was wrapped down the exterior face of the beam and returned approximately 3/4" along the beam soffit.

The exterior stucco veneer was continuous down the front side of the beam and wrapped around the base of the beam to the top of its interior side,

Figure 3: Removed stucco veneer

encapsulating the exposed faces of the beam. A granule-coated, bituminous membrane was applied over the wood floor sheathing, and metal drip edge flashing was provided at the top of the stucco veneer along the exterior edge

Figure 4: Deteriorated beam with exposed interior face of veneer

of the balcony (see Figure 3).

The beam was deteriorated to the extent that the stucco veneer at the opposite side of the beam was visible through the missing sections of the beam (see Figure 4 above).

The design and construction of this structure allowed water to migrate inside the balcony assembly and access the beam. Even though the installation of a vapor barrier mitigated water intrusion from the exterior face of the beam, the beam was still not protected from entrapped water, as the vapor barrier was not continuous to the interior face of the beam. In addition, there was no mechanism to allow water to drain from the assembly.

Case Study #3

A single-family residential structure in the Tampa Bay area exhibited

Figure 5: Stucco veneer distress at balcony beam and column interface

vertical fractures around beam and column interfaces at the second and third story balconies. These veneer fractures were indicative of a possible compromise in the balcony's structural system (see Figure 5).

Destructive testing that exposed the wood framing revealed the balcony to be constructed with wood I-joist engineered lumber, LVL beams, and concrete masonry unit columns. A stucco veneer was applied to the exterior of the beams and columns, and a single layer of felt paper was installed between the stucco veneer and the wood framing. The building paper terminated at the base of the beams with no provision incorporated into the veneer below the beams to allow water to weep from the balcony assembly. The exposed framing exhibited extensive deterioration along the full depth of the LVL members, which were easily disturbed with pressure applied by hand (see Figure 6).

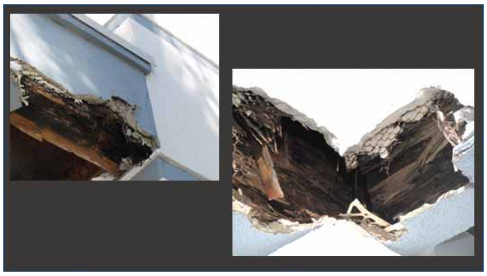

Figure 6: Deterioration of LVL beams

A fiberglass lining extending a few inches up each of the adjoining walls and columns was installed over the floor sheathing of the balcony. Metal drip edge flashing was installed along the edge of the balconies and was terminated inside the field of the stucco. In addition, no control joints were provided in the stucco at flashing terminations,

which allowed veneer fractures to develop above the flashing terminations and let water migrate inside the beam assembly. Water that entered the beam assembly became trapped against the LVL beams, causing the beams to deteriorate to the point of imminent collapse.

Structural Considerations

Although structural designers are not typically responsible for the design of the balcony waterproofing, they should understand the intent of the waterproofing design in conjunction with their design of the structural members. Waterproofing details and specifications should indicate the type of deck membrane, the interaction between the components along the top edge of the balcony, and weep features in the veneer at the base of balcony beams. When these details are unclear, incomplete, or do not divert water to the exterior face of the balcony, structural designers should consider the structural members to be exposed to exterior conditions and should choose materials that are resistant to moisture exposure.

Exacerbating the problem, balcony designers often capitalize on scenic views by maximizing the distance between columns. Frequently, conventional sawn lumber does not provide the stiffness required for the resulting long spans created between these columns. Proprietary wood products, such as LVL members, are made to provide more efficient structural performance for larger spans; however, these materials do not perform well under long-term moisture exposure. For this reason, manufacturers of LVL members often restrict the use of these products to areas that are not exposed to weather/moisture.

Technical literature prepared by one LVL manufacturer explains how restrictive the environment must be by indicating that these products "are intended only for applications that assure *no* exposure to weather or the elements and an environment that is free from moisture from *any* source" (emphasis added).[2] Another manufacturer indicates that the LVL lumber is intended for "dry-use" conditions.[3] This same manufacturer provides a treated parallel strand lumber (PSL) for exterior conditions. However, technical information that the manufacturer provides for the PSL member indicates that it should not be encased

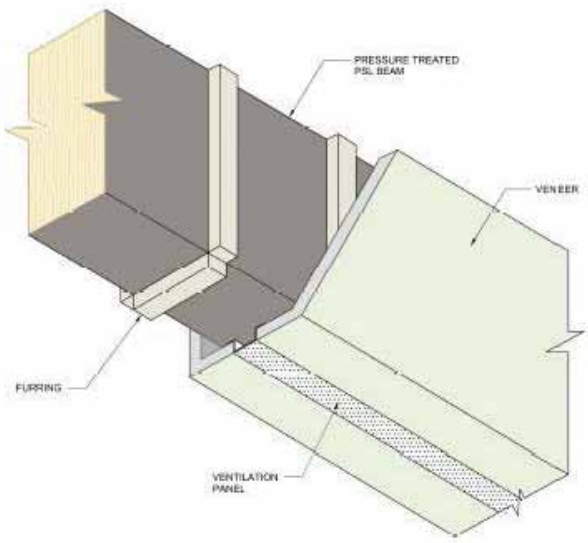

Figure 7: Recommended installation of veneer

in a solid veneer because the veneer cannot provide adequate ventilation or drainage. In lieu of a direct application of a solid veneer, the manufacturer recommends the use of furring strips to offset the veneer from the face of the member, and the provision of ventilation panels along the base of the beam, which is illustrated in Figure 7.[4]

The limitations provided by engineered lumber manufacturers indicate the importance of understanding water management at balconies, and the impact that water intrusion can have on balcony assemblies and engineered lumber that supports those balconies. To provide a resilient structure, the structural designer must understand the environment in which the structural system will be placed and the limits of the material that will be used.

Conclusion

The case studies illustrate the importance of understanding the environment within which a structural system will be expected to perform. Environmental factors can compromise the integrity of structural systems and reduce the lifespan of buildings. Deterioration at hidden balcony members can progress without notice until life a safety hazard has developed. To determine the impact of design and construction practices that develop these conditions, the expert analyzing the system must understand both the structural systems of the balcony and the building envelopes that protect these structural systems. ◆

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. He 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).

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Auto Liability Case Law Update

By Rachel Reed, Section Co-Vice-Chair
Mabry & McClelland, Atlanta

Massey v. Allstate Insurance Company
341 Ga. App. 462 (2017)

The Court of Appeals reversed the trial court's order granting summary judgment to Allstate on the issues of whether the plaintiff/appellant's umbrella policy included UM coverage.

Plaintiff/Appellant Massey was involved in an automobile accident on June 11, 2012. Plaintiff settled with the named defendant for the policy limits. Plaintiff then amended her complaint to add a declaratory judgment action to establish her UM and umbrella coverages, both with Allstate. Plaintiff settled the UM claim, also for the policy limits. At that time, Allstate moved for summary judgment, arguing that umbrella policy no longer had UM coverage. The Trial Court granted Allstate's motion.

Plaintiff had insurance coverage with Allstate starting around 2009. At that time, the policies were a primary automobile policy and an umbrella policy, which included excess liability and UM coverage. Allstate collected separate premiums. In 2010, Allstate sent a renewal notice and indicated that UM coverage was not included. Allstate did not assess a premium for the UM coverage. Later that same year (2010), Allstate provided notice that Plaintiff's limits had been reduced and that, again, there was no UM coverage. The 2011 renewal documents also reflected the reduced limits rate and did not include UM coverage.

Allstate argued that O.C.G.A. § 33-24-45 only applied to primary automobile policies and, therefore, did not extend to umbrella policies. The Court examined the language of O.C.G.A. § 33-24-45 and held that nothing in the language limited its scope to primary automobile policies at the exclusion of umbrella policies that afforded automobile coverage. Therefore, Allstate should have followed the provisions of O.C.G.A. § 33-24-45 upon non-renewal.

The Court then examined whether Allstate's written notice in 2010 was effective. Pursuant to O.C.G.A. § 33-24-45, an insurer must 1) personally deliver the notice to the insured or 2) mail the notice via first —class mail and obtain "the receipt provided by the United States Postal Service or such other evidence of mailing as prescribed or accepted" by the same. The Court noted that the provisions of O.C.G.A. § 33-24-45 must be strictly followed, and if they are not followed, then the policy automatically renews. Allstate could not produce any evidence showing that Massey actually received the non-renewal notice.

Allstate made further arguments that the excess liability and UM coverage were similar and therefore it was not required to follow O.C.G.A. § 33-24-45. The Court declined to follow this reasoning and reversed the trial Court's summary judgment ruling in favor of Allstate/Appellee.

Grange Mutual Casualty Company v. Woodard
300 Ga. 848 (2017)

Responding to certified questions from the Eleventh Circuit, in *Grange Mutual Casualty Company v. Woodard*, the Georgia Supreme Court held that O.C.G.A. § 9-11-67.1 allows for contracts where prompt payment may function as both a condition of acceptance and a form of performance.

In 2014, Thomas Dempsey struck another vehicle driven by Boris Woodard and his daughter, Anna. Ultimately, Anna Woodard died from her injuries. Mr. Woodard's attorney sent Mr. Dempsey's insurer, Grange Mutual Casualty Company ("Grange")an O.C.G.A. § 9-11-67.1 demand letter which, among other terms, specified that payment must be received within ten (10) days of written acceptance, and receipt of payment was an essential element of acceptance. Grange timely provided written acceptance, however, an error occurred in issuing the payment. Counsel for the Woodards asserted that the parties had not reached a settlement agreement. Grange filed suit in the Northern District of Georgia alleging breach of contract and sought relief, including specific performance. Grange argued that O.C.G.A. § 9-11-67.1 did not contain a prompt payment requirement and, therefore, it was "void" and not allowed in demands pursuant to O.C.G.A. § 9-11-67.1. The Woodards argued that the payment term was a condition of acceptance, as specified in the demand itself, and they had the right as the offeror to specify conditions of acceptance. Both parties filed motions for summary judgment, and the Northern District of Georgia held in favor of the Woodards. Grange appealed to the Eleventh Circuit and the Eleventh Circuit certified four questions to the

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Employment Case Law Update

By Joshua Joel, Section Vice-Chair
Goodman McGuffey, Atlanta

JUDICIAL ESTOPPEL
Slater v. U.S. Steel
871 F.3d 1174
(11th Cir. 2017) (*en banc*)

In *Slater v. U.S. Steel*, the Eleventh Circuit, sitting *en banc*, overruled decades of prior precedent which held that where a plaintiff failed to disclose a lawsuit in Chapter 7 bankruptcy, a presumption of intent to mislead the court was presumed and the subsequent case barred by the doctrine of judicial estoppel. Instead, the Eleventh Circuit adopted a totality-of-the-circumstances analysis when dealing with these scenarios. These issues are particularly relevant in the employment law context, where courts have consistently granted summary judgment on employment-based claims when the plaintiff had failed to report those claims in a prior bankruptcy proceeding.

In this case, Sandra Slater alleged claims of discrimination and retaliation against her employer, U.S. Steel. While her discrimination suit was pending, she filed for Chapter 7 bankruptcy. She did not list the discrimination suit in her schedule of assets. U.S. Steel filed a motion for summary judgment in the discrimination suit, arguing that Slater was judicially estopped from bringing her discrimination claims, based on her failure to list her discrimination claims assets in her bankruptcy proceeding. The district court granted the motion, relying on the Eleventh Circuit's well-established precedent.

The Eleventh Circuit, however, reversed and remanded. It adopted a totality-of-the-circumstance test, allowing courts to consider all of the facts and circumstances relating to the debtor's actions to determine whether the debtor intended to mislead the bankruptcy court. Specifically, the Court provided the following non-exhaustive list of factors in making a determination: "the plaintiff's level of sophistication, whether and under what circumstances the plaintiff corrected the disclosures, whether the plaintiff told his bankruptcy attorney about the civil claims before filing the bankruptcy disclosures, whether the trustee or creditors were aware of the civil lawsuit or claims before the plaintiff amended the disclosures, whether the plaintiff identified other lawsuits to which he was party, and any findings or actions by the bankruptcy court after the omission was discovered."

It is important to note that the Eleventh Circuit specifically distinguished Chapter 7 and Chapter 13 cases in its analysis. Specifically, in Chapter 13 cases, the debtor retains standing to pursue claims, whereas in Chapter 7 she does not. Thus, the applicability may be limited to Chapter 7 cases.

PREGNANCY DISCRIMINATION ACT
Hicks v. City of Tuscaloosa, Ala.
870 F.3d 1253 (11th Cir. 2017)

In *Hicks v. City of Tuscaloosa, Ala.*, the Eleventh Circuit Court of Appeals, in a published opinion by Judge Charles Wilson, newly-minted Judge Kevin Newsom, and District Court Judge Lisa Wood, sitting by designation, upheld a $161,319.92 verdict for a female narcotics investigator who was forced to quit her position because the City of Tuscaloosa would not accommodate her need to breastfeed. After becoming pregnant, Hicks was assigned to a pharmaceutical fraud case so that she would not have to work nights and weekends. Her supervisor resented this accommodation. Due to her pregnancy, Hicks needed to take 12 weeks of Family Medical Leave Act ("FMLA") leave. When she returned, she was immediately written up. She also overheard her supervisor calling her sexist names and telling another officer that he needed to find a way to terminate her. Eight days later, she was reassigned to patrol duty and received pay cuts. She was required to wear a ballistic vest, which would impact her ability to breastfeed. The department refused to accommodate her by reassigning her to a non-patrol duty position.

Hicks sued the department on three theories: (1) discriminatory reassignment under the Pregnancy Discrimination Act ("PDA"); (2) constructive discharge under the PDA; and (3) retaliation for taking FMLA leave. Hicks obtained a jury verdict for $374,000, which the judge reduced to $161,319.92 plus costs and attorneys' fees. On appeal, the City argued that Hicks did not prove that the reason proffered by the City for her reassignment—poor job performance—was pretext for discrimination. The Eleventh Circuit, however, affirmed. It held that common sense dictates that lactation is a medical condition related to childbirth and pregnancy, and it is therefore protected by the PDA. Specifically, it stated that the PDA "would be rendered a nullity if women were protected during a pregnancy but

Continued on page 51

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GDLA Sponsors 39th Annual Conference of the National Association of Women Judges

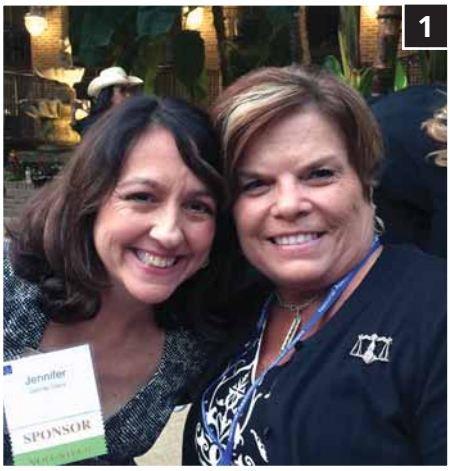
GDLA was honored to sponsor the 39th Annual Conference of the National Association of Women Judges (NAWJ), which was held in Atlanta from October 11-15, 2017, at the Sheraton downtown. Georgia Supreme Court Justice Carol Hunstein and Court of Appeals Judge Sara Doyle served as conference chairs, and a number of other Georgia appellate judges and trial judges chaired other portions of the annual event.

GDLA President Sarah B. "Sally" Akins represented the association by attending the conference, and GDLA Executive Director Jennifer M. Davis volunteered to assist with registration and other event details.

Georgia Supreme Court Justice Mike Boggs kicked off the conference with a keynote address on criminal justice reform, and newly-confirmed U.S. Attorney for the Northern District of Georgia Byung J. "B.J." Pak delivered the keynote address at lunch.

Other conference highlights included Justice Hunstein's interviewing former President Jimmy Carter and his wife, former First Lady Rosalynn Carter; and 11th Circuit Court Judge Beverly Martin and former U.S. Deputy Attorney General Sally Yates' sharing the stage for a conversation.

Additional blockbuster segments included former Georgia Supreme Court Justice Leah Ward Sears' leading a discussion on recognizing and eliminating implicit bias in the judicial system; and Judge Doyle's moderating a "view from the bench" panel featuring Judge Leslie Abrams, U.S. District Court, Middle District of Georgia; Judge Julie Carnes, U.S. Court of Appeals, 11th Circuit; Judge Frank Hull, U.S. Court of Appeals, 11th Circuit; Judge Leigh May, U.S. District Court, Northern District of Georgia; Judge Jill Pryor, U.S. Court of Appeals, 11th Circuit; Judge Robin S. Rosenblum, U.S. Court of Appeals, 11th Circuit; and Judge Amy Totenberg, U.S. District Court, Northern District of Georgia. ◆



Pictured are: 1. GDLA Executive Director Jennifer Davis and Chief Judge Brenda Weaver, Appalachian Superior Court. 2. Georgia Supreme Court Justice Mike Boggs with GDLA President Sally Akins, our ambassador to the conference; 3. President Akins; Chief Judge Mary Kathryn Moss, Chatham County Magistrate Court; Judge Makhabat Bekishova, City Court of Kyzyl-Kiya in Kyrgyzstan; Georgia Court of Appeals Judge and NAWJ Conference Co-Chair Sara Doyle; and Jay Doyle. 4. Ms. Davis and DeKalb State Court Judge Shondeana Morris.

Pictured at the 39th NAWJ Annual Conference, which was held in Atlanta and sponsored by GDLA and many other local bar associations, are: 1. GDLA member and State Bar of Georgia Immediate Past President Pat O'Connor; Court of Appeals Judge Yvette Miller; Supreme Court Justice and NAWJ Conference Co-Chair Carol Hunstein; GDLA President Sally Akins; and U.S. (Northern) District Court Judge Leigh May. 2. Former U.S. Deputy Attorney General Sally Yates, President Akins, and 11th Circuit Court Judge Beverly Martin.

GDLA Board Holds Fall Meeting

The GDLA Board of Directors traveled to the Montage Palmetto Bluff Resort in Bluffton, S.C., from November 3-5, 2017. The weekend commenced with a reception in one of the village homes, after which everyone walked to dinner in the nearby wine cellar. The Board meeting was held on Saturday morning, leaving the afternoon free for everyone to enjoy the spectacular resort that is set overlooking the marshes of the May River. Many Board members and their spouses and guests gathered again in the village home on Saturday afternoon to watch the Bulldogs take on the Gamecocks with a "tail gate" party; later the group ordered pizza delivery for more college gameday fun.

Those present were **Executive Committee**: President Sarah B. "Sally" Akins of Ellis Painter Ratterree & Adams, Savannah; President-Elect Hall F. McKinley III of Drew Eckl & Farnham, Atlanta; Treasurer David N. Nelson, Chambliss Higdon Richardson Katz & Griggs, Macon; Secretary Jeffrey S. Ward of Drew Eckl & Farnham, Brunswick; Immediate Past President Peter D. Muller of Goodman McGuffey, Savannah; Past President Matthew G. Moffett of Gray Rust St. Amand Moffett & Brieske, Atlanta; and Past President Kirby G. Mason of Hunter Maclean, Savannah. **Vice President**: George R. Hall of Hull Barrett, Augusta. **Directors**: Beth Boone of Hall Booth Smith, Brunswick; Daniel C. Hoffman of Young Thagard Hoffman Smith & Lawrence, Valdosta; Candis Jones of Gray Rust St. Amand Moffett & Brieske, Atlanta; Martin A. "Marty" Levinson of Hawkins Parnell Thackston & Young, Atlanta; Jason D. Lewis of Chambless Higdon Richardson Katz & Griggs, Macon; Jason C. Logan of Constangy Brooks Smith & Prophete, Macon; Tracie G. Macke of Brennan Wasden & Painter, Savannah; Garret W. Meader of Drew Eckl & Farnham, Brunswick; Ashley Rice of Waldon Adelman Castilla Hiestand & Prout, Atlanta; James S. V. Weston of Trotter Jones, Augusta; and C. Jason Willcox of Moore Clarke DuVall & Rodgers, Albany. **Past Presidents**: N. Staten Bitting, Jr. of Fulcher Hagler, Augusta; Theodore "Ted" Freeman of Freeman Mathis & Gary, Atlanta; and Edward M. "Bubba" Hughes of Ellis Painter Ratterree & Adams, Savannah.

Minutes will be posted with prior Board meeting minutes in the members only area of our website. ◆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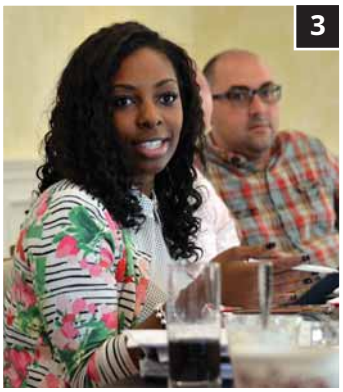
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Pictured at the Board's Fall Meeting at Palmetto Bluff Resort are: 1. Jason Lewis; Jason Logan and his wife, Wendy; Dan Hoffman and his wife, Sue Hellstern. 2. Vice President George Hall with his wife, Margaret, and Beth Boone. 3. Candis Jones and Jason Lewis. 4. Garret Meader with his wife, Kathy (at left), with Past President Matt Moffett and his wife, Diane. 5. Tracie Macke and Secretary Jeff Ward. 6. President-Elect Hall McKinley. 7. Past President Bubba Hughes, President-Elect Hall McKinley, Vice President George Hall, and Past President Staten Bitting. 9. Ashley Rice and Immediate Past President Peter Muller; 10. Cindy Bitting, Past President Staten Bitting, President Sally Akins, Debbie Hughes, Past President Bubba Hughes, Mary Peironnet and her husband, Past President Ted Freeman.

GDLA and GTLA Co-Host Pass the Bar Party

GDLA partnered with our friends from GTLA to host a "Pass the Bar Party," welcoming Georgia's newly-minted attorneys to our organizations and demonstrating that despite being on opposites sides, we do "give a damn." The festivities took place on November 7, 2017 at Cape Dutch in Atlanta. We expect this to become an annual gathering with our counterparts on the other side of the courtroom. We are grateful to GDLA Platinum Sponsor Collision Specialists for their support of this event. ◆

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Pictured are: 1. Collision Specialists' Analiese Stopek and GTLA member Jimmy Hurt, with GDLA member and State Bar YLD President Nicole Leet. 2. GDLA members Molly O'Connor and Jason Vuchinich. 3. President-Elect Hall McKinley (center) with associates from his firm, Earl King and Kayla Chen. 4. Samantha Dorsey, Mike Russ, and Elissa Haynes.

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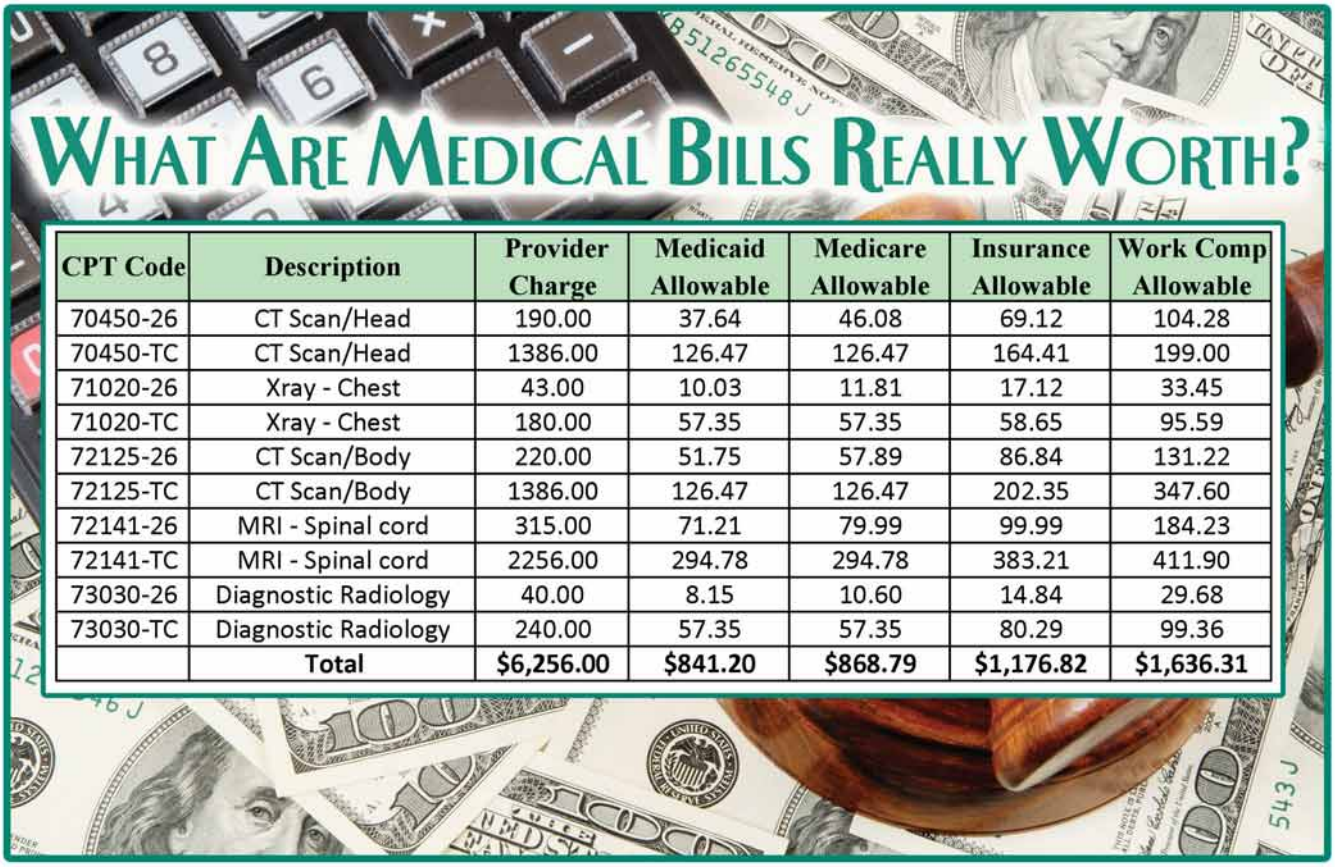

What Are Medical Bills Really Worth?

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

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GDLA Platinum Sponsors Host Happy Hour in Macon

GDLA Platinum Sponsor Collision Specialists, Inc. and LexisNexis joined forces again to host a networking happy hour in Macon. Based on the success of last year's gathering, the event was held again in Beer Garden at Bearfoot Tavern on November 14, 2017. We hope to make this an annual gathering. ◆

Pictured are 1. Collision Specialists' Analiese Stopek, Frank Butler, Jason Lewis, Gene Hatcher, and Renee Rainey. 2. Treasurer Dave Nelson and Taylor Hamrick. 3. Chris Arnold and Barret Kirbo. 4. Wes Childs, Andrew Davidson, Matt Shoemaker, and Cale Davis.

Sexual Harassment

Continued from page 21

quently tried to get plaintiff to date him using "many direct as well as indirect propositions for sex," followed her into the bathrooms, attempted repeatedly to "touch her breasts, place his hands down her pants, and pull off her pants," and enlisted the help of others to try and grope her.[8] As evident from these cases, the conduct must be quite extreme to establish a hostile work environment.

Retaliation Claims

Title VII also prohibits employers from taking any adverse action against an employee for complaining about a hostile work environment. The law also protects the employee from retaliation for cooperating with the EEOC in its investigation of a harassment claim or for participating in a company's internal investigation. The protections against such retaliation apply even if the employee's claim turns out to be untrue, as long as the claim was made in good faith. Thus, a victim must only establish that she subjectively believed the conduct to be inappropriate and that a reasonable person would also consider it inappropriate, even if the allegations turn out to be untrue. So, for example, a report of sexual harassment was found to be objectively unreasonable where the only basis for the employee's belief that a coworker was being harassed was the age and position disparity between the vice president of the company and the 17-year-old employee with whom he was flirting.[9]

Analyzing a Title VII Sexual Harassment Claim

Absent direct evidence, sexual harassment claims are subject to the *McDonnell-Douglas* burden-shifting analysis applicable to Title VII claims.[10] Direct evidence of sexual harassment only involves "only the most blatant remarks."[11] A *quid pro quo* case is more likely to be supported by direct evidence, such as testimony that a supervisor said he would give a promotion if the employee had sex with him. Direct evidence is far less likely to exist in connection with hostile work environment claims.

Under the burden-shifting test, the Plaintiff must first establish a *prima facie* case of sexual harassment. The first requirement is to show that the victim is a member of a protected class, which will almost always be established given that sexual harassment applies no matter the victim's gender. Next, the victim must show he or she was subjected to unwelcome harassment, as defined earlier in this article. The victim must then show that the harassment was based on his or her gender, which is also usually an easy threshold to cross in sexual harassment cases. The final requirement for a *prima facie* case depends on the kind of claim being asserted. In hostile work environment cases, the claimant must show the harassment was severe and pervasive enough to effect a term, condition, or privilege of employment and that the employer knew, or should have known, about the harassment and failed to take corrective action.[12] In *quid pro quo* cases, the victim must show that a supervisor relied upon his apparent or actual authority to extort sexual consideration from an employee.[13] In retaliation cases, the victim must show that he or she was retaliated against because she reported the hostile work environment.[14]

If the employee can establish these elements, the burden will shift to the employer to show a legitimate, non-discriminatory reason for the adverse employment action. In other words, even if an employee can establish that he or she experienced actionable sexual harassment in the workplace, if the adverse employment action would have happened regardless of the harassment, the claim may still fail. The burden will then shift back to the employee to show that the proffered reason of the employer was not the real reason for the action, but rather pretext for discrimination. If the Plaintiff fails to meet his or her burden at any stage of the analysis, or if she fails to rebut the legitimate, non-discriminatory reason presented by the defense, his or her claim will fail.

Timeliness

To sue for sexual harassment under Title VII, a plaintiff must first file a timely charge of discrimination with the EEOC. In Georgia, the time limit for filing a charge is 180 days from when the alleged discrimination occurred or from when the employee believes or has reason to believe that he or she was a victim of discrimination. In sexual harassment claims, a plaintiff may rely on the "continuing violation" doctrine in order to extend the timeliness of a charge. Under this doctrine, a charge will be considered timely if it was filed within 180 days of the last alleged discriminatory act in a pattern of actions.

Officially, the EEOC has 180 days to investigate a charge, but it often takes longer to make a determination. If the EEOC issues a dismissal and notice of right to sue, a plaintiff has only 90 days to sue in federal court. In a rare case, the EEOC may itself pursue a lawsuit. For example, in the last two years in Georgia, the EEOC has settled three sexual harassment suits: for $20,000 with El Chapparo, Inc., for $25,000 with King's Way Baptist Church, and for $50,000 with the Crawford County Development Authority.

Other Causes of Action Under Georgia Law

Title VII only covers employers with 15 or more employees. While establishing that an employer has less than the requisite number of employees will extinguish any Title VII claim—and federal jurisdiction where there is no diversity—Plaintiff may seek other forms of state law relief in response to sexual harassment. The statute of limitations on such claims is two years.

Negligent Retention

The most commonly asserted state-law cause of action in sexual harassment cases is negligent supervision and retention. Under this theory, an employer can be held liable for the sexual harassment by one employee of another employee if the employer knew or should have known that the alleged harasser had a propensity to engage in

harassment and nonetheless continued to employ the alleged harasser.[15] An employer can only be found liable under this theory if there is evidence, usually by way of communications or actions in the workplace that would put a reasonable employer on notice that the alleged harasser was likely to commit sexual harassment. Such a claim could arise, for example, where an employee reported specific repeated incidents of sexual misconduct to management and management neglected to take action. Absent similar evidence, the claim will not succeed.

Intentional Infliction of Emotional Distress

A frequent avenue sexual harassment allegers take is to claim intentional infliction of emotional distress. Georgia courts have somewhat eased the way for such claims stemming from workplace sexual harassment by holding that the existence of a special employment relationship may make otherwise non-egregious conduct outrageous.[16] While isolated incidents may not amount to an actionable claim, repetitive inappropriate sexual behavior over the victim's protests may have the cumulative effect of being considered outrageous by a court. In the words of the Georgia Court of Appeals, "[t]he workplace is not a free zone in which the duty not to engage in wilfully and wantonly causing emotional distress through the use of abusive or obscene language does not exist. Actually, by its very nature, it provides an environment more prone to such occurrences because it provides a captive victim who may fear reprisal for complaining, so that the injury is exacerbated by repetition, and it presents a hierarchy of structured relationships which cannot easily be avoided."[17] Despite this strong language, plaintiffs are often unsuccessful in their intentional infliction of emotional distress claims because it is not common for the conduct to rise to the level of outrageous.

It is important to note that a company's best defense to liability for intentional infliction of emotional distress for sexual harassment lies in the nature of sexual misconduct: it is almost always committed for purely personal reasons unrelated to the furtherance of the employers' business.[18] Thus, such a claim will almost always only be appropriate against the employee-harasser individually. To reach the employer, the Plaintiff must show that the employer was responsible for its own negligence or omissions, like in negligent retention claims discussed above. Alternatively, a victim may be able to reach the corporate entity of a business solely owned by the alleged harasser. Otherwise, it will be difficult for a company to be held liable.

Battery

If the alleged sexual harassment went beyond words and involved physical touching, plaintiffs will often include a battery claim in their complaint. Any offensive or rude touching is considered battery, even if the harasser is not alleged to have touched the victim in a private area. But, touching a coworker in a private area, such as the breasts, buttocks, or groin, will almost always be considered offensive. Alternatively, offensive touching may be found when the allegations include repeated touching in the context of a supervisory employment relationship, which itself makes it difficult for the victim to protect his or herself.[19] Because battery is an intentional tort, however, the plaintiff will almost always only be able to set forth a claim against the employee-harasser, and not the company that employed him.

A Final Word

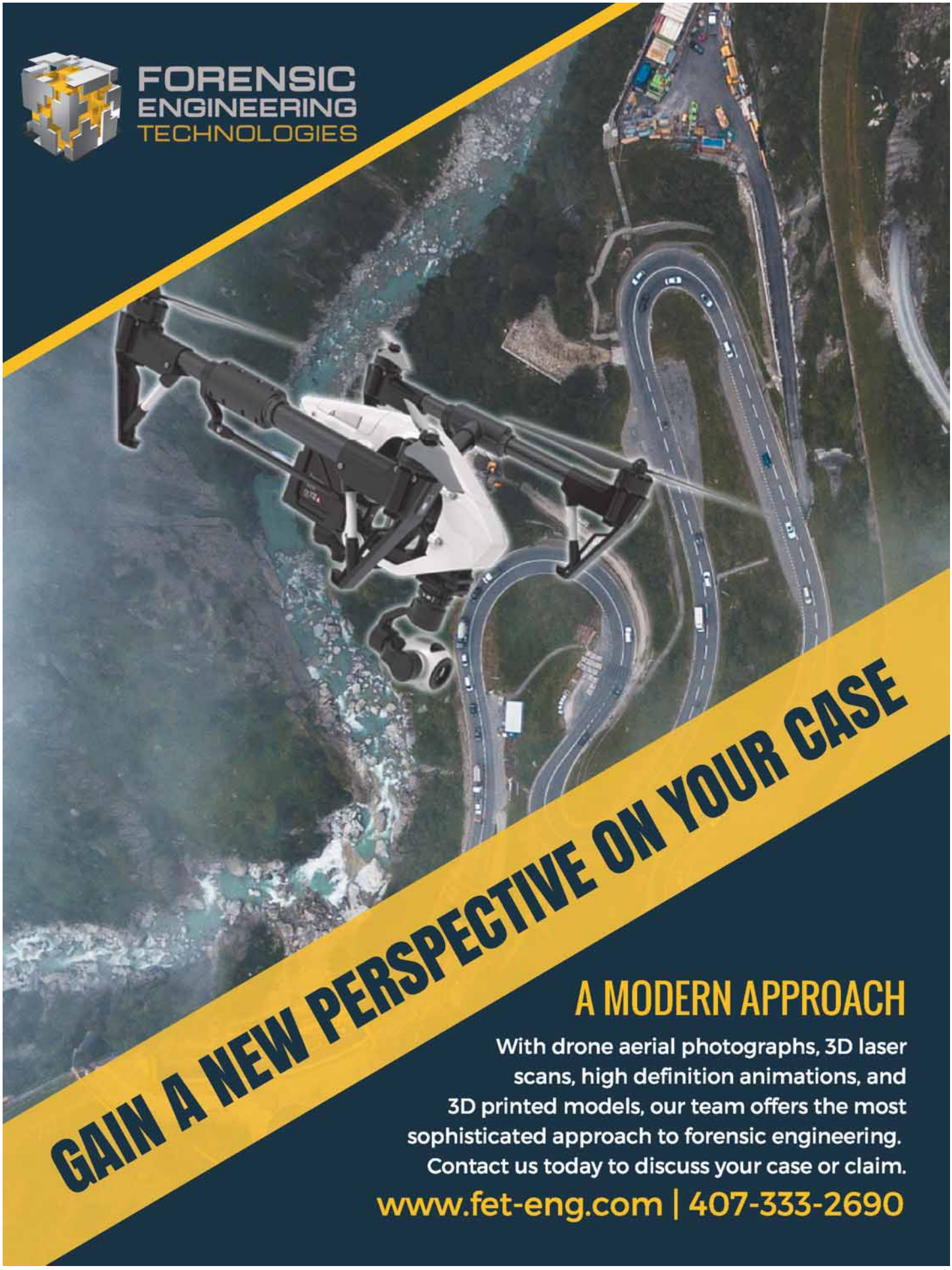
While some sexual harassment claims are baseless or may simply involve bad judgment, it is important to know that defense attorneys are often confronted with legitimate sexual harassment claims. Further, even when dealing with frivolous accusations where there is no legally actionable claim, the potential financial and reputational costs of the public relations nightmare, in addition to the defense costs, can be debilitating to a business. In the current social climate, defense attorneys must be aware of the legal issues surrounding these claims and be prepared to counsel our clients on the best strategy for a defense. ◆

Robert A. Luskin is a partner with Goodman McGuffey in its Atlanta office. He defends corporations and individuals in various complex litigation matters in the areas of products liability, premises liability, professional negligence, questionable insurance claims and other insurance coverage matters. He also handles employment-related cases, including discrimination and harassment issues.

Joshua Y. Joel joined the firm's Atlanta office as an employment litigation associate after serving as a staff attorney with the U.S. Court of Appeals for the Eleventh Circuit. Mr. Luskin and Mr. Joel are chair and vice-chair, respectively, of the GDLA Employment Substantive Law Section.

Endnotes

1 *Henson v. City of Dundee*, 682 F.2d 897 (1982).
2 *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).
3 42 U.S.C. § 2000e, *et al.*
4 477 U.S. 57 (1986).
5 *Henson v. City of Dundee*, 682 F.2d at 903.
6 *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571 (11th Cir. 2000), *overruled on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). *Cheatham v. DeKalb Cty., Georgia, 682 F. App'x 881, 888 (11th Cir. 2017)*
7 *Bruno v. Monroe Cty.*, No. 07-10117-CIV, 2008 WL 4276532 (S.D. Fla. Sept. 18, 2008), *aff'd*, 383 F. App'x 845 (11th Cir. 2010).
8 *Hulsey v. Pride Restaurants, LLC*, 367 F.3d 1238, 1248 (11th Cir. 2004).
9 *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1351 (11th Cir. 1999)
10 *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).
11 *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1266 (11th Cir.1999).
12 *Miller v. Kenworth of Dothan, Inc.,* 277 F.3d 1269, 1275 (11th Cir.2002).
13 *Henson v. City of Dundee*, 682 F.2d at 903.
14 *Williams v. Motorola, Inc.*, 303 F.3d 1284, 1291 (11th Cir. 2002).
15 *See, e.g., H.J. Russell & Co. v. Jones*, 250 Ga. App. 28, 30 (2001).
16 *Trimble v. Circuit City Stores, Inc.*, 220 Ga. App. 498, 499-500 (1996).
17 *Coleman v. Hous. Auth. of Americus*, 191 Ga. App. 166, 169 (1989).
18 *Travis Pruitt & Assocs., P.C. v. Hooper*, 277 Ga. App. 1, 3-5 (2005).
19 *Newsome v. Cooper-Wiss, Inc.*, 179 Ga. App. 670, 672 (1986).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Fake News

Continued from page 23

First, defense attorneys must do more than merely "respond" to the plaintiffs' claims. They must provide an alternative explanation for the bad outcome that upends the plaintiff narrative.

Imagine a product liability suit arising from an accident involving an overturned golf cart, a teenage driver ("RJ") and severe leg injuries to a 10-year-old girl ("MJ"). RJ had been driving his sister around on his grandfather's farmland when he lost control of the cart, veered off the dirt road and tipped the vehicle into a shallow trough. MJ extended her leg to brace herself as she tumbled from the bench seat and ultimately found her ankle pinned under the cart. MJ's parents filed suit against the cart manufacturer, alleging design defect based on the absence of a foot guard (i.e., estimated production cost per unit: $2.50) and inadequate warnings (i.e., estimated cost per unit: pennies).

This plaintiff storyline has the thematic components necessary for a compelling case at trial: a sympathetic victim (the teenager, MJ), a villainous company (the multibillion-dollar cart manufacturer) and customer betrayal (the company put profits over safety).

The defense might argue that the owner's manual clearly stated the importance of keeping arms and legs inside the vehicle at all times, as well as the obvious risk of overturning when operating at excessive speeds and/or on uneven terrain. The company might also argue that the cart design met or exceeded all industry standards, had a solid safety record, etc. These are good defense arguments, and they are likely *necessary* to win the case, but they alone are probably *insufficient* to overcome the reptile framework.

Subject to the reptile tactics in depositions, witnesses would likely be asked questions like, "Wouldn't you agree that a design engineer has a responsibility to avoid needlessly endangering the public?" and "Wouldn't you agree that it is always better to be safe than sorry?" An unprepared design engineer would likely feel compelled to concede both points, creating a suboptimal pre-trial record and reinforcing idealistic expectations of the company.

Second, defense counsel must provide an affirmative story that advances the defense case and motivates jurors to argue it in deliberations. The concepts of knowledge and control are key to doing this.

Jurors apportion blame in all cases by assessing each party's level of knowledge and control over the circumstances precipitating the lawsuit. The greater the level of knowledge and control ascribed to your client, the more likely you are to lose.

> *"This plaintiff storyline has the thematic components necessary for a compelling case at trial: a sympathetic victim (injured teenager), a villainous company (the multibillion-dollar golf cart manufacturer) and customer betrayal (the company put profits over safety)."*

As compared to the injured girl, the golf cart manufacturer will surely be perceived as having superior knowledge and control. After all, the company had engineers trained to improve cart stability, account for human reflexes, etc., and the company certainly had 100 percent control over its profit margins. But, all product manufacturers are not doomed in every case. Why? Jurors are complicated and generally sensible.

Jurors invariably bring to the courtroom the attitudes and experiences that influence the way they hear, process, remember and recall information. People can hold two seemingly countervailing perceptions at the same time. For example, a person may think it is wrong to kill, but killing in self-defense may be justified. Similarly, a person may harbor some anti-corporate views, but also espouse personal responsibility and accountability. So, even in the face of jury venires that appear rabidly anti-corporate, litigators should assume that jurors harbor some predispositions that are defense-friendly.

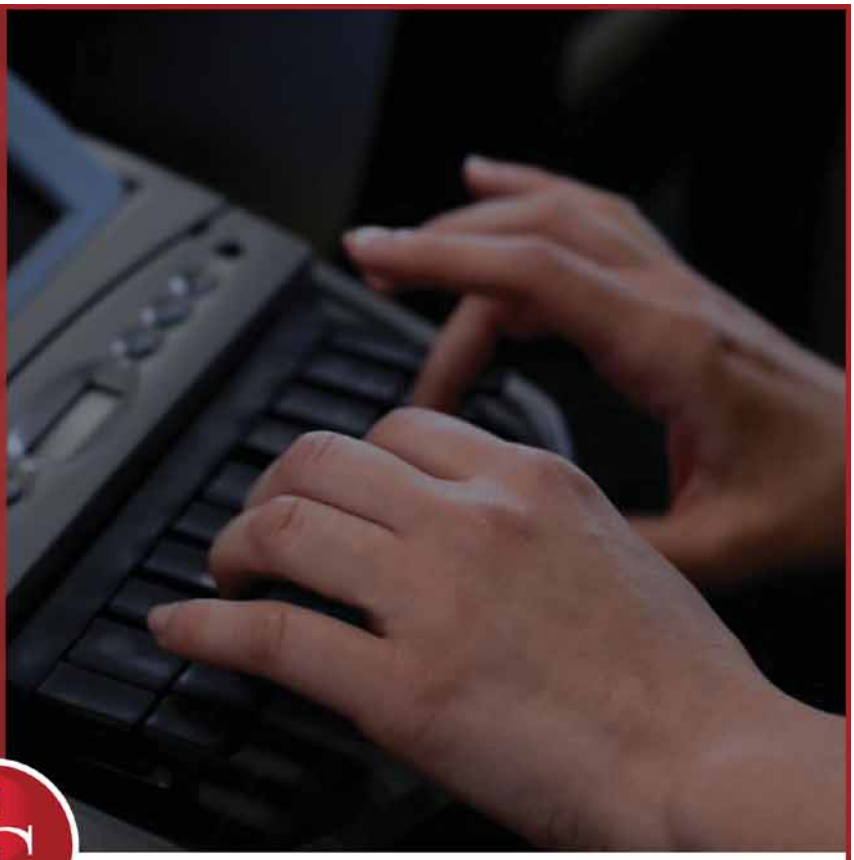
Third, litigators must identify predispositions favoring the defense and leverage them at trial. Jurors must be armed with specific evidence to argue your case and, importantly, be motivated to do so in deliberations.

Many common juror predispositions favor product manufacturers. For example, the vast majority of jurors believe that most *accidents are due to human error, not defective products,* regardless of the product at issue.[4] The majority of jurors also believe that *student drivers should be trained and supervised*, and statistics consistently show that teens are high-risk drivers. Furthermore, most jurors believe product owners should not modify or disable safety systems on equipment (e.g., remove restraints, rails or seatbelts).

The golf cart manufacturer can prevail at trial by elevating the knowledge and control that the jurors ascribe to other parties closer to the incident. This might include bringing out the following case facts in the opening:

- RJ liked racing ATVs with his cousins whenever he visited his grandfather's farm.
- This golf cart was very different from the ATVs RJ was accustomed to riding—i.e., it did not have big, fat tires designed for rough terrain, it did not have a low-center of gravity, etc.
- RJ had never driven this golf cart, or any other cart like it.
- RJ had not taken any safety courses related to operating golf carts.
- RJ had also not completed driver training and did not have a driver's license.
- Grandpa had declined to participate in the dealer's free introductory class on maintaining and operating the cart, including risks associated with speeding, uneven terrain, etc.

Continued on page 49



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- Grandpa had removed a safety net that snapped into place on either side of the vehicle to facilitate passengers getting in and out.
- Mom and Dad had allowed RJ to operate the cart without adult supervision, and they allowed MJ to accompany him.
- Mom and Dad had told RJ that they would follow them home about 15 minutes later.

After all, the accident may not have happened if any one of these factors had been reversed. To be clear, the manufacturer cannot win by merely attacking 15-year-old RJ for having maimed his little sister. But, by asking, "Who was in the best position to have averted this crash?" the company can reframe the case from "innocent child victimized by greedy corporation" to "tragic accident involving a safe product used improperly."

Jurors will reconsider the merits of the plaintiffs' overly simplistic victim/villain storyline if the company can: (1) elevate the knowledge and control of the people closest to the incident; and (2) assuage jurors' fears that the company is operating "off the rails," without regard for the safety of customers and the community. This is true even in today's jury climate which is rife with fear, anxiety and idealistic expectations. Granted, jurors often grumble about getting seated on a jury—after all, it can be inconvenient, disruptive, stressful, expensive, etc. But, once seated and sworn, jurors become emotionally invested in "figuring it out"—in reaching the *right* conclusion. Play your cards right, and jurors will reach your conclusion. ◆

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ENDNOTES

1 Based on data collected by R&D Strategic Solutions in 18 venues across the nation (N= 681).
2 America's Top Fears 2017, Chapman University Survey of American Fears, October 11, 2017
3 David Ball and Don Keenan, "Reptile: The 2009 Manual of the Plaintiff's Revolution"
4 R&D research has consistently found 80-90 percent of mock jurors agree that accidents are more likely due to human error than product defect in cases involving tires, vehicles, appliances and more.

Preserving Evidence

Continued from page 25

is to have all experts involved in such an endeavor review the protocol with an eye toward avoiding surprises. In some situations, published industry standards might be helpful to ensure proper preservation of evidence and thorough detailing of destructive analyses.

As an example of destructive analysis, if the subject device is a metal orthopedic implant, metallurgical analyses might be recommended as one of the destructive analyses to be conducted. In this case, the device will likely be sectioned into smaller pieces, then prepared and analyzed using specialized techniques. The protocol for such an analysis should include details about how the sectioning and preparation will take place, where cuts will be made, and how the process will be documented. These details become particularly crucial in the event additional parties later become involved in the matter. Good documentation should allow anyone after the fact to piece together what was done, how, and what the device looked like prior to the work.

With proper care and communication, everyone involved in a product liability case will have the opportunity to thoroughly analyze the device in question.

With proper care and communication, everyone involved in a product liability case will have the opportunity to thoroughly analyze the device in question. This allows experts to collect and consider the evidence necessary to develop and defend their opinions. Medical devices often present additional challenges regarding the preservation and handling of evidence, but your expert should have the training and expertise to help you navigate those challenges. ◆

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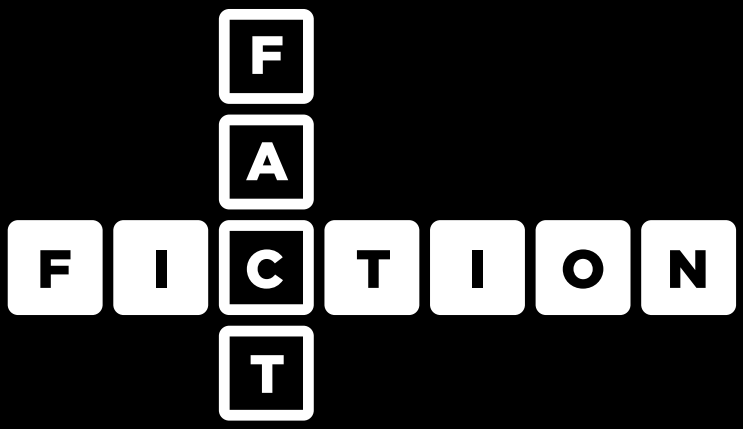

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then could be readily terminated for breastfeeding—an important pregnancy-related "physiological process.'" In addition, the Eleventh Circuit upheld the jury's determination that the City's refusal to accommodate the breastfeeding compelled Hicks to resign, constituting constructive discharge.

REHABILITATION ACT
Boyle v. City of Pell City
866 F.3d 1280 (11th Cir. 2017)

In *Boyle v. City of Pell City*, the Eleventh Circuit Court of Appeals, in a published opinion by Judge Peter Fay and joined by Judge Julie Carnes and Judge Richard Goldberg of the United States Court of International Trade, held that an employer's provision of a greater accommodation than that required by the Rehabilitation Act does not create a legal obligation to continue doing so.

The City of Pell City employed Paul Boyle from 2001 to 2012 as a Heavy Equipment Operator. After sustaining an injury- on the job, his supervisor provided him an accommodation to do office work while maintaining his title. He later laterally moved to a position as a "foreman," maintaining his rate of pay, but doing mechanic's work. The City already had a foreman. After a new supervisor was hired, the supervisor determined that a foreman needed to do foreman's work, and not mechanic's work. Boyle told the new supervisor that he was unable to do the tasks of a foreman. Boyle applied for disability retirement and received it.

Boyle sued his employer asserting, in relevant part, a violation of the Rehabilitation Act for failing to continue accommodating his disability. The district court held that the City did not violate the Rehabilitation Act by refusing to return Boyle to the foreman position. The Eleventh Circuit affirmed, holding that "[w]hen an employer provides a greater accommodation than that required under the Rehabilitation Act, 'it incurs no legal obligation to continue doing so.'" The Court indicated that, while it was laudable that the City went beyond what the law required to do in accommodating Boyle, that did not create a continued responsibility to maintain the accommodation. Thus, there was no liability for removing Boyle from the position when the job had never been available in the first place.

TITLE VII — STATUTES OF LIMITATIONS
Stamper v. Duval County School Board
863 F.3d 1336 (11th Cir. 2017)

In *Stamper v. Duval County School Board*, the Eleventh Circuit, in an opinion by Chief Judge Ed Carnes, Judge William Pryor, and District Court Judge K. Michael Moore, was required to decide whether the Equal Employment Op-

portunity Commission ("EEOC") had revived an employee's claim of discrimination, which was otherwise barred by the statute of limitations, when it vacated a two-year-old dismissal of the employee's administrative charge and the Department of Justice ("DOJ") issued Stamper a new notice of the right to sue.

In 2009, the EEOC dismissed Stamper's charge of discrimination and provided her notice of her right to sue the Board within 90 days. Stamper missed the deadline. In 2011, she filed a request for reconsideration with the EEOC, which vacated the dismissal of her first charge. The DOJ later granted Stamper's request for a new notice of right to sue regarding the same allegations of discrimination. She filed suit within 90 days of the second notice. The district court dismissed Stamper's discrimination suit as untimely, reasoning that she had failed to file the lawsuit within 90 days of receiving the first notice of her right to sue and failed to establish that she was entitled to equitable tolling on the basis of her schizophrenia.

The Eleventh Circuit determined that the EEOC lacked the authority to issue the second notice of right to sue. Thus, concluding that Stamper was not entitled to equitable tolling, it affirmed. The court reasoned that the EEOC only had the authority under the relevant law and regulations to issue a new notice of right to sue after it had revoked a previous notice, which, in this case, it had not. Thus, the second right to sue notice was outside the EEOC's authority and had no effect on the statute of limitations. The court also determined that Stamper had not met her burden to show that her schizophrenia caused her delay in filing a complaint. As such, it affirmed the district court's order.

TITLE VII — RACE DISCRIMINATION
EEOC v. Catastrophe Management Solutions
2017 WL 6015378 (11th Cir. Dec. 5 2017) (denial of rehearing *en banc*)

\In 2016, in *EEOC v. Catastrophe Management Solutions,* a three-judge panel of the Eleventh Circuit, consisting of Judge Adalberto Jordan, Judge Julie Carnes, and District Court Judge Eduardo Robreno—held that discrimination on the basis of race is limited to "immutable" physical characteristics, regardless of cultural traits that may be associated with an individual race. On December 5, 2017, the Eleventh Circuit, over a rigorous dissent by Judge Beverly Martin, decided not to hear the case *en banc*, thereby solidifying the law in the Eleventh Circuit on the matter.

Catastrophe Management instituted a policy wherein it did not hire anyone, black or white, who uses an "excessive hairstyle," including dreadlocks. Chastity Jones, the claimant, refused to remove her dreadlocks, and her offer of employment was rescinded. The EEOC filed suit on her behalf, claiming that the prohibition was discrimination on the basis of race because dreadlocks are physiologically and culturally associated with people of African descent.

In declining to hear the case *en banc*, the court emphasized that, under Eleventh Circuit precedent, prohibiting dreadlocks in the workplace pursuant to "a race-neutral grooming policy" is not intentional race discrimination. It reasoned that dreadlocks are not an "immutable characteristic of black individuals." Also, it concluded that the specific facts in the complaint did not show that the defendant discriminated against Jones in applying its grooming policy to dreadlocks. Noting that the EEOC's position would "reduce the concept of race in Title VII to little more than subjective notions of cultural appropriation," the Eleventh Circuit declined to accept its position.

AMERICANS WITH DISABILITY ACT
***Billups v. Emerald Coast Utilities Auth.*, 2017 WL 4857430 (11th Cir. Oct. 26, 2017) (unpublished)**

In *Billups v. Emerald Coast Utilities Auth.*, the Eleventh Circuit, in an unpublished opinion, held that an open-ended extension of leave without pay is not considered a reasonable accommodation under the Americans with Disabilities Act ("ADA"). Roderick Billups sustained an injury on the job and took FMLA leave on December 19, 2013. Billups was unable to return to work after the 12-week period expired in March. He had surgery on April 16, 2014, and Billups' physician restricted him to sedentary work on May 27, 2014. In June, Emerald Coast sent Billups a notice that he may be terminated because he could not perform the essential functions of his job. Billups presented evidence that he could be cleared for duty on July 15, 2014. But, on June 23, he was terminated. He was only cleared to work on October 23, 2014.

A panel of the Eleventh Circuit, comprised of Judges Frank Hull, Charles Wilson, and Robin Rosenbaum, held that an accommodation is only reasonable if it allows an employee to return to work in the "immediate future." Thus, because Billups' leave of absence would only have allowed him to work "at some indefinite time in the future," it was not a reasonable accommodation.◆

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Light Bulb

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Overall, changing a light bulb, a simple task in theory, never looked so difficult and hazardous. Providing a safe working environment through the use of codes and safety standards is the key to prevention. Electrical shock and many other injuries may be avoided when proper training, installation, and workplace standards are followed. Therefore, the next time you find an employee up on a ladder changing a light bulb, think twice about what is really happening and if you know the proper steps to changing a light bulb.◆

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Auto Liability

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Georgia Supreme Court. Those questions were:

(1) Under Georgia law and the facts of this case, did the parties enter a binding settlement agreement when the insurer Grange accepted the Woodards' offer in writing?

(2) Under Georgia law, does O.C.G.A § 9-11-67.1 permit unilateral contracts whereby offerors may demand acceptance in the form of performance before there is a binding, enforceable settlement contract?

(3) Under Georgia law and the facts of this case, did O.C.G.A § 9-11-67.1 permit the Woodards to demand timely payment as a condition of accepting their offer?

(4) Under Georgia law and the facts of this case, if there was a binding settlement agreement, did the insurer Grange breach that agreement as to payment, and what is the remedy under Georgia law? Id. at 1300-01.

Drawing from common law principles and contract law, The Georgia Supreme Court articulated two (2) long-standing principles: 1) all statutes are drafted in contemplation of other existing law and should be read "in harmony" with that law and 2) an "offeror is the master of the offer and free to set the terms."

The Georgia Supreme Court examined O.C.G.A. § 9-11-67.1, finding that the statute does not preclude additional terms, but merely indicates what terms must be present. The Court held that O.C.G.A. § 9-11-67.1 allows for unilateral contracts, such as the Woodard's, where acceptance can be conditioned on performance, such as payment within a specified time period. The Court, however, declined to answer Questions 1 and 4 insofar as they dealt with the ultimate issue of the case. ◆

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